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

OFFICE OF
GENERAL COUNSEL

November 8, 2019

Re: Response to Acting EPA Inspector General's November 7, 2019 Reply

Dear Administrator Wheeler,

I sent a legal memorandum to you on November 5, 2019 regarding the Administrator's legal obligations and compliance with the Inspector General Act ("IG Act"). On November 7, the EPA Acting Inspector General issued a Reply letter that took issue with some of my conclusions and raised new issues. I have considered these issues, and nothing in the Acting Inspector General's Reply warrants a revision to the fundamental conclusions of the November 5th memo; namely, that the IG Act must be viewed through the lens of the Constitution's design and limits and that the Inspector General lacks the statutory authority to *compel* an employee to appear at an interview. I am attaching an updated version of the legal memo to supplement my previous legal advice, with hope of narrowing the precise legal dispute and preventing my advice from being further mischaracterized by OIG, or in the future by the Agency, as it is essential to have a clear understanding of the balance between the powers of the Administrator and the Inspector General for a proper functioning of the Agency.

The Acting Inspector General claims my legal interpretation would permit the Agency to maintain a "limitless exercise" of its "prerogative" to engage with the Inspector General. (Reply at 1). It does not. But neither is the Inspector General's authority "limitless"; it is bounded by the Constitution and the relevant statutory text. The Acting Inspector General has claimed that if the legal opinion stands, it would "extinguish[] the . . . absolute right of the IG to conduct audit or investigative interviews." The legal opinion does nothing of the sort. I affirm OIG's independence and its broad powers, in keeping with its statutory mission to collect information from the Agency, particularly access to documents and tangible evidence. The narrow legal questions I analyzed as to this IG Investigation were: (1) whether the IG Act provisions cited by OIG provide authority to *compel* an Agency employee to appear at an *interview*, (2) if an agency employee refuses to appear at an *interview*, what are the Administrator's obligations under the IG Act, and (3) under the facts presented, did the Administrator fulfill those obligations.

In short, Congress did not grant OIG legal authority to *compel* an Agency employee to appear at an *interview*. If an employee refuses to appear at an *interview*, the IG can request "assistance" in obtaining the employee's appearance, get "direct and prompt" access to the Administrator, and OIG should report what it believes are unreasonable refusals by employees "without delay." *See generally*, 5 U.S.C. App. 3, § 6. But when there is a dispute of this nature, "the head of any

Federal agency involved shall" "furnish" "such information or assistance" only "insofar as is practicable" and consistent with law. 5 U.S.C. App. 3, § 6 (c)(1). Given that the Agency, not OIG, has general supervisory authority over employees, and Congress has given discretion to the Administrator to determine what assistance is "practicable," the facts presented here support the Administrator's and his subordinates' attempts to provide a practicable accommodation to OIG.

In his Reply, the Acting Inspector General provides no substantive response to two critical points. First, he criticizes, but does not dispute, that the IG Act must be viewed through the lens of the Constitution's design and limits, including the separation of powers and the assignment of all executive power to the Executive Branch. Second, the Acting Inspector General does not dispute his complete lack of statutory authority to compel an EPA employee to appear at an interview. The Acting Inspector General similarly does not refute the conclusion that OIG lacks authority to *require* an agency head to compel an agency employee to participate in an OIG interview.

The Acting Inspector General also raises a new issue that certain provisions of the Inspector General Empowerment Act of 2016 ("IGEA") support his position that OIG is entitled to oral interviews or live testimony. But the opposite is true. Section 5 of the IGEA, which amended certain language in 5 U.S.C. App. 3 § 6, is titled "Full and Prompt Access to All *Documents*." PL 114-317, 130 Stat 1595 (Dec. 16, 2016) (emphasis added). The Acting Inspector General touts IGEA's supposed rejection of a 2015 OLC opinion "that restricted IG access to agency information" as support for his view. But the 2015 OLC opinion to which he refers is far narrower in scope than the more-instructive and broad-based 1977 OLC opinion to which the Acting Inspector General has no response. Indeed, the 2015 opinion dealt with very narrow, specific classes of information: those protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act. A process by which Inspectors General may obtain some of this information (specifically, grand jury materials) was added to the statute by the IGEA. *See* 6 U.S.C. App. 3 § 6(h). This narrow OLC opinion and subsequent congressional action amending the statute to clarify its scope as to grand jury materials does not alter the fundamental legal position that the IG Act is not a limitless, unbounded grant of authority but rather must be viewed through the lens of Constitutional design and limits.

Sincerely,

Matthew Z. Leopold

General Counsel

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

OFFICE OF
GENERAL COUNSEL

November 8, 2019

MEMORANDUM

SUBJECT: Compliance with Inspector General Act*

FROM: Matthew Z. Leopold, General Counsel

TO: Andrew R. Wheeler, Administrator

On October 29, 2019, you received a letter from the Acting Inspector General pursuant to Section 5(d) of the Inspector General Act of 1978, as amended, ("the IG Act"), which is commonly known as a "Seven Day Letter." The Letter makes allegations that the EPA Chief of Staff, Ryan Jackson, has refused to cooperate with the Office of Inspector General ("OIG") with respect to certain interviews seeking information related to an audit and an administrative investigation. Consistent with the statutory requirements invoked in Section 5(d), the Letter requests that you transmit it to the relevant congressional committees on November 5, 2019.

You have asked for an opinion assessing the Agency's compliance with the legal requirements of the IG Act. Specifically, you have asked whether the Agency has complied with the legal requirements in the IG Act Sections 6(a)(1)(A), 6(a)(3), and 6(c)(2) that are referenced in the Seven Day Letter in a situation where Mr. Jackson has not yet provided a second oral interview or other testimony.[1] It is ultimately the Administrator that maintains control of the information sought here and decides what constitutes an adequate accommodation by the Agency of an OIG request in so far as it is practicable. OIG's recourse is to report to Congress if, in its opinion, the Agency's assistance is not a reasonable accommodation. The accommodation process to OIG was still in progress when the Seven Day Letter was transmitted. You have informed me that you personally attempted to fulfill the request for information, including offering to provide Mr. Jackson for a second interview. OIG expressly refused the Agency's offer to withdraw the Seven Day Letter as moot despite this accommodation. Your attempt to

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* This memorandum slightly revises and supersedes my memorandum of November 5, 2019 in order to respond to issues raised by the Acting Inspector General in a November 7, 2019, Reply to my memorandum.

[1] I analyze the question based on the authority citied in the Seven Day Letter. The letter only refers expressly to three sections of the IG Act: "5 U.S.C. App. 3, § 6 (a)(1)(A)," "§ 6 (c)(2)" and "5 U.S.C. App. 3, § 5(d)." The Seven Day Letter does not refer to § 6 (a)(3) directly, but only by reference through § 6 (c)(2); nevertheless, I analyze the Agency's compliance with § 6 (a)(3) as well.

accommodate OIG, nonetheless, fulfilled your legal obligation under the IG Act, and completing that process may have provided sufficient information to complete the investigation without a dispute. With respect to the question related to the audit, it is reasonable in light of the separation of powers to assist the OIG only to the extent that it was not seeking information that would implicate Constitutional concerns, as explained further below. I recommend additional coordination between the Agency and OIG, which may result in the ability to provide the information requested.

This opinion is addressed solely to the Agency's obligations under the IG Act based on information that has been made available to me as of the date of this memorandum when, as here, an employee has not provided an oral interview or testimony sufficient for OIG and there are specific separation of powers concerns; it does not speak to the merits of the underlying audit or administrative investigation. It speaks to the accommodations process and not to personal legal obligations. Further advice to the Agency may be warranted in the future if more definitive information is made available. The OIG draft findings have not been made available at this time, and any questions about the underlying facts at issue should be directed to OIG.

Legal Background

The power of the Executive Branch is vested in the President of the United States. U.S. CONST. ART. II. The President is responsible for implementing and enforcing the laws passed by Congress and, to that end, appoints the heads of the federal agencies. The President retains administrative control of those executing the law. *Myers v. United States*, 272 U.S. 52, 163-64 (1926). As part of this function, the President maintains ultimate control over information within the Executive Branch, and the head of each Executive Branch department may prescribe regulations regarding "the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. "The President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress." Inspector Gen. Legislation, 1 U.S. Op. Off. Legal Counsel 16, 17 (1977) (citing *Congress Construction Corp. v. United States*, 314 F. 2d 527, 530-32 (Ct. Cl. 1963)). The IG Act is written against this Constitutional backdrop and it must be interpreted according to these fundamental Constitutional limits. *See id.* at 17 (concluding that certain provisions in predecessor legislation to the IG Act "that make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches . . . violat[es] . . . the doctrine of separation of powers."). In responding to OIG's exercise of statutory authority, the Agency must apply Constitutional doctrines, such as the separation of powers, particularly in OIG activities that respond to Congressionally initiated audits or investigations. *See, e.g.*, *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (construing another federal statute—the Federal Advisory Committee Act—"strictly" to avoid "severe separation-of-powers problems" that arise from a broader interpretation of that statute).

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." *NASA v. FLRA*, 527 U.S. 229, 256 (1999) (Thomas, J., dissenting). Justice Stevens, writing for the majority, stated: "[t]he IGA

grants Inspectors General the authority to subpoena documents and information, but not witnesses[,] . . . [and] formal sanctions for refusing to submit to an OIG interview cannot be pursued by the OIG alone." *Id.* at 242 (internal citations omitted); *see also id.* ("[I]f the NASA–OIG investigator in this case told the employee that he would face dismissal if he refused to answer questions . . . the investigator invoked NASA's authority, not his own." (internal citation omitted)).[2] Consistent with my view that Inspectors General currently lack this authority, members of Congress have introduced bills as recently as last year proposing to grant Inspectors General authority to subpoena witnesses for testimony.[3]

Nonetheless the statute does provide some remedy in such situations: "the Inspector General may request assistance, and the agency head 'shall . . . furnish . . . information or assistance' to OIG," when "an employee refuses to attend an interview voluntarily," *id.* (Thomas, J., dissenting) (internal citations omitted) (alterations in original). Importantly, the U.S. Solicitor General has taken the position that the IG Act permits, but does not require, the head of an agency to compel participation by an agency employee in an interview with the OIG. *Cf. NASA v. FLRA*, 1998 WL 887453 (S.Ct.), at *31 n.18 (Br. of U.S. as Petitioner). This position comports with the text of the statute. 5 U.S.C. App. 3, § 6(c)(1) (requiring the head of a federal agency to furnish information or assistance upon request of OIG "insofar as is practicable").

Section 6(a)(1)(A), cited in the Seven Day Letter, does not authorize the OIG to take oral interviews, and therefore cannot be a basis to seek the Administrator's assistance here. In its Seven-Day Letter, OIG asserted that it is entitled to "have timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the applicable establishment which relate to the programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. App. 3, § 6(a)(1)(A). Based on a plain language interpretation of this provision, this authority is limited to written information (either stored in hard copy or electronically). The catch-all phrase "all other materials available to the applicable establishment" must be read in context of the list proceeding it. It does not include the authority to conduct interviews, let alone compulsory interviews. Basic legal interpretative canons instruct that one must interpret an ambiguous term in a list of terms in a statute in light of the others in the list. *Yates v. United States*, 135 S.Ct. 1074, 1089 (2015) (Alito, J., concurring in the judgment) ("The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a 'similar' meaning. A related canon, *ejusdem generis* teaches that general words following a list of specific words should usually be read in light of those specific words to mean something 'similar.'" (internal citations omitted)). Therefore, "other material" clearly means other documentary or tangible evidence, not oral testimony. *See e.g., id.* at 1088-89 (Ginsburg, J.) (holding that "tangible object" in a statute means a record or document preserving information and did not include an undersized fish).

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[2] The question of an Inspector General's authority was not mere dicta in this case, as the Acting Inspector General asserts, but rather it was necessary to deciding the question posed in that case—whether the NASA OIG's investigator was a representative of the Agency for the purposes of the Federal Service Labor-Management Relations Statute.

[3] *See, e.g.*, H. R. 4917, 119th Cong. (2d Sess. 2018) ("An Act to amend the Inspector General Act of 1978 to provide testimonial subpoena authority, and for other purposes").

OIG asserts Section 6(c)(2) as a basis of authority in the Seven Day Letter, stating that "[n]o 'information' requested by the IG may be 'unreasonably refused or not provided'" consistent with 6(c)(2). Section 6(c)(2) provides "[w]henever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." OIG asserts that, "in the sphere of gathering information during an investigation, the IG, not an agency employee, makes the 'judgment' as to reasonableness." While section 6(c)(2) is triggered "whenever information . . . is, in the judgment of an Inspector General, unreasonably refused or not provided," this provision simply allows notification of the Administrator, nothing more, and OIG fails to explain why this is a basis for the Seven Day Letter.

The third potential basis for OIG's claimed statutory authority is Section 6(a)(3), a provision referenced only indirectly in the Seven Day Letter. It provides that the Inspector General may "request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by th[e] Act from any Federal, State, or local governmental agency or unit thereof." 5 U.S.C. App. 3, § 6(a)(3). This could include a request to an Agency to make one of its employees available for an interview. *See generally U.S. Nuclear Regulatory Comm'n v. FLRA*, 25 F.3d 229, 234 (4th Cir. 1994) ("[T]he Act gives to each Inspector General access to the agency's documents and agency personnel."). But a right to *request* does not equate to the right to *receive* all information requested; that decision ultimately falls to the agency to provide as determined by the agency's head, consistent with the Executive Branch's constitutional authority.

Analysis of Administrative Investigation Allegations

The Seven Day Letter and its appendices demonstrate that on October 15, 2019, OIG sent an email seeking assistance from the Administrator in compelling Mr. Jackson to comply fully with a request to sit for a second interview. That is when OIG officially triggered its request for assistance to the Administrator. This was consistent with OIG authority under 6(a)(3) and 6(c)(2). Subsequent to that request, Doug Benevento, Associate Deputy Administrator, called a meeting with the Acting Inspector General, Charles Sheehan that I attended, on October 18, 2019, where he provided assistance by attempting to identify the parameters of Mr. Jackson's participation acceptable to OIG. Then on October 21, 2019, Mr. Jackson provided some accommodation of the OIG request by offering to respond to questions in writing, which was a change of his previous position of having requested that OIG provide him with the "subject of the conversation so that I may prepare for it." My understanding is that OIG did not respond to Mr. Jackson's email.

You have informed me that before receipt of the final Seven Day Letter, you directed Mr. Benevento to reach out to the Acting Inspector General Sheehan to attempt to accommodate the OIG staff request and, subsequent to that meeting, Mr. Jackson changed his previous position. This demonstrates that the Agency attempted to accommodate the OIG. While not referenced in the Seven Day Letter, this attempt by Mr. Benevento and Mr. Jackson is a form of assistance contemplated under Section 6(c)(1) of the IG Act. *See* 5 U.S.C. App. 3, § 6(c)(1) ("Upon request

of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable . . . furnish . . . such information or assistance."). You also informed me that on November 5, 2019 you personally called Acting Inspector General Sheehan to offer Mr. Jackson to sit for a second interview. Following that call, Mr. Benevento and I called Acting Inspector General Sheehan again to attempt to arrange for the interview and request that the Seven Day Letter be tolled or withdrawn as moot.

This assistance to OIG is a proper exercise of your responsibilities under Section 6 of the Act. The Agency should continue to attempt to bring the accommodation process to a resolution to allow OIG to obtain the appropriate information.

Analysis of Audit Allegations

Finally, I turn to the specific allegations related to the "Refusal to provide requested information" in the audit. In the course of the audit, OIG demanded to know how Mr. Jackson obtained a copy of draft Congressional testimony of Deborah Swackhamer, a special governmental employee who served on a Federal Advisory Act Committee. The routine process at EPA for providing Agency testimony to Congress runs through the Office of Congressional and Intergovernmental Relations and the Chief of Staff. Neither the Seven Day Letter nor any other OIG statement made available describes why it would be appropriate to deviate from that standard agency process that has spanned multiple administrations or why the source of the information is material to this audit. While OIG is not required to provide the Agency this information, to the extent this audit is aimed at improving agency processes for reviewing testimony of Federal Advisory Act Committee members, it is unclear why the information sought would be relevant to that goal. 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. 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 role given to the Administrator in EPA's statutes or upend EPA's right to manage its communications to Congress. EPA is keenly aware of inter-branch concerns and should follow normal channels, *i.e.*, the Congressional oversight process, to appropriately accommodate specific legislative prerogatives.