# Congress of the United States
Washington, DC 20510

October 10, 2014

**VIA ELECTRONIC TRANSMISSION**

Karl R. Thompson
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Acting Assistant Attorney General Thompson:

Thirty-six years ago, as members of the United States House of Representatives, the two of us voted for a bill that became the Inspector General Act of 1978.[1] We write to you today as the respective Ranking Members of the Senate and House Judiciary Committees to remind you of the purpose of this Act. The Inspector General Act established Offices of the Inspector General as:

> independent and objective units – (1) to conduct and supervise audits and investigations relating to the programs and operations of [government] establishments . . . (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and (3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action . . . .[2]

In order to carry out audits and investigations with the independence mandated by the Act, Inspectors General must have unfettered access to records of the Departments they oversee. Accordingly, Section 6(a)(1) of the Act authorizes Inspectors General to access:

> *all* records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relates to programs and operations with respect to which that Inspector General has responsibilities under this Act.[3]

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[1] Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101, as amended.
[2] 5 U.S.C. App. § 2.
[3] 5 U.S.C. App. § 6(a)(1).

Section 6(a)(1) recognizes that Inspectors General simply cannot fulfill their statutorily-mandated duty to conduct oversight without such access.

In certain limited circumstances, the law does allow the Attorney General to "prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena."[4] However, the Attorney General is required to provide written notice to the Inspector General of the reasons for doing so and to forward a copy of that written notice to Congress.[5]

On November 19, 2013, and again on September 9, 2014, Inspector General Michael Horowitz testified that the Department is improperly impeding his access to records to which he is entitled under the Inspector General Act.[6] For example, in August 2010, when the Inspector General requested from the FBI files relating to grand jury records and material witness warrants, the FBI apparently denied the request on grounds that the grand jury secrecy rules override the Inspector General Act—contrary to the longstanding practice of the FBI and the contemporaneous practice of all other Department components to which this request had been made.[7] Similarly, the FBI reportedly denied the Inspector General's request for Title III wiretap information and for consumer credit information.[8] These records were withheld, yet the statutory procedure for written notice by the Attorney General and a report to Congress were not followed.[9] Eventually, the Inspector General obtained these records after the Attorney General and the Deputy Attorney General granted written permission.[10]

Under the Act, however, the Attorney General is required to write to the Inspector General not when *permitting* access to records, but—precisely the opposite—when *preventing* an OIG review.[11] In other words, the burden is placed on the Attorney General to explain in writing why the Inspector General's work should be impeded, not *vice versa*. Under the statute, the

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[4] 5 U.S.C. App. § 8E(a)(1), (2).
[5] 5 U.S.C. App. § 8E(a)(3).
[6] U.S. Senate Committee on Homeland Security and Government Affairs, Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce; *Strengthening Government Oversight: Examining the Roles and Effectiveness of Oversight Positions Within the Federal Workforce*, (November 19, 2013); http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/strengthening-government-oversight-examining-the-roles-and-effectiveness-of-oversight-positions-within-the-federal-workforce; accessed March 5, 2014 [hereinafter Senate Homeland Security Hearing]; *see also* U.S. House of Representatives Committee on the Judiciary: *Access to Justice?: Does DOJ's Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?* (September 9,2014); http://judiciary.house.gov/index.cfm/2014/9/hearing-access-to-justice-does-doj-s-office-of-inspector-general-have-access-to-information-needed-to-conduct-proper-oversight; accessed September 23, 2014 [hereinafter House Judiciary Hearing].
[7] *See* Attachment 1, "Summary of the Department of Justice Office of the Inspector General's Position Regarding Access to Documents and Materials Gathered by the Federal Bureau of Investigation," at 1-2, (explaining that the FBI reportedly provided routine access to these records from 2001 through 2009, before reversing its policy abruptly in 2010 and that "All of the Department's components provided [the Inspector General] with full access to the material . . . with the notable exception of the FBI").
[8] *See* House Judiciary Hearing, *supra* note 7.
[9] *See* Senate Homeland Security Hearing, *supra* note 7.
[10] *Id.*
[11] 5 U.S.C. App. § 8E(a)(3).

Attorney General's blessing on the IG's work is not required. That is the essence of independence.

The current practice is the opposite of the procedure dictated by the statute and unnecessarily delays the work of the Inspector General.[12] More importantly, it circumvents the oversight authority with regard to such disputes, which Congress explicitly reserved for itself through the reporting requirement.[13] This is because inaction in response to a document request allows the Department's leadership to indefinitely deny or delay a review sought by the Inspector General under his statutory right of access without having to report to Congress.

To clarify the Department's position on this issue, we understand that the Inspector General has requested that the Office of Legal Counsel issue an opinion on this matter. Accordingly, please issue this opinion promptly and provide a copy to both Judiciary Committees. Whatever opinion is issued, it should explain the following issues:

1. How is the Department's current practice of withholding records from the Inspector General without reporting that fact to Congress as required by Section 8E(a)(3) of the Inspector General Act justified?

2. If grand jury secrecy rules prohibit the disclosure of grand jury and material witness warrant information to the Inspector General, as the FBI's post-2010 interpretation asserts, then how can the Department reconcile that position with:

    a. The legality of the FBI's pre-2010 practice of routinely providing that information to the Inspector General; and

    b. The legality of providing those records to the Inspector General by the Justice Department's National Security Division, the U.S. Marshals Service, the Federal Bureau of Prisons, and the U.S. Attorney's Offices for the Southern District of New York, the Northern District of Illinois, and the Eastern District of Virginia.

3. If those previous instances of providing such material to the Inspector General were allegedly inappropriate, then how will the Department hold those responsible for the disclosures to the IG accountable? How could anyone be held accountable given that the IG Act explicitly authorizes the IG to access all records of the Department?

If you have any questions, please contact Jay Lim of Ranking Member Grassley's staff at (202) 224-5225 or Aaron Hiller of Ranking Member Conyers' staff at (202) 225-6906. Thank you.

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[12] *See* Attachment 2, "Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, before the U.S. House of Representatives Committee on the Judiciary concerning 'Access to Justice?: Does DOJ's Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?'"(September 9, 2014) at 3.
[13] 5 U.S.C. App. § 8E(a)(3).

Sincerely,

Charles E. Grassley
Ranking Member
U.S. Senate
Committee on the Judiciary

John Conyers
Ranking Member
U.S. House of Representatives
Committee on the Judiciary

cc: Michael E. Horowitz
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Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

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House Committee on the Judiciary
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# Attachment 1

Summary of the Department of Justice Office of the Inspector General's Position Regarding Access to Documents and Materials Gathered by the Federal Bureau of Investigation

**Introduction**

In November 2009, the Office of the Inspector General (OIG) initiated a review of the Department's use of the material witness statute, 18 U.S.C. § 3144. Pursuant to our responsibilities under Section 1001 of the Patriot Act, a significant part of our review is to assess whether Department officials violated the civil rights and civil liberties of individuals detained as material witnesses in national security cases in the wake of the September 11 terrorist attacks. In addition, the review will provide an overview of the types and trends of the Department's uses of the statute over time; assess the Department's controls over the use of material witness warrants; and address issues such as the length and costs of detention, conditions of confinement, access to counsel, and the benefit to the Department's enforcement of criminal law derived from the use of the statute.

In the course of our investigation, we learned that most of the material witnesses in the investigations related to the September 11 attacks were detained for testimony before a grand jury. At our request, between February and September 2010 the Department of Justice National Security Division and three U.S. Attorneys' offices (SDNY, NDIL, EDVA) provided us with grand jury information concerning material witnesses pursuant to Fed. R. Crim. P. 6(e)(3)(D), which permits disclosure of grand jury matters involving foreign intelligence information to any federal law enforcement official to assist in the performance of that official's duties. We also sought a wide range of materials from other Department components, including the U.S. Marshals Service, the Federal Bureau of Prisons, and the Federal Bureau of Investigation (FBI). All of the Department's components provided us with full access to the material we sought, with the notable exception of the FBI.

In August 2010, we requested files from the FBI relating to the first of 13 material witnesses. In October 2010, representatives of the FBI's Office of General Counsel informed us that the FBI believed grand jury secrecy rules prohibited the FBI from providing grand jury material to the OIG. The FBI took the position that it was required to withhold from the OIG all of the grand jury material it gathered in the course of these investigations. The FBI has also asserted that, in addition to grand jury information, it can refuse the OIG access to other categories of information in this and other reviews, including Title III materials, federal taxpayer information; child victim, child witness, or federal juvenile court information; patient medical information; credit reports; FISA information; foreign government or international organization information; information subject to non-disclosure agreements, memoranda of

understanding or court order; attorney client information; and human source identity information. The information we have requested is critical to our review. Among other things, we are examining the Department's controls over the use of material witness warrants, the benefit to the Department from the use of the statute, and allegations of civil rights and civil liberties abuses in the Department's post-9/11 use of the statute in the national security context. The requested grand jury information is necessary for our assessment of these issues.

The FBI has also asserted that page-by-page preproduction review of all case files and e-mails requested by the OIG in the material witness review is necessary to ensure that grand jury and any other information the FBI asserts must legally be withheld from the OIG is redacted. These preproduction reviews have caused substantial delays to OIG reviews and have undermined the OIG's independence by giving the entity we are reviewing unilateral control over what information the OIG receives, and what it does not.

The FBI's position with respect to production of grand jury material to the OIG is a change from its longstanding practice.[1] It is also markedly different from the practices adopted by other components of the Department of Justice. The OIG routinely has been provided full and prompt access to grand jury and other sensitive materials in its reviews involving Department components in high profile and sensitive matters, such as our review of the President's Surveillance Program and the investigation into the removal of nine U.S. Attorneys in 2006. Those reviews would have been substantially delayed, if not thwarted, had the Department employed the FBI's new approach.

In many respects, the material witness warrant review is no different from other recent OIG reviews conducted in connection with our civil rights and civil liberties oversight responsibilities under the Patriot Act in which Department components granted the OIG access to grand jury and other sensitive material. For example, in our review of the FBI's use of "exigent letters" to obtain telephone records, at our request the Department of Justice Criminal Division and the FBI provided us grand jury materials in two then

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[1] Since 2001, when the OIG assumed primary oversight responsibility for the FBI, the OIG has undertaken numerous investigations which required review of the most sensitive material, including grand jury material and documents classified at the highest levels of secrecy. Through all of these reviews, the FBI never refused to produce documents and other material to the OIG, including the most sensitive human and technical source information, and it never asserted the right to make unilateral determinations about what requested documents were relevant to the OIG reviews. On the rare occasion when the FBI voiced concern based on some of the grounds now more broadly asserted in this matter, quick compromises were reached by the OIG and the FBI. Indeed, with only minor exceptions, the FBI's historical cooperation with the OIG has been exemplary, and that cooperation has enabled the OIG to conduct thorough and accurate reviews in a timely manner, consistent with its statutorily based oversight mission and its duty to assist in maintaining public confidence in the Department of Justice.

ongoing sensitive media leak investigations involving information classified at the TS/SCI level. The grand jury materials were essential to our findings that FBI personnel had improperly sought reporters' toll records in contravention of the Electronic Communications Privacy Act and Department of Justice policy. [2]

Similarly, in our review of the FBI's investigations pertaining to certain domestic advocacy groups, the OIG assessed allegations that the FBI had improperly targeted domestic advocacy groups for investigation based upon their exercise of First Amendment rights. In the course of this review, the FBI provided OIG investigators access to grand jury information in the investigations we examined. This information was necessary to the OIG's review as it informed our judgment about the FBI's predication for and decision to extend certain investigations. The lack of access to this information would have critically impaired our ability to reach any conclusions about the FBI's investigative decisions and, consequently, our ability to address concerns that the FBI's conduct in these criminal investigations may have violated civil rights and civil liberties.[3]

When the OIG has obtained grand jury material, the OIG has carefully adhered to the legal prohibitions on disclosure of such information. We routinely conduct extensive pre-publication reviews with affected components in the Department. The OIG has ensured that sensitive information – whether it be law enforcement sensitive, classified, or information that would identify the subjects or direction of a grand jury investigation – is removed or redacted from our public reports. In all of our reviews and investigations, the OIG has scrupulously protected sensitive information and has taken great pains to prevent any unauthorized disclosure of classified, grand jury, or otherwise sensitive information.

For the reasons discussed below, the OIG is entitled to access to the material the FBI is withholding. First, the Inspector General Act of 1978, as amended (Inspector General Act or the Act), provides the OIG with the authority to obtain access to all of the documents and materials we seek. Second, in the same way that attorneys performing an oversight function in the Department's Office of Professional Responsibility (OPR) are "attorneys for the government" under the legal exceptions to grand jury secrecy rules, the OIG attorneys conducting the material witness review are attorneys for the government entitled to receive grand jury material because they perform the same oversight function. Third, the OIG also qualifies for disclosure of the grand jury material requested in the material witness review under

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[2] We described this issue in our report, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, (January 2010).

[3] Our findings are described in our report, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups* (September 2010).

amendments to the grand jury secrecy rules designed to enhance sharing of information relating to terrorism investigations.

## I. THE INSPECTOR GENERAL ACT

The FBI's refusal to provide prompt and full access to the materials we requested on the basis of grand jury secrecy rules and other statutes and Department policies stands in direct conflict with the Inspector General Act. The Act provides the OIG with access to all documents and materials available to the Department, including the FBI. No other rule or statute should be interpreted, and no policy should be written, in a manner that impedes the Inspector General's statutory mandate to conduct independent oversight of Department programs. *See, e.g., Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.").

### A. The Inspector General Act Grants the OIG Full and Prompt Access to any Documents and Materials Available to the DOJ, Including the FBI, that Relate to the OIG's Oversight Responsibilities

The Inspector General Act is an explicit statement of Congress's desire to create and maintain independent and objective oversight organizations inside of certain federal agencies, including the Department of Justice, without agency interference. Crucial to the Inspectors General (IGs) independent and objective oversight is having prompt and complete access to documents and information relating to the programs they oversee. Recognizing this, the Inspector General Act authorizes IGs "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. App. 3 § 6(a)(1). The Act also authorizes the IGs to "request" necessary "information or assistance" from "any Federal, State, or local governmental agency or unit thereof," including the particular establishments the IGs oversee. *Id.* § 6(a)(3); *id.* § 12(5) (defining the term "Federal agency" to include the establishments overseen by the Inspectors General). Together, these two statutory provisions operate to ensure that the Inspectors General are able to access the information necessary to fulfill their oversight responsibilities.

The only explicit limitation on IGs' right of access to information contained in the Inspector General Act concerns all agencies' obligation to provide "information or assistance" to the Inspectors General. However, this limitation does not apply to IGs' absolute right of access to documents from their particular agency. This circumscribed limitation provides that all federal

agencies shall furnish information or assistance to a requesting IG "insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested[.]"5 U.S.C. § 6(b)(1) (emphasis added).[4]

Another provision of the Inspector General Act grants the Inspectors General discretion to report instances of noncooperation to the head of the relevant agency, whether that noncooperation impedes on the IGs' authority to obtain documents or "information and assistance." Under that section, when an IG believes "information or assistance" is "unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." 5 U.S.C. App. 3 § 6(b)(2) The FBI contends this reporting provision of the Act is a further limitation on the agencies' obligation to provide documents and "information and assistance" to the Inspectors General. The FBI has argued that the provision implicitly recognizes that requests for both documents and "information and assistance can be "reasonably refused."

The OIG believes the FBI's reliance on this reporting section as limiting an IG's right of access to documents in the custody of the agency it oversees is misplaced. This provision of the Act is entirely consistent with the right of full and prompt access to documents and materials and does not create a limitation, explicit or implicit, on the authorities provided elsewhere in the Act. By granting the Inspectors General the discretion to decide that some instances of noncooperation by an agency do not rise to the level of a reportable incident, the provision accounts for the practical reality that many instances where

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[4] The legislative history is silent on the reason for conditioning agencies' furnishing of "information or assistance" to all IGs on practicability or statutory restriction, but imposing no such limitation on an agency's absolute requirement to provide its documents to its own IG. However, there are possible explanations for the distinction. For example, providing access to documents and materials maintained in agency systems and files is simple, inexpensive, and an undeniable precondition to the fair, objective, and successful exercise of the IGs' oversight responsibilities. Accordingly, the Act's unconditional language authorizing IGs to have access to the documents and materials of the agency it oversees is understandable and sensible. In contrast, agencies may not always be able to fulfill requests for "information or assistance" immediately, even from their agency's IG. A request of one agency from another agency's IG may require more careful scrutiny because it would entail information being transmitted outside of the requested agency. In addition, busy agency schedules must be accommodated when fulfilling a request for an interview; subject matter experts may not be immediately available to interpret documents or may have left the agency's employment; responses to interrogatories often require revisions and approvals; and annotations, explanations, and written analyses of existing documents and materials can take significant amounts of time. Despite the OIG's historical success at reaching reasonable compromises with components of the DOJ responding to requests for "information or assistance," the OIG readily acknowledges that circumstances could arise where a component's delay, difficulty, or even refusal in responding to a request for "information or assistance" would be reasonable. These considerations are not applicable, however, to IGs' access to documents and materials of the agency it oversees, and therefore, that provision of the Act authorizes access in absolute terms.

Inspectors General are not granted access to documents or materials, or are not provided "information or assistance" in response to a request, do not merit a report to agency management.[5]

To summarize, the Inspector General Act provides the Inspectors General a right of full and prompt access to documents and materials in the custody of the agency they oversee, a right to request "information or assistance" from any agency that is modestly limited, and an obligation to report instances of agency noncooperation to the agency head when, in the judgment of the Inspector General, such noncooperation is unreasonable. Accordingly, the Act provides Inspectors General unconditional authority to gather documents and records in the custody of the agency they oversee, an authority necessary to obtain the basic information to conduct independent and objective reviews and investigations.

### B. The Only Limitation on the OIG's Authority to Conduct Audits and Investigations within its Jurisdiction is Section 8E of the Inspector General Act, and that Limitation Must Be Invoked by the Attorney General

In the law creating the DOJ OIG, Congress inserted an exception to the normal authority granted to Inspectors General. In a section captioned "Special provisions concerning the Department of Justice," the IG Act provides the Attorney General the authority, under specified circumstances and using a specific procedure, to prohibit the OIG from carrying out or completing an audit or investigation, or from issuing any subpoena. *See* 5 U.S.C. App. 3 § 8E. This authority may only be exercised by the Attorney General, 5 U.S.C. App. 3 § 8E(a)(1)-(2), and only with respect to specific kinds of sensitive information. *Id.* § 8E(a)(1). The Attorney General must specifically determine that the prohibition on the Inspector General's exercise of authority is necessary to prevent the disclosure of certain specifically described categories of information, or to prevent the significant impairment to the national interests of the United States. *Id.* § 8E(a)(2). The Attorney General's decision must be conducted in writing, must state the reasons for the decision, and the Inspector General must report the decision to Congress within thirty days. *Id.* § 8E(a)(3). These provisions represent an acknowledgement of the fact that the Department of Justice often handles highly sensitive criminal and national security information, the premature disclosure of which could pose a threat to the national interests.

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[5] For example, IG document requests can be very broad, particularly before IG investigators have learned the details of the program under review. In such instances, formal requests are often informally and consensually narrowed after discussions with the agency under review, and a report to the agency head is unnecessary. Similarly, an agency's failure to provide the Inspector General with access to a document is often inadvertent or such a minor inconvenience that the Inspector General could reasonably view the noncooperation as *de minimis*.

These exacting procedures confirm that the special provisions of Section 8E represent an extraordinary departure from the baseline rule that the Inspectors General shall have unconditional access to documents and materials, and broad authority to initiate and conduct independent and objective oversight investigations. These procedures also confirm that only the Attorney General, and not the FBI, has the power to prohibit the OIG's access to relevant documents and materials available to the Department.

## II. GRAND JURY SECRECY RULES

The Federal Rules of Criminal Procedure provide the general rule of secrecy applicable to grand jury information and various exceptions to that general rule. One of the exceptions allows disclosure of grand jury information to "an attorney for the government." This exception provides a basis, additional to and independent of the Inspector General Act, for disclosing the requested grand jury materials to the OIG.[6] The OIG's reliance on the "attorney for the government" exception to obtain access to grand jury material is supported by an Office of Legal Counsel (OLC) opinion and a federal court decision. OIG access to grand jury material under this exception is consistent with the broad authority granted to the OIG under the Inspector General Act, and it avoids an oversight gap so that Department employees cannot use grand jury secrecy rules to shield from review their adherence to Department policies, Attorney General Guidelines, and the Constitution. The "attorney for the government" exception allows for automatic disclosure of grand jury materials and is, therefore, particularly well suited to ensure that the OIG's ability to access documents and materials, and to access them promptly, is coextensive with that of the Department and the FBI.

### A. OIG Attorneys Are "Attorneys for the Government"

In an unpublished opinion issued subsequent to *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) (a Supreme Court opinion narrowly construing the term "attorney for the government" as used in the exception to the general rule of grand jury secrecy), the OLC determined that, even in light of the Court's decision, the Rule was broad enough to encompass Office of Professional Responsibility (OPR) attorneys exercising their oversight authority with regard to Department attorneys.

In *Sells*, Civil Division attorneys pursuing a civil fraud case sought automatic access to grand jury materials generated in a parallel criminal proceeding. The Supreme Court interpreted the exception that provides for

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[6] Rule 6(e)(3)(A)(i) provides: "Disclosure of a grand jury matter – other than the grand jury's deliberations or any grand juror's vote – may be made to: (i) an attorney for the government for use in performing that attorney's duty . . . ." Fed. R. Crim. P. 6(e)(3)(A)(i).

automatic disclosure of grand jury materials to "attorney[s] for the government" for use in their official duties, as limited to government attorneys working on the criminal matter to which the material pertains. *Sells*, 463 U.S. at 427. The Court held that all other disclosures must be "judicially supervised rather than automatic," *id.* at 435, because allowing disclosure other than to the prosecutors and their assistants would unacceptably undermine the effectiveness of grand jury proceedings by: (1) creating an incentive to use the grand jury's investigative powers improperly to elicit evidence for use in a civil case; (2) increasing the risk that release of grand jury material could potentially undermine full and candid witness testimony; and (3) by circumventing limits on the government's powers of discovery and investigation in cases otherwise outside the grand jury process. *See id.* at 432-33.

In its unpublished opinion, OLC concluded that the three concerns the Supreme Court expressed in Sells were not present when OPR attorneys conduct their oversight function of the conduct of Department attorneys in grand jury proceedings. OLC concluded that as a delegee of the Attorney General for purposes of overseeing and advising with respect to the ethical conduct of department attorneys and reporting its findings and recommendations to the Attorney General, OPR is part of the prosecution team's supervisory chain. Thus, OPR attorneys may receive automatic access to grand jury information under the supervisory component inherent in the "attorney for the government" exception.

OIG attorneys should be allowed automatic access to grand jury material in the performance of their oversight duties because OIG and OPR perform the identical functions within the scope of their respective jurisdictions. Like OPR attorneys conducting oversight of Department attorneys in their use of the grand jury to perform their litigating function, OIG attorneys are part of the supervisory chain conducting oversight of the conduct of law enforcement officials assisting the grand jury. Both the OIG and OPR are under the general supervision of the Attorney General, *compare* 28 C.F.R. 0.29a(a) (OIG) *with* 28 C.F.R. 0.39. Just like OPR, the Inspector General must "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3, §§ 4(d) & 8E(b)(2). OIG attorneys make findings and recommendations to the Attorney General regarding the conduct of law enforcement officials assisting the grand jury, and the Attorney General then imposes any discipline or implements reform. Therefore, for purposes of the "attorney of the government" exception, the OIG is in the same position as OPR, both with respect to its oversight function and its relationship to the Attorney General.

More to the point, whatever formal differences exist in the relative structures of the OIG and OPR, the two offices are functionally indistinguishable for purposes of access to grand jury materials for all of their oversight purposes. The risks to the secrecy of the underlying grand jury

proceedings from disclosure to the OIG, if any, are no different from those created by automatic disclosure to OPR. OPR's oversight of the conduct of Department attorneys is an after-the-fact examination of what happened during the grand jury process, just as is OIG's oversight of law enforcement agents' conduct. OIG review of law enforcement conduct in such circumstances is not undertaken to affect the outcome of a civil proceeding related to the target of an underlying criminal investigation. Therefore, disclosure of grand jury materials to the OIG runs no risk of creating an incentive to misuse the grand jury process in order to improperly elicit evidence for use in a separate administrative or criminal misconduct proceeding against the target of the grand jury's investigation. Similarly, because our review is of law enforcement conduct and not of lay witnesses who are called to testify, the willingness of those witnesses to testify should not be implicated. OIG oversight also ensures that the Department's law enforcement officials who testify before the grand jury do so fully and candidly, and that Department employees do not ignore their legal obligations to the grand jury.

Moreover, the OIG's inherent supervisory role with regard to Department employees who assist the grand jury was recognized by a federal court overseeing proceedings relating to the death of Bureau of Prisons inmate Kenneth Michael Trentadue. The district court granted the government's motion for access to grand jury materials, finding that the OIG's investigation of alleged misconduct "is supervisory in nature with respect to the ethical conduct of Department employees." The court stated that "disclosure of grand jury materials to the OIG constitutes disclosure to 'an attorney for the government for use in the performance of such attorney's duty[.]'" *In re Matters Occurring Before the Grand Jury Impaneled July 16, 1996*, Misc. #39, W.D. Okla. (June 4, 1998).

Accordingly, there is no principled basis upon which to deny OIG attorneys the same access as OPR is allowed to review grand jury materials necessary to carry out its oversight function. Both OPR and OIG attorneys require access to grand jury materials to fulfill a supervisory function directed at maintaining the highest standards of conduct for Department employees who assist the grand jury. As such, OIG attorneys should also be able to obtain automatic access to matters that pertain to law enforcement conduct in matters related to the grand jury within the jurisdiction of the OIG.

### B. The OIG is entitled to Receive Grand Jury Materials Involving Foreign Intelligence Information

Another exception to the general rule of grand jury secrecy allows an attorney for the government to disclose "any grand-jury matter involving foreign intelligence, counterintelligence . . . , or foreign intelligence information . . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the

information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D). This exception was added in 2001 as part of the USA PATRIOT Act and was designed to enable greater sharing of information among law enforcement agencies and the intelligence community to enhance the government's effort to combat terrorism.[7]

This exception encompasses the OIG's request for the grand jury materials at issue in its material witness warrant review. The grand jury proceedings pursuant to which the materials were collected were all investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001. All of the grand jury information gathered in them is thus necessarily "related to," "gathered . . . to protect against," or "relates to the ability of the United States to protect against," among other things, "international terrorist activities." *See* 50 U.S.C. § 401a and Rule 6(e)(3)(D). All of the grand jury material gathered in those investigations thus constitutes foreign intelligence, counter intelligence, or foreign intelligence information (collectively, Foreign Intelligence Information).

In addition, OIG officials qualify as law enforcement officials within the meaning of the rule by virtue of the Inspector General's authority to conduct criminal investigations, apply for search warrants, make arrests, and investigate violations of civil rights and civil liberties. *See, e.g.,* 5 U.S.C. App. 3 § 6(e)(1); USA PATRIOT ACT, Pub. L. 107-56, § 1001, 115 Stat. 272, 391 (2001). Also, the OIG's oversight activities constitute law enforcement duties for purposes of the foreign intelligence exception because they directly affect the design and implementation of the Department's law enforcement programs.

The OIG has discussed the access issues with Department leadership and sought their assistance in resolving the dispute with the FBI. Although the Department's consideration of all these issues is ongoing, in July 2011, the Department concluded that, at a minimum, the foreign intelligence exception authorizes an "attorney for the government" to disclose grand jury information to the OIG for use in connection with OIG's law enforcement duties, such as the material witness warrant review, to the extent that the attorney for the government determines that the grand jury information in question involves foreign intelligence. Since then, an "attorney for the government" in the Department's National Security Division (a Department component under review in the Material Witness Warrant review), has been conducting a page-by-page review of the materials withheld by the FBI to determine whether they qualify as Foreign Intelligence Information under the exception before providing them to the OIG. In addition, the FBI has continued its own page-by-page review of some of the requested files to identify and redact grand jury and other categories of information, before the National Security Division attorney

[7] Pub. L. 107-56, § 203(A)(1), 115 Stat. 272, 279-81 (2001).

performs yet another review for the purpose of sending the material back to the FBI for the removal of grand jury foreign intelligence information redactions.

The Department's confirmation that the foreign intelligence exception is one basis for authorizing the OIG to obtain access to grand jury information was helpful. However, the page-by-page review of the material being conducted by the FBI and National Security Division to implement that decision is unnecessary. In our view, such page-by-page review is not necessary here because all of the grand jury material we have sought to date in the material witness review was collected in investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001, and thus necessarily falls within the very broad definitions of foreign intelligence, counterintelligence, or foreign intelligence information. *See* 50 U.S.C. § 401a and Rule 6(e)(3)(D). Therefore, the exception allows the OIG to receive all of the grand jury information from those investigations.[8]

Although the Department's determination that the OIG is entitled to access to the requested grand jury information in the material witness review under the foreign intelligence exception is helpful, that decision does not resolve the access issue. First, it does not address access to grand jury material that does not involve foreign intelligence information. Second, the Department's preliminary decision under the foreign intelligence exception does not address access to grand jury material in other OIG reviews. And third, the decision has been construed by the National Security Division and the FBI to require page-by-page review of the information, thereby undermining the independence and timeliness of the OIG's review as described above. Accordingly, a full decision confirming the OIG's right of access to grand jury and other information under the Inspector General Act and the "attorney for the government" exception is still necessary to enable the OIG effectively to carry out its oversight mission.

## III. CONCLUSION

The objective and independent oversight mandated by the Inspector General Act depends on the fundamental principle that the Inspectors General should have access to the same documents and materials as the establishments they oversee. This principle explains why the Inspector General Act grants the IGs access to the documents and materials that are available to their establishments. It explains why OIG investigators are routinely granted

[8] As noted above, such page-by-page reviews are also improper because they are contrary to the provisions of the Inspector General Act granting the OIG broad access to any document or material that is available to the agency overseen; undermine the independence of the Inspector General by granting a component under review unilateral authority to determine what materials the Inspector General receives, and result in unacceptable delays in the production of materials necessary for the OIG to conduct its oversight.

access to TS/SCI materials when reviewing TS/SCI programs. It explains why OIG investigators are routinely read into some of the government's most highly classified and tightly compartmented programs, such as the President's Surveillance Program and the programs involved in the Robert Hanssen matter. And it explains why any instance of unreasonable denial of access to documents or materials under the Inspector General Act must be reported to the head of the agency, and why the Attorney General's decision to preclude an OIG audit, investigation, or subpoena must be reported to Congress.

The FBI's withholding of grand jury and other information is unsupported in law and contrary to the Inspector General Act and exceptions to the general rule of grand jury secrecy. The OIG is entitled to access under the Inspector General Act. Moreover, the OIG qualifies for two exceptions to the general rule of grand jury secrecy. *See supra*; *see also* 5 U.S.C. App. 3 § 6; Fed. R. Crim. P. 6(e)(3)(D), 6(e)(3)(A)(i). It is true, of course, that under Section 8E of the Inspector General Act, the Attorney General could deny the OIG access to the documents at issue, as many of the documents constitute sensitive information within the scope of that Section. *See* 5 U.S.C. App. 3 § 8E. But the Attorney General has not done so, and until he makes the written determination required in Section 8E(a)(2) and sets out the reasons for his decision, the OIG is entitled to prompt and full access to the materials.

Denying the OIG access to the materials it is seeking would also represent an unnecessary and problematic departure from a working relationship that has proven highly successful for years. Since its inception, the OIG has routinely received highly sensitive materials, including strictly compartmented counterterrorism and counterintelligence information, classified information owned by other agencies, and grand jury information, and it has always handled this information without incident. The OIG has always conducted careful sensitivity reviews with all concerned individuals and entities, both inside and outside the Department, prior to any publication of sensitive information, and it has been entirely reasonable and cooperative in its negotiations over such publications. The OIG's access to sensitive materials has never created a security vulnerability or harmed the nation's interests; far from it, the OIG's access to sensitive information has markedly advanced the nation's interests by enabling the independent and objective oversight mandated by Congress.

Simply put, there is no reason, legal or otherwise, to depart from the time-tested approach of allowing the OIG full and prompt access to documents and using a thorough prepublication sensitivity review to safeguard against unauthorized disclosure of the information therein. Access to grand jury and other sensitive materials is essential to the OIG's work, perhaps never more so than when the OIG is overseeing such important national security matters as the Department's use of material witness warrants and the FBI's use of its Patriot Act authorities. But whatever the subject matter, the authorities and

**mandates of the Inspector General are clear, and neither grand jury secrecy rules nor any other statutory or internal policy restrictions should be read in a manner that frustrates or precludes the OIG's ability to fulfill its mission.**

# Attachment 2

Office of the Inspector General
United States Department of Justice

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

*before the*

U.S. House of Representatives
Committee on the Judiciary

*concerning*

"Access to Justice?: Does DOJ's Office of the Inspector General Have Access to Information Needed to Conduct Proper Oversight?"

September 9, 2014

Mr. Chairman, Congressman Conyers, and Members of the Committee:

Thank you for inviting me to testify about the issues that the Department of Justice (Department or DOJ) Office of the Inspector General (OIG) has faced in obtaining access to documents and materials needed for its audits and reviews. This is an issue of utmost importance, as evidenced by the 47 Inspectors General who signed a letter last month to the Congress strongly endorsing the principle of unimpaired Inspector General access to agency records. I want to thank the Members of Congress for their bipartisan support in response to our letter. I also want to acknowledge the provision included by the Senate Committee on Appropriations in the Department's fiscal year 2015 appropriations bill, S. 2437, which prohibits the Department from using appropriated funds to deny the OIG timely access to information.

Access by Inspectors General to information in agency files goes to the heart of our mission to provide independent and non-partisan oversight. It is very clear to me – just as it is to the Inspectors General community – that the Inspector General Act of 1978 (IG Act) entitles Inspectors General to access all documents and records within the agency's possession. Each of us firmly believes that Congress meant what it said in Section 6(a) of the IG Act: that Inspectors General must be given complete, timely, and unfiltered access to agency records.

However, as reflected in the recent Inspectors General letter and in my prior testimony before Congress, since 2010 and 2011, the FBI and some other Department components have not read Section 6(a) of the IG Act as giving my Office access to all records in their possession and therefore have refused our requests for various types of Department records. As a result, a number of our reviews have been significantly impeded. For example, the report we issued last week examining the Department's use of the federal material witness statute in international terrorism investigations experienced significant delays resulting from the FBI's objections to providing us with access to both grand jury and Title III electronic surveillance material. Additionally, in connection with our report last month on the FBI's use of national security letters, the FBI had previously objected to providing us with access to information it had collected using Section 1681u of the Fair Credit Reporting Act. We experienced similar objections from Department components that resulted in significant delays in gaining access to important information in other reviews as well, including during the review that culminated in our 2012 report on ATF's Operation Fast and Furious.

In response to each of these objections to providing us with access to information, the Attorney General or the Deputy Attorney General granted us permission to access the records we sought by making the finding that our reviews were of assistance to them. They also have stated to us, as well as publicly, that it is their intent to continue to grant us permission to access records in future audits and reviews. We appreciate their support and commitment to continue to issue to Department components whatever orders are necessary to ensure that we can access agency records in order to perform our oversight responsibilities. However,

as I have publicly testified previously, I have several significant concerns with this process.

First and foremost, this process is inconsistent with the clear mandate of Section 6(a) of the IG Act. The Attorney General and Deputy Attorney General should not have to order Department components to provide us with access to records that the Congress has already made it clear in the IG Act that we are entitled to review. Second, requiring the OIG to have to obtain the permission of Department leadership in order to review agency records compromises our independence. The IG Act expressly provides that an independent Inspector General should decide whether documents are relevant to an OIG's work; however, the current process at the Department instead places that decision and authority in the leadership of the agency that is being subjected to our oversight. Third, the need for the OIG to elevate matters such as these to the Department's leadership results in delays to our audits and reviews, consumes an inordinate amount of OIG staff time and my time, as well as time from the Attorney General's and Deputy Attorney General's busy schedules. Finally, while current Department leadership has supported our ability to access the records we have requested, agency leadership changes over time and an independent Inspector General's access to records surely should not depend on whether future occupants of these leadership positions support such access.

Moreover, the process that the OIG is being required to follow is inconsistent with how the Department treats other DOJ components that exercise oversight over Department programs and personnel, but that are not statutorily independent like the OIG and have not been granted an express statutory right of access by Congress like the OIG. For example, to our knowledge, the Department's Office of Professional Responsibility (OPR) continues to be given access to grand jury and wiretap information without objection, and no questions have been raised about providing OPR with the information it needs to investigate alleged misconduct by Department attorneys, which the IG Act grants OPR the exclusive jurisdiction to handle. This disparate treatment – requiring the OIG to obtain permission from Department leadership to gain access to these records, but not requiring OPR to do the same – is unjustifiable, and results in the Department being less willing to provide materials to the OIG, presumably because the OIG is statutorily independent, while OPR is not. Such a distinction subverts the very purpose of that statutory independence, and fails to take into account the clear access language in Section 6(a) of the IG Act. The disparate treatment, however, does highlight once again OPR's lack of independence from the Department's leadership. This lack of independent oversight of alleged attorney misconduct at the Department can only be addressed by granting the statutorily-independent OIG with jurisdiction to investigate all alleged misconduct at the Department, including by Department attorneys, as we have advocated for many years. Indeed, the independent, non-partisan Project on Government Oversight (POGO) made the same recommendation in a report issued in March of this year. Bipartisan legislation introduced in the Senate at the same time, the Inspector General Empowerment Act of 2014 (S.2127), would do just that.

This past May, the Department's leadership asked the Office of Legal Counsel (OLC) to issue an opinion addressing the legal objections raised by the FBI to the OIG gaining access to certain records. We did not then believe, nor have we ever believed, that a legal opinion from OLC was necessary to decide such a straightforward legal matter regarding the meaning of Section 6(a) of the IG Act. However, we did not object to the Department's decision to seek an OLC opinion, in part because we hoped that OLC would quickly provide the assurance that our Office is indeed entitled to access all agency records that the OIG deems necessary for its audits and reviews. We have attached to my written statement the legal views of the OIG regarding these issues, which summarizes the views we previously shared with the Department.

We also have emphasized to the Department's leadership the importance of a prompt OLC opinion, given that the existing practice, even though it has enabled us to get materials through an order of the Attorney General or Deputy Attorney General, seriously impairs our independence for the reasons I just described. It remains critical that OLC issue its opinion promptly.

Meanwhile, in the absence of a resolution of this dispute, our struggles to access information relevant to our reviews in a timely manner continue to cause delays to our work and consume resources. They also have a substantial impact on the morale of the auditors, analysts, agents, and lawyers who work extraordinarily hard every day to do the difficult oversight work that is expected of them. Far too often, they face challenges getting timely access to information from some Department components. Indeed, even routine requests can sometimes become a challenge. For example, in two ongoing audits, we even had trouble getting organizational charts in a timely manner.

We remain hopeful that this matter will be resolved promptly with a legal opinion concluding that the IG Act entitles the OIG to independent access to the records and information that we seek. Indeed, a contrary opinion, which interpreted the IG Act in a manner that resulted in limitations on the OIG's access to documents, would be unprecedented and would be contrary to over 20 years of policy, practice, and experience within the Department. As we discuss in our attached legal summary, for the OIG's first 22 years of existence, until the FBI raised legal objections in 2010 and 2011, the OIG received without controversy or question grand jury, Title III, and FCRA information in connection with reviews in which the information was relevant, including from the FBI. Should an OLC legal opinion interpret the IG Act in a manner that results in limits on our ability to access information pursuant to the IG Act, we will request a prompt legislative remedy, which the Department has said it will work with us on.

For the past 25 years, my Office has demonstrated that effective and independent oversight saves taxpayers money and improves the Department's operations. Actions that limit, condition, or delay access to information have substantial consequences for our work and lead to incomplete, inaccurate, or significantly delayed findings or recommendations. In order to avoid these consequences, the pending access issues need to be resolved promptly, hopefully

through a legal opinion from OLC finding that Section 6(a) of the IG Act means what it says, namely that the OIG is entitled "to have access to all records . . . or other material available to the" Department, which must be construed as timely, complete, and independent access to information in the Department's possession.

This concludes my prepared statement. I would be pleased to answer any questions that you may have.