



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



Lack of cooperation by the U.S. Chemical Safety Board with the EPA's Office of Inspector General

**Statement of Arthur A. Elkins Jr.
Inspector General**

**Before the Committee on Oversight and Government Reform
U.S. House of Representatives**

June 19, 2014

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Good morning, Chairman Issa, Ranking Member Cummings and members of the committee. I am Arthur Elkins, Inspector General at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you today.

Overview of EPA OIG's Responsibilities

It is important to remind everyone present that the Office of Inspector General (OIG) is an independent and objective office. Congress has entrusted the EPA OIG with serving as the Office of Inspector General for both the EPA and the U.S. Chemical Safety and Hazard Investigation Board (CSB).¹ The EPA OIG operates with a separate budget and decision-making authority from both agencies, and senior leaders at the agencies may not prohibit, prevent or obstruct us from conducting our work.

In accordance with the Inspector General (IG) Act of 1978, as amended, the EPA OIG's mission is to: conduct independent and objective audits and investigations related to programs and operations at the EPA and the CSB; prevent and detect waste, fraud and abuse; promote economy, effectiveness and efficiency; review pending legislation and regulations; and keep the agency heads and Congress fully and currently informed. We fulfill our mission primarily by issuing reports that include recommendations for corrective actions, by conducting investigations, and by referring criminal cases to the U.S. Department of Justice for prosecution.

The IG Act is clear in Section 6(a)(1) that Offices of Inspectors General 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"² As a matter of statutory interpretation, the IG Act is unambiguous that OIGs have access to all agency records without qualification.

Whenever I have the privilege of appearing before this committee, I appreciate the opportunity to express my profound gratitude and respect for the expertise, dedication, diligence and professionalism of the EPA OIG staff who do their best every day to carry out this mission.

¹ See *Consolidated Appropriations Act of 2012*, Pub. L. 112-74 ("notwithstanding any other provision of law, the individual appointed to the position of Inspector General of the [EPA] shall, by virtue of such appointment, also hold the position of Inspector General of the [CSB]").

² 5 U.S.C. App. 3, § 6(a)(1)

Turning to the matters at hand, I have been asked to testify about the EPA OIG's recent experiences with regard to the CSB. I will first address the circumstances leading to the rare issuance of a "Seven Day Letter" in an open investigation that has been dormant for months pending the refusal of the CSB to produce requested documents. Then I will speak briefly about our Office of Audit's work with the CSB.

CSB's Refusal to Provide Requested Documents to EPA OIG

In September 2012, the EPA OIG received a written complaint from a CSB employee alleging that a high-level Office of Special Counsel (OSC) employee had disclosed to a CSB official the identities of CSB whistleblowers who previously had filed confidential complaints with the OSC. The complaint also alleged that the same high-level OSC employee had taken actions to thwart an open OSC investigation into the CSB whistleblowers' complaints. A complaint identical to the one received by the EPA OIG had been sent to the OSC, which in turn forwarded it to the Office of Personnel Management (OPM) General Counsel's office to review and investigate.

From October 2012 until May 2013, the Federal Bureau of Investigation and the EPA OIG conducted a criminal investigation into the allegation that a high-level employee at the OSC had obstructed justice and disclosed the identities of confidential OSC whistleblowers.

In November 2012, the OPM General Counsel's office suspended its administrative investigation in response to a request from the FBI and the EPA OIG pending the completion of our criminal investigation.

In May 2013, the FBI and the EPA OIG briefed the U.S. Department of Justice (DOJ) Public Integrity Section on our investigative findings. The DOJ Public Integrity Section declined prosecution at that time, and the FBI closed its criminal case.

Although the case was no longer a criminal matter, that investigation had revealed a key administrative issue warranting further investigation outside of the EPA OIG's jurisdiction: A high-level OSC employee may have disclosed, without authorization, the identities of confidential whistleblowers from the CSB in violation of the Whistleblower Protection Act (5 U.S.C. § 1213h, protecting the confidentiality of whistleblowers' identity) and the Privacy Act of 1974 (5 U.S.C. § 552a). The EPA OIG coordinated with the OSC, which determined that the OPM Office of Inspector General, not the OPM General Counsel's office, should continue the investigation. On October 31, 2013, the EPA OIG provided the OPM OIG with our substantive investigative material from the closed joint criminal investigation with the FBI.

Meanwhile, in February 2013, the EPA OIG received a new complaint alleging that CSB officials were using nongovernmental email accounts to conduct official CSB business. However, the CSB refused, and to this day continues to refuse, to provide the documents the EPA OIG requested and has determined are necessary for this investigation into those CSB activities.

The CSB hired a private attorney, Mr. Peter Broida, to represent the CSB in connection with the whistleblower complaints. In May 2013, the OIG made three separate requests to CSB Chairman Rafael Moure-Eraso, CSB General Counsel Richard Loeb and Mr. Broida for all records of communications pertaining to official CSB matters that were sent by Chairman Rafael Moure-Eraso via a Gmail or any other nongovernmental email account for the time period from January 1, 2012, forward. Those requests specified names and topics that should be included pursuant to our investigation, and were requested to be produced in unredacted, original form.

Mr. Broida provided some of the requested records, some of which were heavily redacted. He stated that he was withholding other responsive records based on the attorney-client privilege and/or attorney-work product privilege. We received no records from Chairman Moure-Eraso or Mr. Loeb.

On July 22, 2013, Deputy Assistant Inspector General for Investigations Michael Daggett sent a letter to CSB Chairman Moure-Eraso requesting a full and complete production from CSB in response to the OIG's pending requests.

On August 7, 2013, Chairman Moure-Eraso sent his response by way of a letter to me stating that the CSB did not intend to comply with the OIG's requests.

The IG Act in Section 5(d) requires each 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]."³ This reporting tool, which is rarely used by the OIG community, is referred to as a "Seven Day Letter" because it requires the agency head to transmit the OIG's letter and the agency's response to appropriate committees or subcommittees of Congress within seven calendar days.

On August 8, 2013, I responded to Chairman Moure-Eraso's letter of the previous day informing him that the EPA OIG would proceed with a Seven Day Letter if the records were not provided by August 23, 2013.

On August 20, 2013, CSB Special Counsel for Investigations Christopher Lyon requested an extension of the deadline. The EPA OIG granted an extension until August 29.

On August 27, Mr. Lyon acknowledged in an email that the CSB had the requested documents.

³ 5 U.S.C. App. 3, § 5(d)

On August 29, Chairman Moure-Eraso sent a letter to me declining to produce the documents, stating:

. . . I have concluded that release of the documents requested by OIG would result in a waiver of the attorney-client privilege of the CSB with respect to certain third-party claimants whose interests are adverse to the CSB and the executive branch. . . . The vast majority of the documents you have requested are communications between CSB personnel and the agency's outside legal counsel. A small number of communications are between me and CSB attorneys. I am concerned that release of these documents to the OIG will waive the agency's attorney-client privilege vis-a-vis third parties adverse to the agency and the executive branch.

On September 5, 2013, the EPA OIG issued a Seven Day Letter to Chairman Moure-Eraso regarding the CSB's refusal to provide requested documents to the OIG as part of an ongoing investigation.

To date, CSB has provided no records, instead asserting to Congress that the agency is obliged to protect attorney-client privilege with respect to third parties, which excuses production to the OIG. In support of its contention, the CSB attached the analysis of a law professor paid by the CSB concluding that the agency would waive privilege if it turned over the documents to the EPA OIG as requested.

The CSB's assertion that production of documents to the EPA OIG would waive the privilege is wrong but also irrelevant to the CSB's obligations to the EPA OIG and this committee. The IG Act provides no exception to an Inspector General's right of unfettered access to agency records based on an assertion of privilege, attorney-client or otherwise.

The IG Act provides the statutory basis for OIG access to all records without qualification. The CSB has a duty to provide the records fully, completely and without delay. Refusal is a particularly serious and flagrant problem requiring the issuance of the EPA OIG's Seven Day Letter. However, without congressional follow-up, the letter is without teeth.

The critical matter that I wish to call to this committee's attention is the substance of the EPA OIG's investigation that led to the Seven Day Letter: The OIG has a legitimate law enforcement purpose for requesting the records at issue in order to pursue allegations of CSB officials, most notably the Chairman, using nongovernmental email to communicate on official CSB matters. By refusing to provide the requested information, the CSB is preventing the EPA OIG from conducting a complete investigation. In turn, we are precluded from providing Congress with a meaningful report on all of the CSB's activities.

CSB's Mission, Timeliness of Reports and Cooperation with EPA OIG

I also was asked to testify about the EPA OIG's audit findings with regard to the CSB's fulfillment of its mission, timeliness in issuing reports and overall cooperation.

The EPA OIG issued its "CSB Management Challenges and Internal Control Weaknesses" letter in September 2013, which revealed that the CSB is not investigating all of the industrial chemical accidents within its legal jurisdiction. Pursuant to the statutory authority provided in the Clean Air Act Amendments of 1990, the CSB "shall ... investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions and circumstances, and the cause or probable cause, of any accidental chemical release resulting in a fatality, serious injury or substantial property damages." Auditors found the CSB has an investigative gap between the number of accidents that it investigates and the number of accidents that fall under its statutory responsibility to investigate. To put that record in more stark terms, with dozens of accidents involving fatalities between 2009 and 2012, the fiscal years covered by our letter, the CSB initiated no more than six investigations in any given year. In 2012, for example, while there were 65 accidents, the CSB initiated only one investigation. That leaves 98 percent of the year's accidents uninvestigated.

An EPA OIG audit of the CSB's investigation process completed in July 2013 yielded similar results. Auditors determined that the CSB had not accomplished its strategic objective to "complete timely, high quality investigations that examine the technical, management systems, organizational and regulatory causes of chemical incidents." They found that, over a 6-year period, the CSB had fallen steadily behind in its goals of completing investigations. After meeting goals in fiscal years 2007 and 2008 at 100 percent, percentages fell to 66.67 in 2009, 50.00 in 2010, 33.33 in 2011 and 25.00 in 2012. Six investigations were open for more than 3 years.

Moreover, several EPA OIG audits going back to 2011 have included recommendations with which the CSB agreed but never implemented, with dates for completion now long past.

Insofar as the CSB, as a small agency, may cite a burden of compliance with the EPA OIG's requests, it is worth noting that our work pertaining to that agency is minimal.

In addition to the single investigation that is a subject of today's hearing, the EPA OIG has two active and four planned audits. Of those, all but one audit are mandated by Congress. A single discretionary audit seeks to determine whether the CSB effectively manages its contracts. The EPA OIG sought to begin that audit in June 2013 but delayed it until September at the request of the CSB, which cited staffing issues. When we notified the CSB of a re-start last November, it requested a second delay until February 2014, citing a heavy workload, competing priorities and vacation conflicts. We granted that delay, as well, noting that it would be the last. The project was re-started on February 10, 2014, and auditors anticipate completion by May 2015.

Conclusions

Through the IG Act, Congress established independent Offices of Inspector General to ensure oversight of Executive Branch agencies of all sizes. When the CSB tells the OIG charged with such responsibility that it will not comply with the OIG's request for information for reasons of its own invention, it is disregarding the law that Congress wrote for the protection of taxpayers that Congress intended.

OIGs must be able to obtain access to documents, depend on the cooperation of agencies, and conduct our work without delay. When we cannot do so, we fail the American public in several ways. First, in these times of tight budgets and scarce resources, the unnecessary hours, days, months and even years required by repeated attempts to complete an audit or investigation mean that we are not attending to other deserving work. Second, when an OIG is faced with obstruction and obfuscation by an agency, inefficiency thrives unchecked, and potential wrongdoing evades both notice and consequences. Third, potential misconduct on behalf of an agency's officials could change the direction of and/or evidence available to the OIG's investigation when it moves forward. Finally, and most significantly, public health is at risk. The CSB's mission is of utmost importance dealing, literally, with matters of life and death.

The EPA OIG stands ready to carry out our mission to the fullest. Although the use of a Seven Day Letter is unusual, we knew that it was warranted in this case. However, having sent the letter more than nine months ago, we are still in the same position and look to Congress to support the EPA OIG by directing that the CSB produce the requested records.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions you may have.