U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Is it Necessary to Clarify or Strengthen the Inspector General Act of 1978?

Statement of Arthur A. Elkins Jr.
Inspector General

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

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Good morning, Chairman Issa, Ranking Member Cummings and members of the committee. I am Arthur Elkins, Inspector General (IG) at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you today. I appreciate the opportunity to address how well the Inspector General Act is serving the taxpayers of this country in accomplishing goals that Congress set in passing it more than 35 years ago. As an Inspector General entrusted with executing the authorities provided for in the Act, the corollary question for me is whether the Act needs to be strengthened or clarified in any way. And I welcome the opportunity to publicly commend the expertise, dedication, diligence and professionalism of the Office of Inspector General (OIG) staff—not only at the EPA, but across the federal government—who work hard each day to carry out this very important mission.

Overview of the EPA OIG

The EPA OIG is an independent and objective office that is uniquely charged with conducting investigations and audits related to programs and operations not only at the EPA but at the U.S. Chemical Safety and Hazard Investigation Board (CSB). The EPA OIG operates with a separate budget and decision-making authority, and neither agency's senior leaders may prohibit, prevent or obstruct us from conducting our work.

At the request of the committee, I will testify on the importance of an OIG's access to agency records, and how this OIG's access has been limited by both the EPA and the CSB. Then, I will summarize the letter to Congress signed by 47 IGs, including me, regarding the denial of access. Lastly, I will offer my opinion as to whether there is a need to strengthen or clarify the IG Act.

CSB Denies Access to the OIG

Several recent events inform my personal response to the questions posed today. First, as the committee is aware, for more than a year, this OIG was confronted with a denial of access by the CSB. The CSB's leadership asserted that the denial was based on attorney/client privilege. However, we countered that such denial violated the IG Act, specifically Section 6(a)(1).

Our current issue with the CSB began in February 2013 when we received a complaint alleging that CSB officials were using nongovernmental email accounts to conduct official business. In

response, we opened an investigation. In May 2013, the OIG requested records of communications of the CSB for a specified time period pertaining to official CSB matters sent by Chairman Rafael Moure-Eraso via nongovernmental email accounts. A private attorney hired by the CSB in connection with the whistleblower complaints sent us only some of the records, and some of those were heavily redacted.

In July and August 2013, the OIG made repeated requests for a full and complete production of the requested records. Although the CSB acknowledged having the records, it still refused to produce them.

When that impairment of my office's ability to provide oversight of the CSB continued—despite lengthy, time-consuming efforts by my staff—we resorted to the rarely invoked "Seven Day Letter." On September 5, 2013, we issued a Seven Day Letter to CSB Chairman Moure-Eraso, which required him to transmit the OIG's letter and the CSB's response to the appropriate congressional committees and subcommittees within seven days.

This committee held a hearing on the Seven Day Letter and related issues on June 19, 2014, during which I provided testimony about these matters. At that hearing, Chairman Issa instructed that the CSB turn over the documents to the OIG within a week. The CSB produced several sets of documents to the OIG since the hearing. We have reviewed the documents to determine whether they were responsive to the request, whether the response was complete, and whether the documents indicated the existence of and need to request additional documents from CSB. At this point, the OIG concludes that CSB has substantially, but not fully, complied with our document request; however, the evidence we have gathered demonstrates that there are additional documents within the scope of our request that CSB officials have not provided to the OIG.

The evidence that we have been able to gather and review demonstrates that senior CSB officials, including Chairman Moure-Eraso, have used non-government email accounts to conduct official business on significant CSB issues.

EPA Denies Access to the OIG

The second matter I will discuss is how the EPA's Office of Homeland Security (OHS), which is in the Immediate Office of the Administrator, continues to impede the investigations of this OIG. My Assistant IG for Investigations, Patrick Sullivan, provided detailed testimony on this subject before this committee on May 7, 2014. He noted that while the OHS serves as the agency's internal liaison for the intelligence community on homeland security matters, it has no statutory authority to conduct investigations and no law enforcement authority.

I would like to remind this committee that the OHS' investigation of John C. Beale, who infamously defrauded the EPA under the guise of being a Central Intelligence Agency operative, seriously compromised the EPA OIG's later investigative interviews with Mr. Beale. Mr. Sullivan testified, "Because OHS continues to block my office's access to information essential to the OIG's work, I cannot assure the committee that we are doing everything possible to root

out other 'John Beales' who may be at the EPA or other malfeasance of similar magnitude." That is still the case.

During the May hearing, Mr. Sullivan also highlighted how OHS' denial of access to information has impeded the EPA OIG's ability to:

- Investigate threats against EPA employees and facilities.
- Conduct employee misconduct investigations.
- Investigate computer intrusions.

While there are multiple facets to this problem, the crux is this: The EPA believes that there is a category of activity that the EPA defines as "intelligence" to which the OIG may have access only subject to the EPA's granting of permission. EPA Administrator Gina McCarthy has given me a "Procedures" memorandum that is to govern the "handling" of matters between OHS and the OIG. That memo provides that, upon receipt of "intelligence," OHS will provide that information to the OIG "to the maximum extent allowable by law," with any such limitations on what might or might not be allowed by law to be determined by the EPA in accordance with advice and counsel from the EPA's Office of General Counsel. That, as is obvious, does not give the OIG access to "all" information "available" to the agency, as required by Section 6(a)(1) of the IG Act. Rather, it purports to preclude the OIG from full access to EPA information.

There are no "special needs", as referenced in the Procedures memo for national security matters and intelligence information other than required handling protocols. But, if an OIG member has the requisite security clearance, and is viewing or discussing the matters in an appropriate facility, there is no legal basis that allows the EPA or a unit of the EPA to preclude OIG access based on a "special need" for that program area. At intelligence community agencies, essentially all program areas involve intelligence and their respective OIG has access to all such program areas. At the EPA, that includes the OHS and its programmatic functions.

The committee has taken an on-going interest in this situation with OHS, and you have asked me to keep you informed. This impairment was ongoing when I arrived four years ago, and is still not resolved to this day.

Forty-Seven IGs Notify Congress about Denial of Access

I recently joined with 46 other federal IGs in writing a letter on August 5, 2014, to this committee, as well as other congressional members, to discuss more broadly the troubling push-back many of us have been seeing from our respective agencies denying us mandated access to agency employees and records. The letter provided examples of the obstacles faced by other IGs besides myself, including those at the Peace Corps and the U.S. Department of Justice (DOJ). Specifically, it mentioned how the agencies construed other statutes and laws applicable to privilege to circumvent our express authorization contained in the IG Act.

While the challenges faced by the three IGs were highlighted in the letter, by no means were such restrictions only limited to them. In fact, other IGs have also faced similar obstacles to their

mission. Besides claiming some highly tenuous rationale to trump the clear mandate of the IG Act, an agency will sometimes impose burdensome administrative conditions on access. Further, we noted that even when the IGs were ultimately able to resolve these issues with agency management, the negotiation utilizes a considerable amount of the OIG's resources and diverts the OIG from substantive oversight activities. Indeed, the letter emphasizes that agency actions that limit, condition, or delay access thus have profoundly negative consequences for our work—they make us less effective, encourage other agencies to take similar actions, and erode the morale of the dedicated professionals that make up our staffs.

As I stated earlier in my testimony, Section 6(a)(1) of the IG Act provides for the IG's complete and timely access to all agency materials and data. The letter reiterates that fact and also reminds Congress that limiting access risks leaving the agencies insulated from scrutiny and vulnerable to mismanagement and misconduct. In that letter, we asked Congress for a strong reaffirmation of the original and still existing congressional intent that OIGs have unfettered access to all agency information—coupled with the use of all available powers to enforce such access when agencies refuse to comply—to assist IGs in obtaining prompt and complete agency cooperation.

Does the IG Act Need to Be Strengthened or Clarified?

In short, Mr. Chairman, the questions about whether the IG Act is accomplishing Congress' goals, and whether the IG Act needs strengthening or clarification, are not hypothetical for me. They are questions with real-world impact on my ability to carry out my mandated functions—in situations I have faced over an extended period of time and continue to face today.

You might think, therefore, that I would say without reservation that the IG Act requires some enhancements on IG access and agency cooperation. However, I want all of us—IGs and Congress included—to be very careful about what I am saying and am not saying on this issue that is the crux of today's hearing: The IG Act as written is quite strong and quite clear. It provides access to all agency information and all agency employees. There are no exceptions—not for material that an agency asserts cannot be further released outside of the OIG once the OIG does receive it, and not for some piece of agency activity that might happen to involve classified information. No courts, no congressional committees, and no opinions from the DOJ's Office of Legal Counsel have given any cause for concern that the requirement for access to "all" information means anything other than "all." Even the former EPA Administrator issued a "cooperation with the OIG" memo in 2009 explicitly recognizing that the OIG has "full and unrestricted access to personnel, facilities, records … or other information that is needed by the OIG to accomplish its mission." Any attempt to clarify or strengthen that authority could only suggest that it is not already strong and fully encompassing.

The problem that I and my IG colleagues face is in the implementation or enforcement of the authority we already have. What happens when an agency refuses? In the case of the EPA and its OHS, we have had over four years of non-cooperation, which resulted in us not finding out about John Beale as quickly as we should have. It also means that an alleged assault within OHS has not been investigated for almost a year. In the case of the CSB, it means that we had to resort to a

Seven Day Letter, followed by an investigation by this committee with substantial investment by your staff and mine to gain access that should have been given immediately.

I also would like to take this opportunity to remind the committee that another threat to IG independence is under-funding. The OIG is a very labor-intensive agency. In fact, most of my budget—about 90 percent—goes toward staffing costs, and the remainder goes toward administrative costs. Lack of funding leads to fewer personnel to accomplish the mission. A decrease in staff leads to fewer audits and investigations. It also hampers succession planning, as senior staff are not replaced following retirements due to a lack of funds.

Conclusion

The IG Act hinges on the cooperation of the agency with its IG. If there is no cooperation, the work of the OIG is stifled. In that circumstance, the American taxpayers, the Congress and the agency will not receive the full benefit of an unimpeded, objective review of the nation's investment in the programs and operations of an agency. The result is that the taxpayers cannot have confidence that their investment is being used as intended.

I therefore urge this committee to look at enforcement mechanisms for the access and cooperation already required. The standard is fine; the ability to ignore the standard without consequence is the problem.

We will be happy to work with your staff—in concert with the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency—on devising an array of tools and remedies.

Mr. Chairman, as you have demonstrated repeatedly, this committee and the federal IGs are partners in providing oversight of agency activities and protecting taxpayers' investment. For whatever reason, many of our IGs have been encountering strong and continued push-back on our authority to provide mandated oversight. I believe Congress can send a strong and needed message, through legislative enhancements and other means, that such impairment will not be tolerated. In conclusion, I would like to reaffirm the OIG's commitment to add value and assist the EPA in accomplishing its mission of safeguarding the health of the American people and protecting the environment. We take very seriously our mandate to promote economy, efficiency and effectiveness; and to prevent and detect fraud, waste and abuse through independent oversight of the EPA's programs and operations.

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