



## OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

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Washington, DC 20528 / [www.oig.dhs.gov](http://www.oig.dhs.gov)

August 31, 2023

The Honorable James Comer, Chairman  
Committee on Oversight and Accountability  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Jamie Raskin, Ranking Member  
Committee on Oversight and Accountability  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Mark E. Green, M.D., Chairman  
Committee on Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Bennie G. Thompson, Ranking Member  
Committee on Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

Re: July 27, 2023 letter

Dear Chairman Comer, Ranking Member Raskin, Chairman Green, and Ranking Member Thompson:

I write in response to Ranking Member Raskin's and Ranking Member Thompson's July 27, 2023, letter, in which they assert that "the Committees are expanding their investigation" into my leadership of the Department of Homeland Security (DHS) Office of Inspector General (OIG). Their letter makes several assertions, poses many questions, requests a large volume of records and information, and asks that I make two members of my senior staff available for a briefing.

I thank members of Chairman Comer's and Chairman Green's staffs for confirming that I am not under investigation by your respective Committees. I am grateful for the opportunity to address some apparent misconceptions concerning an independent investigation conducted by Wilmer Hale and a recent agreement between DHS OIG and a former employee in settlement of litigation.

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The Wilmer Hale investigation should not be minimized.

On July 25, 2019, the Senate unanimously confirmed me as Inspector General of DHS. The following year, I authorized a competitive process aimed at contracting with an outside firm to conduct an investigation into allegations of serious wrongdoing on the part of three DHS OIG career senior executives. The result of this competitive process, which was administered by career civil servants well-versed in procurement, budget, and related rules, was the award of a contract to the law firm Wilmer Hale. After a six-month investigation, Wilmer Hale provided DHS OIG with an independent Report of Investigation (ROI).

Ranking Member Raskin's and Ranking Member Thompson's July 27, 2023, letter suggests that the Wilmer Hale investigation was not a worthwhile expenditure of public funds. I disagree, and refer you to the ROI, which speaks for itself. *See Attachment.*<sup>1</sup>

### Torment by CIGIE

In early 2021, I provided the Wilmer Hale ROI to Congress and to the Council of the Inspectors General for Integrity and Efficiency (CIGIE). The ROI found, among other things, that some senior executives at DHS OIG misused their positions by using government resources and their official titles to interfere in the Senate's advice-and-consent process, specifically, by opposing the President's decision to nominate me to be Inspector General of DHS. Wilmer Hale further found that CIGIE's Vice-Chairperson, who went on to be CIGIE's Chairperson, encouraged this misuse of position.<sup>2</sup>

Not long after I provided the Wilmer Hale ROI to CIGIE, CIGIE opened an investigation into the award of the Wilmer Hale contract. It is reasonable to infer that CIGIE's goal is to protect its leadership by discrediting Wilmer

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<sup>1</sup> The attached copy of the Wilmer Hale ROI has been redacted in accordance with 5 U.S.C. § 407(b), which prohibits disclosure of the identity of an individual who provides information to an OIG. However, personally-identifying information (PII) has not been redacted where it appears in other contexts, because the Committees have a privilege to receive PII that is otherwise shielded from disclosure under the Privacy Act. 5 U.S.C. § 552a(b)(9).

<sup>2</sup> Wilmer Hale noted that the senior executives had the right, as "citizens" acting in their "personal capacity," to express their opposition to my nomination, but that is not what they did. Instead, the senior executives were acting in their official capacity as employees of DHS OIG when they attempted to prevent my confirmation. One of the senior executives was misusing her position for personal gain insofar as her effort to undermine my nomination, if successful, would have resulted in her remaining as Acting Inspector General of DHS for a longer period. *See ROI at 24-29.*



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Hale's investigation. It is also reasonable to infer that CIGIE is displeased with the Wilmer Hale investigation because CIGIE declined to act on multiple complaints of misconduct that I and several DHS OIG career civil servants sent to them. I subsequently authorized an independent investigation that tellingly substantiated some of those same allegations.

The CIGIE investigation into the Wilmer Hale contract continues to this day. As part of that investigation, CIGIE obtained, under compulsion, my protected whistleblowing communications with Congress. Senators Portman, Grassley, Johnson, Lankford, Romney, and Hawley asked CIGIE to establish a taint team to filter out those communications so that the CIGIE investigators would not see them. CIGIE refused to honor their request.

CIGIE acted against the legal interests of the United States by tilting the playing field in favor of a private litigant, thereby leaving DHS OIG with no choice but to settle the litigation between DHS OIG and a former employee.

In 2021, CIGIE informed DHS OIG that as part of its investigation into the Wilmer Hale contract, it intended to conduct a comprehensive inquiry into personnel actions taken against a former DHS OIG employee that were the subject of pending litigation before the Merit Systems Protection Board (MSPB). DHS OIG objected and pointed out that under Supreme Court precedent the MSPB had exclusive jurisdiction of the matter.<sup>3</sup> However, CIGIE declined to follow Supreme Court precedent, would not relent, and demanded all DHS OIG records associated with the personnel actions.

CIGIE later became dissatisfied with the pace of DHS OIG's production of records and set an unreasonably short deadline for the completion of production. When DHS OIG responded that the records needed to be reviewed and appropriately marked where they were covered by the attorney-client or some other privilege, CIGIE demanded that DHS OIG stop marking the records and turn them over immediately. In so doing, CIGIE threatened to find that the DHS OIG career civil servants, who were responsible for gathering and producing records, were guilty of misconduct if they failed to produce them quickly enough. This means that DHS OIG personnel were coerced by the threat of a career-ending finding of misconduct into producing unmarked privileged documents to CIGIE. These documents included DHS OIG's litigation strategy in the pending MSPB matter, protected communications with Congress, and related attorney work product.

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<sup>3</sup> *Elgin v. Dept. of the Treasury*, 567 U.S. 1 (2012); *United States v. Fausto*, 484 U.S. 439 (1988).



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Apart from these documents, CIGIE had two investigators grill the chief counsel of DHS OIG for six hours, covering sensitive, privileged matters relating to the pending MSPB litigation. CIGIE investigators also interviewed an unknown number of other DHS OIG witnesses about the matters raised in the pending litigation. Whereas agency counsel typically attends a deposition taken as part of the MSPB discovery process, CIGIE refused to allow DHS OIG counsel to attend its interviews of witnesses.

MSPB's rules provide that a litigant may obtain records from a third party by requesting them directly, without MSPB's involvement. During my deposition in the matter, the former employee's attorney referred to DHS OIG records covered by the attorney-client and a related privilege and questioned me about them.

Courts have long held that when a party releases privileged material to a second party, who does not stand in an attorney-client relationship with the first party, the privilege is considered waived as to all parties. Although CIGIE claims that it does not consider an OIG's disclosure of privileged material to CIGIE to be a waiver of the privilege, CIGIE's view is irrelevant. Instead, it is up to a court, or in this instance, MSPB, to decide whether production of privileged material to CIGIE results in a waiver of the privilege. The specific issue of the effect of disclosure of privileged material to CIGIE has never been decided by MSPB or a court.<sup>4</sup>

In sum, CIGIE sabotaged litigation to which DHS OIG was a party and significantly tilted the playing field in the opposing party's favor. It did so after being told that it was unlawfully interfering and that MSPB had exclusive jurisdiction over the matter. DHS OIG faced the prospect of having MSPB admit privileged material into evidence, and even leaving that possibility aside, it appears from the questions posed by the former employee's attorney during my deposition that the former employee gained an improper advantage in the litigation. Under the circumstances, DHS OIG

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<sup>4</sup> A party's failure to strongly resist a demand for privileged material weighs in favor of finding that the privilege has been waived as to all parties, *United States v. Phillip Morris, Inc.*, 212 F.R.D. 421 (Dist. D.C. 2002), but as explained above, CIGIE threatened career civil servants at DHS OIG with finding them guilty of misconduct simply for taking the time to mark privileged material as such before producing it to CIGIE. It should also be noted that Congress has given the Office of Special Counsel (OSC), which investigates alleged prohibited personnel practices in the executive branch, express authority to obtain privileged material from an agency; the same statute also provides that an agency's disclosure of privileged material to OSC is not a waiver of the privilege as to a third party. 5 U.S.C. § 1212(b)(5)(C). By contrast, Congress has not given CIGIE authority to obtain privileged material from an OIG, and no statute preserves privileges for material disclosed to CIGIE by an OIG.



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was left with no choice but to settle. The amount of the settlement was not unreasonable because the case was dormant for most of the three-year period between its filing and the settlement -- due to a lack of quorum at MSPB -- putting the potential award of back pay, attorney fees, and damages in the one-million-dollar range. I encourage members who are unhappy about the settlement to seek answers from CIGIE about its actions.

Please call me with questions, or a member of your staff may contact Kristen Fredricks, Chief of Staff, at (202) 981-6000.

Sincerely,

JOSEPH V  
CUFFARI

Digitally signed by JOSEPH V  
CUFFARI  
Date: 2023.08.31 11:19:05 -04'00'

Joseph V. Cuffari, Ph.D.  
Inspector General

Attachment: Wilmer Hale Report of Investigation (Dec. 14, 2020)