



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



How the EPA's Office of Homeland Security Impedes the Investigations of the EPA's Office of Inspector General

**Statement of Patrick Sullivan
Assistant Inspector General for Investigations**

**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 Patrick Sullivan, Assistant Inspector General for Investigations at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you today.

Overview of the EPA OIG

Given the issues that will be discussed, it is important to remind everyone present that the Office of Inspector General (OIG) is an independent and objective office within the EPA that is uniquely charged with conducting investigations and audits related to programs and operations at the agency and the U.S. Chemical Safety and Hazard Investigation Board. Although we are a part of the EPA, the OIG operates with a separate budget and decision-making authority, and the agency's senior leaders may not prohibit, prevent or obstruct us from conducting our work.

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

Before I begin, I would like to commend the expertise, dedication, diligence and professionalism of the OIG staff who strive every day to carry out this mission.

How the EPA OHS Impedes the OIG's Mission

The EPA OIG's Office of Investigations is being impeded from fulfilling its responsibilities by actions of the EPA's internal Office of Homeland Security (OHS), a unit within the Office of the Administrator. OHS is overseen by Gwendolyn Keyes Fleming, who serves as Chief of Staff to Administrator Gina McCarthy. To illustrate this big picture problem, I will discuss three specific, serious, ongoing actions by OHS.

As a starting point, I would like to call your attention to our successful investigation of former EPA official John Beale, which was the subject of a hearing held by this committee on October 1, 2013. You will recall that Mr. Beale defrauded the agency under the guise of being a Central

Intelligence Agency operative. The OIG's investigation ultimately led to Mr. Beale's conviction and sentence to serve 32 months in federal detention. As I testified in October, prior to EPA officials contacting the OIG about the situation, OHS conducted its own investigation. The OHS' actions, which included several interviews with Mr. Beale, damaged the OIG's subsequent investigation.

I would like to go on record today and state that, as the official in charge of internal investigations at the EPA, I am very concerned that vital information regarding suspected employee and contractor misconduct is being withheld from the OIG. 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. I wholeheartedly believe that the current situation represents a significant liability for the EPA, the Congress and the American taxpayers. In short, the actions of OHS violate the IG Act, the very legislation that Congress passed to ensure federal agencies have oversight to prevent and detect fraud waste and abuse. Without a shred of doubt, I can say that OHS is preventing the OIG from doing what Congress has mandated us to do.

Certain news media have reported on alleged assaults associated with an OIG initial investigation into OHS last year. The circumstances of that incident are indeed important and part and parcel of the overall narrative. I am grateful that the committee has taken an interest in what happened that day and will hear from witnesses on that topic. To date, the public has heard less about the broader issues at stake regarding the respective jurisdictions of the OIG and OHS. Those will be the subject of my testimony.

As a final background topic, it is necessary to provide a brief description of the duties and authority of the three offices involved in this matter. Those offices are the OIG, OHS and the EPA Security Management Division (SMD).

The EPA OIG was created pursuant to the IG Act and thereby has statutory authorization, as well as an obligation, to conduct criminal and administrative investigations of employee misconduct, threats against EPA personnel and facilities, and intrusions into EPA computer networks and systems. Pursuant to the Attorney General's Guidelines for OIGs with Statutory Law Enforcement Authority, the EPA and the Federal Bureau of Investigation (FBI) share concurrent jurisdiction for agency-related cases. Indeed, the OIG's Office of Investigations enjoys a healthy professional working relationship with the FBI, and we currently are collaborating on numerous joint investigations.

OHS serves as the agency's central liaison for homeland security matters. It was created on February 6, 2003, by a memorandum from the EPA Administrator. The OHS has absolutely no statutory authority to conduct investigations and no law enforcement authority. Nor does the Administrator's memorandum authorize OHS to take investigatory actions. Although OHS continually has stated that there are intelligence directives and guidelines that provide it authority to withhold information from and avert oversight by the EPA OIG – including Title 50 U.S. Code Section 402a; Presidential Policy Directive-21, Critical Infrastructure Security and Resilience (2013); and EPA Order 3220, Intelligence Operations (2008) – it has yet to provide a

basis that trumps the IG Act. While certain Title 50 agency OIGs have some limitations on their oversight authority, the EPA OIG, as a non-Title 50 agency, does not have any limitations.¹

The SMD, which is part of the EPA's Office of Administration and Resource Management, provides management and protection of the EPA's facilities and other critical assets nationwide. At most federal departments and agencies, the designated offices of the OIG, and those entities with similar duties to EPA's OHS and SMD, typically work together in a reasonable manner and within their respective scopes of authority. While the OIG Office of Investigations is appreciative of such a relationship with SMD, both offices' interactions with OHS are highly concerning, putting EPA employees and facilities at risk.

The three issues I will discuss are as follows: First, and most important, the OIG's ability to investigate threats against EPA employees and facilities has been diminished due to OHS' complete and systematic refusal to share threat information with the OIG. Second, the OIG's ability to conduct employee misconduct investigations has been impeded due to the OHS' own investigative actions and its joint investigative actions with the FBI, which effectively cut off the OIG's access to information on suspected employee and contractor misconduct. Third, the OIG's ability to investigate computer intrusions has been impeded due to OHS' refusal to share information or recognize the authority of the OIG to investigate intrusions.

OHS' actions are violating federal law. Neither the Office of the Administrator nor its Office of General Counsel at the EPA has stepped in to stop this usurping of authority by OHS or its interference with the statutory authority of the OIG.

Issue One: The OIG's ability to investigate threats against EPA employees and facilities has been impeded due to OHS's total and systematic refusal to share threat information.

The most critical concern of the OIG is the safety and security of all EPA employees, facilities and assets. The OIG's ability to investigate threats against EPA employees and facilities has been impeded due to OHS' total and systematic refusal to share threat information.

To date, despite the OIG's repeated and sincere efforts to coordinate and exchange information on matters of mutual interest, OHS has refused to provide any threat information or reasonably cooperate at all with the OIG Office of Investigations. At times, my office has received threat information from external federal law enforcement agencies significantly later than it was known by OHS, whether acquired by or given to that office from other sources. This problem has created an extremely dysfunctional environment, as my office receives threat information from external federal law enforcement agencies, on a sporadic, hit-or-miss basis, after it was provided to or otherwise known by OHS.

In investigating threats, timely access to all available information is critical to developing a profile, assessing the situation and implementing an investigatory plan of action. OHS, by refusing to provide or exchange information with the OIG, places my special agents in the

¹ Title 50 U.S. Code Section 402a establishes and provides authority to entities that comprise the U.S. Intelligence Community.

position of developing an assessment based upon incomplete information. Obviously, this situation creates an elevated and undue risk for OIG special agents in the field who are conducting interviews. Even worse, if OHS possesses independent information of a threat that the OIG is not privy to, we have absolutely no ability at all to investigate, address or mitigate that threat, which is a key function of our office.

Most important, the withholding of threat information from the OIG also places all EPA employees and facilities at risk.

OHS refuses to provide threat information not only to the OIG, but also to the EPA SMD. To put this point in context, OHS, which has a primary function to liaise and coordinate with intelligence and homeland security agencies², refuses to share threat information with the very EPA offices charged with investigating threats (OIG) and providing first line security for EPA facilities (SMD). This practice is not only unacceptable—it is dangerous.

The current situation with OHS harks back to the days before 9/11 when U.S. government entities often did not communicate effectively or at all, contributing to the most horrific terrorist attack ever on U.S. soil. A tragic lesson resulting from that day was the critical importance that law enforcement, intelligence and public safety units establish clear and timely lines of communication to share relevant information. Obviously, that is not happening at the EPA. No single entity can accomplish its work in a vacuum. We must work together.

In response to denying the OIG's repeated requests for information and cooperation, OHS has invoked the term "national security" as its mantra. This formidable cloak does not justify OHS' insistence upon filtering information germane to the OIG's jurisdiction, whether classified or not, or a summary dismissal of two EPA entities charged with security. OHS does not have authority to make such a call. OIGs in the Intelligence Community agencies (which the EPA is not) deal almost exclusively with classified information. Agency management, let alone a small shop buried inside the agency, has no power whatsoever to tell the OIG what it needs to know. It is actually the reverse. Under the IG Act, the OIG has access to the entirety of information available to the agency, and it is the IG who determines what information, among that universe, it needs to know. The IG has the power to request IG employees be read into any classified compartment and obtain access to any classified documents available to the agency.

Personnel in both the OIG and SMD hold security clearances. I personally hold a Top Secret security clearance with four Sensitive Compartmented Information (SCI) endorsements. I have held a Top Secret/SCI security clearance for more than 35 years. All OIG special agents hold, at a minimum, Top Secret security clearances. Clearly, the federal government has entrusted me, and my special agents, to handle classified information.

For at least three years, OHS has attempted to limit the OIG's access to classified information by deciding, unilaterally, that OIG personnel do not have "a need to know." OHS uses circular logic to assert its own conclusion that the OIG does not need the information and then uses the conclusion as a basis to assert that it would be violating national security protocols to share the information.

² <http://www.epa.gov/homelandsecurity/responsibilities.htm>

Equally troubling is that OHS' Senior Intelligence Advisor, when challenged about OHS' responsibilities and limitations, repeatedly has invoked the authority of the FBI and threatened the possible imprisonment of EPA employees who have disagreed with or questioned his position.

I would like to describe a specific example of OHS' refusal to provide threat information to the OIG. In August 2013, the OIG received a threat-related Direction of Interest Report from the U.S. Secret Service. This report concerned an individual who stated he had knowledge of a threat to harm President Obama and who also exhibited potential threatening behavior toward the EPA. The individual had an extensive and violent criminal history including weapons and drug charges. The Secret Service had prepared this report at the request of an OHS employee without the knowledge of the OIG. My office, which investigates threats, belatedly learned of the report only because of our working relationship with the Secret Service. During our subsequent investigation, we discovered that, in addition to the OIG, OHS had never shared the threat information with either SMD or the EPA Administrator's protective detail. The OIG immediately notified both entities. The SMD issued a bar notice so that the individual could not enter any EPA facility, and the OIG conducted an investigation that included interviewing the subject.

The OHS' refusal to share information must be addressed and corrected so that the OIG and SMD can timely, fully and safely perform their respective functions, including collaborative efforts with OHS, to thwart any potential attack on an EPA employee or facility. This change needs to happen immediately.

Issue Two: The OIG's ability to conduct employee misconduct investigations has been impeded by OHS' operation as an unauthorized de facto law enforcement organization as well as its personnel's refusal to share information related to employee misconduct cases.

The second issue is that the OIG's ability to conduct employee misconduct investigations has been impeded by OHS' operation as an unauthorized *de facto* law enforcement organization, as well as that office's refusal to share information related to potential criminal and administrative misconduct by EPA employees and contractors.

I need to emphasize that the EPA OHS has no authority to conduct investigations or engage in law enforcement activities. In fact, the EPA's own Office of Environmental Compliance and Assurance (OECA) issued a legal opinion holding that OHS lacks both statutory law enforcement authority and the authority to detail an EPA Criminal Investigation Division (CID) special agent to work as a criminal investigator within OHS.

Even so, the OHS continues to operate directly within the EPA's Office of the Administrator as a *de facto* independent law enforcement and investigative organization, having acquired by detail an EPA CID special agent who carries a weapon, badge and law enforcement credentials. This special agent is limited by statute (18 USC 3063) to the investigation of environmental crimes. Under no circumstances should this agent be conducting national security or employee misconduct investigations. OHS has engaged in a pattern of clear investigative activities that have included having EPA employees sign non-disclosure forms; conducting interviews of EPA employees and

contractors; and collecting the emails of EPA employees. These unauthorized activities by OHS have crossed into the statutory authority and established jurisdiction of the OIG.

We opened an investigation, not of criminal wrongdoing, but of the nature and extent of these activities, as they were impacting our ability to carry out our mandated activities. As part of that effort, we attempted to interview the CID special agent (criminal investigator) who was working for OHS. He was obligated to submit to our interview. Because he was not suspected of any criminal wrongdoing, he was not entitled to have an attorney present, but we concurred to his having an attorney present as an accommodation. Unfortunately, because of several delays caused by the CID special agent, we were unable to complete the interview.

The result of OHS having EPA employees sign non-disclosure agreements is the effective preclusion of the OIG from interviewing those individuals. Such an agreement also prevents those employees from reporting potential misconduct to the OIG related to the subject of any OHS interview. When the OIG contacted the FBI in order to de-conflict a matter related to an ongoing EPA investigation, OHS accused the OIG of interference. Again, the FBI and the OIG are law enforcement organizations that share concurrent jurisdiction. It is entirely appropriate, and often necessary, for an OIG special agent to communicate with an FBI special agent. The EPA OIG and OIG community, in general, regularly work with the FBI on a myriad of criminal investigative issues. OHS' assertion demonstrates either a lack of understanding of the OIG's authority under the IG Act or a blatant disregard for that authority.

In July 2012, OHS entered into a unilateral memorandum of understanding (MOU) with the FBI—without the OIG's knowledge or consent—making OHS the EPA's single point of contact with the FBI for investigations with a nexus to national security. In particular, the MOU mentions that OHS will make referrals to the FBI under Section 811 of the 1995 Intelligence Authorization Act, as amended, 50 USC 402a(e), whenever there is an indication that classified information is being or may have been disclosed to a foreign power. In order for OHS to reach any decision to refer such matters to the FBI, it would almost certainly involve a suspicion that an EPA employee or contractor is engaged in serious misconduct.

This arrangement effectively has precluded the OIG from being able to conduct some employee misconduct investigations and some threat investigations. We have attempted to engage the EPA Administrator on the question of how the MOU with the FBI's National Security Section was approved without the OIG's input, but we have not received a satisfactory response.

Also problematic is OHS' utter refusal to acknowledge or accept the OIG's statutory authority and its oversight over *all* EPA employees. Because OHS operates directly within the Office of the Administrator, OHS has been able to operate with impunity from any effective OIG oversight. Further, since OHS is essentially operating as a rogue law enforcement organization, we do not have access to that office's cases. This block unquestionably has hamstrung the OIG's ability to carry out its statutory mandate to investigate wrongdoing of EPA employees—including, potentially, those within OHS.

Indeed, OIG special agents had attempted to conduct an administrative investigation of OHS which led to alleged assaults. The EPA Administrator made an unprecedented request that the OIG stand down on the administrative investigation into potential wrongdoing by OHS employees, including that office's Senior Intelligence Advisor. We asked the Federal Protective Service to conduct a criminal investigation which led to a referral to DOJ. However, DOJ declined prosecution and referred the matter back to the OIG for administrative action. Due to a potential conflict of interest, we asked the Council of Inspectors General on Integrity and Efficiency to assign another OIG to investigate the administrative matter. The investigation by the U.S. Department of Defense's Office of Inspector General is currently ongoing, so we cannot discuss the case.

Recently, the OIG received a serious allegation regarding intimidation and potential threats by an OHS employee; however, due to OHS' continuous obstruction and refusal to cooperate with official OIG investigations, the OIG is unable to carry out an investigation into this potential wrongdoing.

Issue Three: The OIG's ability to investigate computer intrusions has been impeded due to OHS' refusal to share information or recognize the OIG's authority to investigate classified intrusions.

OHS' refusal to share classified, or any, information, or to recognize the OIG's statutory authority and responsibility, also extends to intrusions into EPA computer systems and networks.

In many cases, information related to cyber and computer related intrusions is derived from classified sources, which the OIG has the ability, and the statutory authority and responsibility, to receive, handle and investigate. OHS' actions are blocking the OIG's ability to conduct computer intrusion investigations, which could adversely affect the EPA's computer network.

For example, recent attempts have been made to illegally penetrate the agency's network. These incidents were reported to the OIG by the EPA's Computer Security Incident Response Capability. In return, the OIG has shared investigative information with the agency's network administrators that could assist the agency in the protection of the EPA network. The OIG has learned that OHS received classified information directly related to attempted intrusions yet failed to share it with the OIG.

OHS has taken it upon itself to exclude the OIG, withhold sensitive information and discourage outside agencies, such as the FBI, from working with the OIG by creating agency-supported roadblocks such as the external MOU with the FBI. OHS has excluded the OIG from any investigation as it sees fit, which gravely impedes the OIG's ability to provide accurate and timely investigative information to the appropriate network security teams responsible for securing the EPA's network. These actions have damaged external law enforcement relationships between outside agencies and the OIG— thus creating serious gaps in the OIG's ability to appropriately respond, mitigate and investigate threats to the EPA's network.

Conclusion

My testimony today shines a bright light on the misguided actions of the agency's Office of Homeland Security, which has dangerously morphed into a *de facto* law enforcement and investigative organization without any authority to conduct investigations. This masquerade has led to the EPA's direct impedance of the OIG to conduct investigations as mandated under the IG Act. Under the heavy cloak of "national security," OHS has repeatedly rebuffed and refused to cooperate with the OIG's ongoing requests for information or cooperation.

Over the past few months, I discussed this situation with many of my fellow Assistant Inspectors General for Investigation (AIGIs) within the federal OIG community. I learned that the situation I face at the EPA is an anomaly. Most of my AIGI counterparts, particularly those with statutory law enforcement authority such as the EPA, advised me that their Offices of Investigation would either directly participate with the FBI in any such national security related investigation targeting an employee or they would be fully informed about the investigation for coordination and de-confliction purposes. In addition, the use of "non-disclosure" agreements by an internal entity, such as OHS, to prevent employees from speaking to the OIG would not be tolerated.

Additionally, the OIG's leadership has numerous times implored the EPA's leadership to recognize the illegitimacy of OHS conducting itself in such a manner and the urgency of correcting the situation. We are reminded of the John Beale case in that the agency's highest managers appear to believe, and even endorse, a fictitious set of facts manufactured by OHS personnel. This situation could, and should, have been fixed easily a long time ago without a need to elevate it to the level of Congress' attention.

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 prevent and detect fraud, waste and abuse through independent oversight of the EPA's programs and operations.

Toward that end, on behalf of the EPA OIG, I must urge the committee to lend assistance in the following five areas:

1. Delineating for the EPA's leadership, including within OHS, the clear authority of the OIG's jurisdiction under the IG Act to conduct unfettered criminal and administrative investigations, including full access to information, records and employees.
2. Encouraging EPA's leadership to collaborate expeditiously with the OIG to finalize, sign and abide by a new MOU between the OHS and the OIG that recognizes each office's unique responsibilities and sets forth a joint obligation to share information relevant to both missions. The OIG has drafted such a document and shared it with EPA leadership. However, overtures to collaborate on achieving a final version have been stonewalled.
3. Persuading the EPA's leadership to inform the FBI that the current OHS-FBI MOU is null and void because it does not account for the OIG's authorities and requirements.

4. Requesting that the EPA acknowledge OHS is a policy office that does not have the authority to conduct investigations or engage in law enforcement activities.
5. Ascertaining the understanding of the EPA's leadership that agency employees outside of the OIG may not conduct criminal or administrative misconduct investigations, as doing so places both the agency and such an employee at risk. As supported by the written legal opinion of the EPA's OECA, that office's employees – whether working in OECA or detailed to OHS – may conduct only investigations of environmental crimes.

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