UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

November 5, 2019

MEMORANDUM

SUBJECT: Compliance with Inspector General Act

FROM: Matthew Z. Leopold, General Counsel

TO: Andrew R. Wheeler, Administrator

On October 29, 2019, you received a letter from the Acting Inspector General pursuant to Section 5(d) of the Inspector General Act of 1978 ("the IG Act"), which is commonly known as a "Seven Day Letter." The Letter makes allegations that the EPA Chief of Staff, Ryan Jackson, has refused to cooperate with the Office of Inspector General ("OIG") with respect to certain interviews seeking information related to an audit and an administrative investigation. Consistent with the statutory requirements invoked in Section 5(d), the Letter requests that you transmit it to the relevant congressional committees on November 5, 2019.

You have asked for an opinion assessing the Agency's compliance with the legal requirements of the IG Act. Specifically, you have asked whether the Agency has complied with the legal requirements in the IG Act Sections 6(a)(1), 6(a)(3), and 6(b)(2) that are referenced in the Seven Day Letter.[1] It is ultimately the Administrator that maintains control of the information sought and decides what constitutes an adequate accommodation by the Agency of an OIG request in so far as it is practicable. OIG's recourse is to report to Congress if, in its opinion, the Agency's assistance is not a reasonable accommodation. The accommodation process to OIG was still in progress when the Seven Day Letter was transmitted. You have informed me that you attempted to fulfill the request for information, including offering to provide Mr. Jackson for a second interview. OIG expressly refused the Agency's offer to withdraw the Seven Day Letter as moot despite this accommodation. Your attempt to accommodate OIG, nonetheless, fulfilled

[1] I analyze the question based on the authority citied in the Seven Day Letter, with the following exceptions. The letter only refers expressly to three sections of the IG Act: "5 U.S.C. App. 3, § 6 (a)(1)," "§ 6 (c)(2)," and "5 U.S.C. App. 3, § 5(d)." The letter is obviously inaccurate when it refers to "§ 6 (c)(2)," as that section does not exist in the statute. I assume for purposes of this analysis that the Acting Inspector General meant to refer to his authority in § 6 (b)(2), which he quotes from on page one of the letter. Further, the Seven Day Letter does not refer to § 6 (a)(3) directly, but only by reference through § 6 (b)(2); nevertheless, I analyze the Agency's compliance with § 6 (a)(3) as well.

your legal obligation under the IG Act, and completing that process may have provided sufficient information to complete the investigation without a dispute. With respect to the question related to the audit, it is reasonable in light of the separation of powers to assist the OIG only to the extent that it was not seeking information that would implicate Constitutional concerns, as explained further below. I recommend additional coordination between the Agency and OIG, which may result in the ability to provide the information requested.

This opinion is addressed solely to the Agency's obligations under the IG Act based on information that has been made available to me as of the date of this memorandum; it does not speak to the merits of the underlying audit or administrative investigation. It speaks to the accommodations process and not to personal legal obligations. Further advice to the Agency may be warranted in the future if more definitive information is made available. The OIG draft findings have not been made available at this time, and any questions about the underlying facts at issue should be directed to OIG.

Legal Background

The power of the Executive Branch is vested in the President of the United States. U.S. CONST. ART. II. The President is responsible for implementing and enforcing the laws passed by Congress and, to that end, appoints the heads of the federal agencies. The President retains administrative control of those executing the law. *Myers v. United States*, 272 U.S. 52, 163-64 (1926). As part of this function, the President maintains ultimate control over information within the Executive Branch, and the head of each Executive Branch department may prescribe regulations regarding "the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. "The President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress." Inspector Gen. Legislation, 1 U.S. Op. Off. Legal Counsel 16, 17 (1977) (citing *Congress Construction Corp. v. United States*, 314 F. 2d 527, 530-32 (Ct. Cl. 1963)). The IG Act is written against this Constitutional backdrop and it must be interpreted according to these fundamental Constitutional limits. *See id.* at 17 (concluding that certain provisions in predecessor legislation to the IG Act "that make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches . . . violat[es] . . . the doctrine of separation of powers."). In responding to OIG's exercise of statutory authority, the Agency must apply Constitutional doctrines, such as the separation of powers, particularly in OIG activities that respond to Congressionally initiated audits or investigations. *See, e.g.*, *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (construing another federal statute—the Federal Advisory Committee Act—"strictly" to avoid "severe separation-of-powers problems" that arise from a broader interpretation of that statute).

The IG Act and case law are clear that "Inspectors General do not have the statutory authority to compel an employee's attendance at an interview." *NASA v. FLRA*, 527 U.S. 229, 256 (1999) (Thomas, J., dissenting). Nonetheless the statute does provide some remedy in such situations: "the Inspector General may request assistance, and the agency head 'shall . . . furnish . . . information or assistance' to OIG," when "an employee refuses to attend an

interview voluntarily," *id.* (Thomas, J., dissenting) (internal citations omitted) (alterations in original). Importantly, the IG Act permits, but does not require, the head of an agency to compel participation by an agency employee in an interview with the OIG. *Cf. NASA v. FLRA*, 1998 WL 887453 (S. Ct.), at *31 n.18 (Br. of U.S. as Petitioner); 5 U.S.C. App. 3, § 6(b)(l) (requiring the head of a federal agency to furnish information or assistance upon request of OIG "insofar as is practicable").

Section 6(a)(1), cited in the Seven Day Letter, does not authorize the OIG to take oral interviews, and therefore cannot be a basis to seek the Administrator's assistance here. In its Seven Day Letter, OIG asserted that it is entitled 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." 5 U.S.C. App. 3, § 6(a)(l). Based on a plain-language interpretation of this provision, this authority is limited to written information (either stored in hard copy or electronically). The catch-all phrase "all other material available to the applicable establishment" must be read in context of the list proceeding it. It does not include the authority to conduct interviews, let alone compulsory interviews. Basic legal interpretative canons instruct that one must interpret an ambiguous term in a list of terms in a statute in light of the others in the list. *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015) (Alito, J., concurring in the judgment) ("The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a 'similar' meaning. A related canon, *ejusdem generis* teaches that general words following a list of specific words should usually be read in light of those specific words to mean something 'similar.'" (internal citations omitted)). Therefore, "other material" clearly means other documentary or tangible evidence, not oral testimony. *See, e.g.*, *id.* at 1088-89 (Ginsburg, J.) (holding that "tangible object" in a statute means a record or document preserving information and did not include an undersized fish).

OIG asserts Section 6(b)(2) as a basis of authority in the Seven Day Letter, stating that "[n]o 'information' requested by the IG may be 'unreasonably refused or not provided'" consistent with 6(b)(2).[2] Section 6(b)(2) provides "[w]henever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." OIG asserts that, "in the sphere of gathering information during an investigation, the IG, not an agency employee, makes the 'judgment' as to reasonableness." While section 6(b)(2) is triggered "whenever information . . . is, in the judgment of an Inspector General, unreasonably refused or not provided," this provision simply allows notification of the Administrator, nothing more, and OIG fails to explain why this is a basis for the Seven Day Letter.

The third potential basis for OIG's claimed statutory authority is Section 6(a)(3), a provision referenced only indirectly in the Seven Day Letter. It provides that the Inspector

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[2] As noted above, OIG's reference in the Seven-Day Letter to section "6(c)(2)" is incorrect, as that section does not exist in the statute.

General may "request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by th[e] Act from any Federal, State, or local governmental agency or unit thereof." 5 U.S.C. App. 3, § 6(a)(3). This could include a request to an Agency to make one of its employees available for an interview. *See generally U.S. Nuclear Regulatory Comm'n v. FLRA*, 25 F.3d 229, 234 (4th Cir. 1994) ("[T]he Act gives to each Inspector General access to the agency's documents and agency personnel."). But a right to *request* does not equate to the right to *receive* all information requested; that decision ultimately falls to the agency to provide as determined by the agency's head, consistent with the Executive Branch's constitutional authority.

Analysis of Administrative Investigation Allegations

The Seven Day Letter and its appendices demonstrate that on October 15, 2019, OIG sent an email seeking assistance from the Administrator in compelling Mr. Jackson to comply fully with a request to sit for a second interview. That is when OIG officially triggered its request for assistance to the Administrator. This was consistent with OIG authority under 6(a)(3) and 6(b)(2). Subsequent to that request, Doug Benevento, Associate Deputy Administrator, called a meeting with the Acting Inspector General, Charles Sheehan that I attended, on October 18, 2019, where he provided assistance by attempting to identify the parameters of Mr. Jackson's participation acceptable to OIG. Then on October 21, 2019, Mr. Jackson provided some accommodation of the OIG request by offering to respond to questions in writing, which was a change of his previous position of having requested that OIG provide him with the "subject of the conversation so that I may prepare for it." My understanding is that OIG did not respond to Mr. Jackson's email.

You have informed me that, before receipt of the final Seven Day Letter, you directed Mr. Benevento to reach out to the Acting Inspector General Sheehan to attempt to accommodate the OIG staff request and, subsequent to that meeting, Mr. Jackson changed his previous position. This demonstrates that the Agency attempted to accommodate the OIG. While not referenced in the Seven Day Letter, this attempt by Mr. Benevento and Mr. Jackson is a form of assistance contemplated under Section 6(b)(1) of the IG Act. *See* 5 U.S.C. App. 3, § 6(b)(1) ("Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable . . . furnish . . . such information or assistance"). You also informed me that on November 5, 2019 you personally called Acting Inspector General Sheehan to offer Mr. Jackson to sit for a second interview. Following that call, Mr. Benevento and I called Acting Inspector General Sheehan again to attempt to arrange for the interview and request that the Seven Day Letter be tolled or withdrawn as moot.

This assistance to OIG is a proper exercise of your responsibilities under Section 6 of the Act. The Agency should continue to attempt to bring the accommodation process to a resolution to allow OIG to obtain the appropriate information.

Analysis of Audit Allegations

Finally, I turn to the specific allegations related to the "Refusal to provide requested information" in the audit. In the course of the audit, OIG demanded to know how Mr. Jackson obtained a copy of draft Congressional testimony of Deborah Swackhamer, a special governmental employee who served on a Federal Advisory Act Committee. The routine process at EPA for providing Agency testimony to Congress runs through the Office of Congressional and Intergovernmental Relations and the Chief of Staff. Neither the Seven Day Letter nor any other OIG statement made available describes why it would be appropriate to deviate from that standard agency process that has spanned multiple administrations or why the source of the information is material to this audit. While OIG is not required to provide the Agency this information, to the extent this audit is aimed at improving agency processes for reviewing testimony of Federal Advisory Act Committee members, it is unclear why the information sought would be relevant to that goal. To the extent OIG is acting on behalf of Congress to obtain information that is the subject of a Congressional inquiry, separation of powers between the executive and legislative branches support the Agency, not OIG, as having ultimate control of how to accommodate information requests by Congress.

OIG's domain is objective inquiry into waste, fraud, abuse, and mismanagement *at the Agency*, but it is not authorized, for example, to investigate the Congress itself. This testimony pertains to a hearing being conducted by the legislative branch, and additional Constitutional concerns are implicated given the broad protections for legislative activities defined in the Speech or Debate Clause (Article I, Section 6, Clause 1). How Congress takes testimony or from whom it receives final testimony is not a proper area of inquiry for OIG. Moreover, this piece of information does not appear to be even necessary to conduct an "audit" to improve EPA operations. EPA is keenly aware of inter-branch concerns and should follow normal channels, *i.e.* the Congressional oversight process, to appropriately accommodate specific legislative prerogatives.