



June 26, 2018

The Honorable Jon Tester
Ranking Member
U.S. Senate
Committee on Veterans Affairs

The Honorable Tim Walz
Ranking Member
U.S. House of Representatives
Committee on Veterans Affairs

Dear Ranking Member Tester and Ranking Member Walz:

The Council of Inspectors General for Integrity and Efficiency (CIGIE) and the Inspector General (IG) community appreciate your endorsement of our role and oversight mission. Consistent bipartisan Congressional support has guaranteed IGs the access to information and independence that are essential for unbiased and objective scrutiny of agency programs, activities and operations. We hope that this letter will clarify the role of an IG and the duty of an agency to comply with IG information requests.

The IG's Role and Independence

The stated purpose of the Inspector General Act of 1978¹, as amended, is to embed in each agency an independent and objective unit whose duty it is to combat waste, fraud, and abuse in the programs and operations of that agency.² To this end, each IG is responsible for conducting audits and investigations relating to the agency's programs, activities and operations, providing policy leadership and undertaking other activities for the purpose of promoting economy, efficiency and effectiveness and preventing and detecting fraud and abuse. Importantly, each IG is also required to keep the agency head and the Congress "fully and currently informed" about problems and deficiencies relating to the administration of agency programs and operations.³

Though located within Federal agencies, IGs are required to carry out their work independently, free from control or influence by the host agency. Independence is central to an IG's objectivity and effectiveness, and key provisions of the IG Act are intended to safeguard it. IGs have broad discretion as to how to carry out the oversight mission. Section 6(a)(2) authorizes the IG to "make such investigations and reports as are, in the judgment of the Inspector General, necessary or desirable." Not even the agency head can prohibit an IG from "initiating, carrying out, or completing any audit or investigation, or

¹ Pub. L. No. 95-452 (Oct. 12, 1978), 5 U.S.C. app. 3.

² Additionally, the IG Act, at section 7, sets out that the IG may receive and investigate complaints alleging mismanagement.

³ IG Act § 4(a)(5).

from issuing any subpoena during the course of any audit or investigation.”⁴ (Federal appellate cases have consistently construed this authority broadly, holding that the IG alone determines when and how to investigate a particular matter.)⁵ In addition, every IG must obtain its legal advice from an attorney who is independent of the agency.⁶ Any attempt by an agency to interfere with the independence of an IG must be reported to Congress.⁷

An IG also exercises independent authority over key administrative and operational decisions. This includes all hiring, compensation and other personnel determinations for his or her Office, entering into professional services contracts and engaging experts and consultants, as needed.⁸ Many IGs request and receive an appropriation separate from that of the host agency, and, unlike the agency head, IGs may protest to Congress the President’s proposed budget for the Office.⁹ Effectively, for purposes of staffing, contracting and use of appropriated funds, the Inspector General functions as the agency head for his or her Office.

Still other measures insulate the Inspector General individually from influence, pressure or retaliation. The agency head does not evaluate or rate the IG and cannot determine or influence the IG’s compensation.¹⁰ CIGIE’s Integrity Committee, rather than the agency, handles misconduct allegations against an IG.¹¹ The IG reports directly to Congress, as well as to the agency head, and need not share those communications with agency personnel nor clear statements or testimony through the Office of Management and Budget. A Presidentially appointed, Senate confirmed (PAS) IG, such as the VA’s, cannot be fired or removed by the agency head. Only the President can take these actions, and only after 30 days’ notice to Congress, with an explanation of the reasons.¹²

To be sure, Section 3(a) of the IG Act provides that “[e]ach Inspector General shall report to and be under the general supervision of” the agency head.¹³ While the IG Act does not define “general supervision,” such supervision does not limit the specific rights, duties and authorities conferred by statute on the IG. The leading appellate case on IG independence described the agency head’s supervisory authority as “nominal.”¹⁴ As the Fourth Circuit noted, the “general supervision” language was meant to promote a strong and positive relationship between the IG and the agency head.¹⁵ This is supported by the legislative history:

⁴ IG Act § 3(a) (PAS IGs) and § 8G(d)(1) (DFE IGs). The only exception is that the heads of eight specified agencies, not including the Department of Veterans’ Affairs, may intervene to prevent an investigation to preserve national security, protect ongoing criminal prosecutions or limit disclosure of information that could significantly affect markets or the economy. E.g., IG Act § 8.

⁵ *NRC v. FLRA*, 25 F.3d 229, 234 (4th Cir. 1994) (Congress intended that the Inspector General’s investigatory authority include the power to determine when and how to investigate”); see also *DHS v. FLRA*, 751 F.3d 665, 671-72 (D.C. Cir. 2014); *Amtrak v. Fraternal Order of Police*, 855 F.3d 335 (D.C. Cir. 2017).

⁶ IG Act § 3(g).

⁷ IG Act § 5(a)(2).

⁸ IG Act §§ 6(a)(7)-(9).

⁹ IG Act § 6(g).

¹⁰ E.g., Section 3 of the Inspector General Reform Act, Pub. L. No. 110-409 (Oct. 14, 2008).

¹¹ IG Act § 11(d).

¹² IG Act § 3(b). In this respect, the IG enjoys more protection than a PAS agency head, who can be fired or removed without notice.

¹³ IG Act § 8G(d)(1) contains a similar provision related to DFE IGs.

¹⁴ *NRC*, 25 F.3d at 235.

¹⁵ *NRC*, 25 F.3d at 235.

If the agency head is committed to running and managing the agency effectively and to rooting out fraud, abuse and waste at all levels, the Inspector and Auditor General can be his strong right arm in doing so.¹⁶

In effect, “general supervision” was meant to reflect the fact that the IG is part of the agency but is uniquely independent and not subject to the broad supervisory powers that an agency head exercises over other personnel.

Ensuring the organizational independence of Inspectors General was the force animating passage of the IG Act in 1978. Each of the subsequent amendments has strengthened that independence, reflecting the continuing realization that unbiased and objective scrutiny can occur only in conditions of substantial autonomy. Independent oversight cannot exist when an audit or investigative function is placed under the authority of the official whose particular programs are being scrutinized, an IG and IG staff are vulnerable to reprisal for issuing reports that criticize management, or IG reporting is subject to agency approval. That organizational independence allows IGs to fulfill our IG Act-mandated dual reporting obligations for IGs to keep both the head of the agency and the Congress “fully and currently informed” about deficiencies in agency programs and operations, and progress in correcting those deficiencies.¹⁷

The Importance of IG Access

A bedrock principle of the IG Act is that an IG must have access to all agency records and information relating to the programs and operations of the agencies we oversee. Without timely and unfettered access to all necessary information, IGs cannot ensure that government programs and operations are subject to exacting and independent scrutiny. Refusing, restricting or delaying an IG’s independent access may lead to incomplete, inaccurate, or significantly delayed findings and recommendations, which in turn may prevent the agency from promptly correcting serious problems and pursuing recoveries that benefit taxpayers, and deprive Congress of timely information regarding the agency’s activities. It may also impede or otherwise inhibit investigations and prosecutions related to agency programs and operations.

The IG Act has always contained clear and unqualified statements about IGs’ access to information related to the programs and operations of the agencies they oversee. However, beginning in 2010, several Federal agencies, including the Department of Justice (DOJ), the Peace Corps, the Department of Commerce, the Chemical Safety and Hazard Investigation Board, and the Department of the Treasury, challenged their respective IGs’ right to access all such agency information. A July 2015 opinion by the Department of Justice Office of Legal Counsel (OLC) threatened the independence and access rights of all IGs by allowing officials whose agencies were under review to decide what documents an IG can and cannot have. Allowing agencies to unilaterally decide what information they will release to the IG presents a clear conflict of interests.

In response to the July 2015 OLC opinion, Congress took strong action to override the opinion’s holding in order to ensure that IGs’ access rights were protected. They first added restrictions to FY 2016

¹⁶ S.Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2684 (hereinafter “Senate Report”).

¹⁷ IG Act § 4(a)(5).

appropriations acts that prohibited agencies from expending appropriated funds to deny an IG access to documents. They then passed the Inspector General Empowerment Act of 2016¹⁸ (IG Empowerment Act), which permanently overrode the OLC opinion by reiterating that, with respect to an IG's access to agency records, "all" really means "all." The IG Empowerment Act makes clear that only a Federal law that both explicitly references the IG and explicitly limits the IG's right of access may be interpreted to override an IG's access. Indeed, the OLC has since added an editor's note to its July 2015 opinion that acknowledges the amendments made by the IG Empowerment Act and that they effectively overrode the OLC opinion. The IG Empowerment Act also made it clear that the information requested by an IG must be provided in a timely fashion. The denial of such access, absent a statute referencing the IG and restricting access, would run afoul of Federal law.

Conclusion

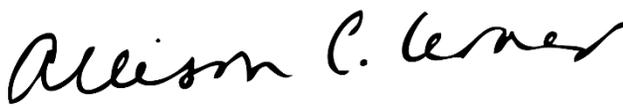
Inspectors General are uniquely positioned in the federal government to identify waste, fraud and abuse because of our placement within the agencies we oversee and our statutory authority to independently conduct audits, evaluations, inspections, and investigations. In the almost four decades since the passage of the IG Act, IGs have saved taxpayers hundreds of billions of dollars, identified and prosecuted thousands of individuals who defrauded government agencies, and improved the programs and operations of the Federal government through their independent oversight. Actions that limit IGs' independence or condition or delay their access to agency information have profoundly negative consequences for our work: they make us less effective and erode the morale of the dedicated professionals on our staffs who are committed to the difficult task of government oversight. Such limitations are inconsistent with the IG Act and risk insulating agencies from independent scrutiny—the very thing our offices were established to do, and what Congress and the American people expect of us.

Thank you for your continued support of CIGIE and its member IGs. If you have any questions, please do not hesitate to contact us or Chris Fontanesi at 202-692-2900.

Sincerely,



Michael E. Horowitz
Chair
CIGIE



Allison Lerner
vice-Chair
CIGIE

CC:

Honorable Johnny Isakson, Chairman, U.S. Senate Committee on Veterans Affairs
Honorable Phil Roe, Chairman, U.S. House of Representatives Committee on Veterans Affairs

¹⁸ Pub. L. No. 114-317 (Dec. 16, 2016).