NAVIGANT

August 26, 2015

Senator Chuck E. Grassley
Chairman, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Hearing on "'All' Means 'All': The Justice Department's Failure to Comply with Its Legal Obligation to Ensure Inspector General Access to All Records Needed for Independent Oversight"

Dear Chairman Grassley:

Thank you for holding a hearing on this important issue and for your longstanding support of inspectors general. I would also like to thank the Chairman personally for his support of me when I was the Inspector General for the General Services Administration.

This letter[1] will provide my response to the questions for the record addressed to me.

> ***Question: The Congressional Research Service has identified at least 32 statutory provisions that impose limitations on disclosure, but CRS has stated that this list is not exhaustive. Do you know of an exhaustive list of all the limitations on disclosure that can be found in the U.S. Code that would need to be mentioned by name in legislation in order to satisfy OLC's version of the clear statement rule?***

I do not know of an exhaustive list of potential statutes that might be used to limit an inspector general's access to information. A search for such a list may prove futile and perhaps dangerous.

---

[1] The views expressed in this letter are mine alone and do not necessarily express the views of Navigant Consulting, Inc.

It may be futile, because agency officials who do not want embarrassing information about the agency released may turn to many different statutes in an attempt to deny access to an office of inspector general. The degree of cogency of the legal arguments advanced, however, may vary greatly, and sometimes, upon reflection and calmer circumstances, the legal arguments are given up and access granted. At other times, even statutes with very little connection may even be cited. Trying to anticipate all of the statutes that might be appealed to may be impossible.

The search for such a list may also be dangerous, because a statute may be inadvertently left off of the list. Under the rules of statutory interpretation, the negative implication is that all statutes left off of the list are not affected. The list will be deemed to list the *only* statutes covered. Any statute left out of the list may be deemed to be not covered. See generally, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 107ff (2012).[2] Only those statutes on the list would be affected and no others.[3]

Question: If it is unrealistic to predict every potential statute that the Department might invoke to withhold records in the future, then how could we revise the law to leave no doubt that the Inspector General really should have access to "all" records the Department has?

I think that the best approach is the one advocated by the Council of Inspectors General for Integrity and Efficiency.[4] That approach is that "all" means "all" in the Inspector General Act and, if Congress wants to change that, it must clearly and expressly state that it is denying access to the Office of Inspector General. Otherwise the "all" means "all." The CIGIE proposed language is:

"No law or provision restricting access to information applies to Inspectors General unless that law expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form."

Question: Would it help if Congress were to write a law that allowed Inspectors General to connect directly into agency data management systems, so that Inspectors General could run queries themselves, without having to go to the agency to request that information?

---

[2] Section 10. Negative-Implication Canon: The expression of one thing implies the exclusion of others (*expressio unius est exclusion alterius*). Scalia & Garner, *Reading Law*, at 107. Scalia and Garner provide a good example from everyday life: "When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit." *Id.* at 107 (original emphasis).

[3] One way to limit the application of this rule (the negative-implication rule) is to add the phrase: "including without limitation." *Id.* at 232-33.

[4] Letter to Chairman Johnson, Ranking Member Carper, Chairman Chaffetz, and Ranking Member Cummings, from the Council of Inspectors General on Integrity and Efficiency, August 3, 2015.

As I have written before, I believe that this would be extremely helpful to offices of inspector general.[5] Running these types of queries is critical today for effective audits, investigations, and oversight generally. In our electronic age, inspectors general need this kind of information. I would urge the Committee to ensure that inspectors general have at least read-only access to all electronic databases in their agencies.

Thank you for your support of oversight and for inspectors general, and thank you for including me in this important hearing.

Very truly yours,

Brian D. Miller
Former Inspector General, GSA

---

[5] Brian D. Miller, "Three Ideas to Improve Effective Inspector General Access to Both Information and Individuals," Journal of Public Inquiry, at 15-16 (Spring/Summer 2009), found at: https://www.gsaig.gov/?LinkServID=7BB91C36-FFEA-B8F5-6D11C21F2F652149&showMeta=0.