

Senator Chuck Grassley

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**Nominee, Inspector General, United States Department of Justice
Questions for the Record**

1. Section 552a(b)(9) of the Privacy Act permits the Executive Branch to provide information that would otherwise be protected by the Act to Congress or a “committee or subcommittee thereof.” Nevertheless, an Office of Legal Counsel (OLC) opinion of December 5, 2001, concludes that the Privacy Act prohibits the disclosure of Privacy Act-protected information to the ranking minority members. The OLC opinion cites no legal authority and does not address contrary authority, such as a Second Circuit Court of Appeals case decided a year and a half earlier. That opinion, *Devine v. United States*, held that information sent to a congressman in his official capacity as a member of a subcommittee fell “squarely within the ambit of § 552a(b)(9).” [See *Devine v. United States*, 202 F.3d 547, 551 (2nd Cir. 2000).]

- a. What is your view of the persuasiveness of the above OLC opinion?

Answer: While the OLC opinion is well written and its reasoning is clearly explained, it is difficult to provide an independent assessment of its persuasiveness given that I have not previously studied this issue myself and the Opinion does not provide comprehensive citations to the legal authorities supporting the principles enunciated. In order for me to reach a conclusion as to the Opinion’s persuasiveness, I would need to undertake a thorough legal analysis as well as understand the deliberations that led OLC to reach the conclusions outlined in its opinion. If I am confirmed to be Inspector General, I would ask the Office’s General Counsel to undertake that effort and provide me with that analysis. I believe it is important for the Inspector General to have that independent legal analysis before reaching a determination.

- b. How do you resolve the conflict between the OLC opinion and the Second Circuit case?

Answer: Given that I have not previously studied this issue myself, in order for me to determine whether there is a conflict to resolve, I would need to understand the legal authorities considered and relied upon by OLC in reaching its opinion, including whether it considered the *Devine* decision, as well as understand more fully the facts underlying the *Devine* case (particularly since the case involved the DOJ Inspector General). If confirmed as Inspector General, I would seek the advice of the Office’s General Counsel on the nature of the possible conflict and, if there is a conflict, as to how it should be resolved.

- c. Since the OLC opinion was written after the Second Circuit case, shouldn’t the case at least have been cited and analyzed in the opinion? Does the fact that it ignores relevant legal precedent make the OLC opinion less persuasive? Why or why not?

Answer: Yes, it would have been helpful for the OLC opinion to have expressly addressed the *Devine* decision. In order to determine, however, whether the OLC considered the decision in connection with its opinion, I would need to consult with the OLC about the deliberations it undertook before rendering its opinion. If the OLC failed to consider a relevant legal decision, it would have an impact on the persuasiveness of its opinion because it raises a question about the thoroughness of its decision-making process.

d. Congress is capable of limiting its own access to records depending on the identity of an appropriate requestor. It does so in the context of tax return information under Section 6103 by allowing disclosure to Congress only upon request of the Chairman of the Finance or Ways and Means Committees or the staff director of the Joint Tax Committee. Given that no such restriction appears in the text of the Privacy Act, why should disclosure be conditioned on the identity of the requestor, as asserted in the OLC opinion?

Answer: The manner in which Congress drafted one statute may have relevance in evaluating its intent in drafting another statute, although that is not necessarily dispositive of the legal analysis. I would want to understand more fully the legal authorities that were relied upon by the OLC in reaching its opinion in order to determine the strength of its conclusion that disclosure should be conditioned on the identity of the requestor.

e. The Privacy Act does not address the Congressional exemption in terms of the origin of a request. It does not even refer to any request from any source. Rather, it simply exempts disclosures *to a Committee*. In other words, the statutory structure conditions the exemption on the *recipient* alone. Given the plain words of the statute, do you agree that so long as the disclosure is made *to a Committee*, that it qualifies for the Congressional exemption? Why or why not?

Answer: The plain language of a statute clearly is an important factor in any legal analysis, although it may not necessarily be dispositive of the legal analysis. As noted previously, I have not studied this issue previously and would have to undertake substantial legal research and analysis before I was in a position to render a legal opinion. Among other things, I would need to more fully understand the basis for the contrary view reached in the OLC opinion. I appreciate the importance of this issue and, if confirmed, I will seek the advice of the Office's General Counsel as well as others in the Office who may have relevant experience before I come to any conclusion.

2. Section 6(a) of the Inspector General Reform Act of 2008 [P.L. 110-409] reads as follows:

Sec. 6 SEPARATE COUNSEL TO SUPPORT INSPECTORS GENERAL.

(a) Counsels to Inspectors General of Establishment.--Section 3 of the Inspector General Act of 1978 is further amended by adding at the end the following:

“(g) Each Inspector General shall, in accordance with applicable law and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General.”

- a. Given these provisions requiring Inspectors General to seek legal advice from counsel independent of the agency, do you believe you would be bound by the above OLC opinion even if your own independent General Counsel disagreed?

Answer: In a situation where an OLC opinion on a matter of importance to the Office was determined to be incorrect by the General Counsel and the General Counsel also concluded that the Office was not bound by the opinion, I would concur in the determination assuming I agreed with the analysis.

- b. Would your General Counsel be required to abide by the OLC opinion even if there is contrary legal authority or if the OLC opinion is unpersuasive?

Answer: In a matter of importance to the Office, where there is contrary legal authority to an OLC opinion or the opinion is unpersuasive, my approach would be to ask the General Counsel to provide me with an independent legal analysis on the issue and to advise me on whether the Office was bound by the OLC opinion. As noted in response to Question 2(a), assuming that I agreed with the analysis, I would concur in the determination.

- c. If confirmed, how would you respond to a request from the Ranking Minority Member of this Committee that information otherwise covered by the Privacy Act be disclosed *to the Committee*? Would you provide the information?

Answer: If confirmed, I would ask the Office’s General Counsel for independent advice on this legal question, including the persuasiveness of the OLC opinion, and then determine whether the Office was legally authorized to make the disclosure. If it was determined that we were legally permitted to provide the information, the Office would do so.

- d. Would you rely on the OLC opinion to claim that the Privacy Act prevents you from complying?

Answer: Same answer as to Question 2(c).

3. In the past, there have been occasions where congress and the IG are running investigations concurrently. Sometimes the relationship between the two investigations is less than collaborative. I’m aware that in May of 2010, you gave a presentation in London, and one of the topics was “How to Respond in the Event of Government Inquiries.” It is important that the person who is appointed to serve as IG be willing and able to work with Congress in order to create a collaborative environment where fraud and fault can be quickly and effectively exposed.

- a. What did the presentation recommend regarding responding to government inquiries?

Answer: I do not recall the specific discussion or recommendations made during that presentation, although I believe that my particular presentation and comments were designed to address criminal and/or regulatory investigations, and not Congressional or Legislative investigations.

- b. Do you believe that you would be able to fully and effectively work with Congress complete investigations more quickly and successfully?

Answer: I do, but I would take the utmost care to ensure that I did not do anything to compromise the Office's obligation to conduct investigations independently and thoroughly.

- c. What experiences have you had that would support your contention that you are interested and able to work with the legislative branch to effectively carry out investigations?

Answer: During the course of my investigation into police corruption in the 30th Precinct, I worked in a collaborative environment with an independent Commission created by the Mayor to conduct public oversight hearings on police corruption in the New York City Police Department and to issue a public report. I recognized the importance of the oversight that the Commission was undertaking, and the need to provide the Commission with information during the course of the criminal investigation, although I took care to do so in a manner that was consistent with my legal obligations and that did not negatively impact our ability to successfully conclude the criminal investigation. The result was a highly successful criminal investigation and a highly successful set of oversight hearings by the Commission.

4. I'm concerned that you don't have any experience at all in the Inspector General community. As a prosecutor you litigated cases using evidence and information that was gathered for you by separate law enforcement agencies. However, as an Inspector General, it would be your job to directly supervise audits and investigations.

- a. Because you don't have any Inspector General experience, how are you qualified to supervise compliance with government auditing standards?

Answer: While I have not served previously as an employee of an Inspector General's office, as a corruption prosecutor in the Southern District of New York, I frequently worked closely with Inspectors General (including the DOJ Inspector General) and Internal Affairs investigators. In many of those matters, I played a critical role in overseeing and directing the criminal investigations for many months before any arrests were made. Moreover, frequently, the investigations involved working with agents and accountants to trace funds and determine how funds were being spent. A significant amount of financial analysis was undertaken in those matters.

In private practice for the past nine years, much of my work has involved working closely with forensic auditors to evaluate the books and records of clients in order to determine whether a fraud occurred. Additionally, I work regularly with internal auditors to review audit reports, and corporate books and records, for signs of weaknesses in financial accounting and controls. As part of that effort, I also have been involved in creating audit work plans. These experiences have resulted in my speaking on audit issues at conferences of the International Institute of Auditors and the Pharmaceutical Internal Audit Forum.

- b. What familiarity and/or experience do you have with the Comptroller General's Yellow Book auditing standards?

Answer: As noted above, I have substantial GAAP accounting experience over the past nine years from my work in the private sector, which is a part of the Generally Accepted Government Accounting Standards. Additionally, since my nomination, I have worked to familiarize myself with other aspects of the Yellow Book standards.

5. For the past ten years, the Inspector General has identified the grant award process and oversight of grant funding as major challenges to preventing fraud, waste, and abuse. Year after year, the Inspector General's audits of grantees point to unallowable and unsupported costs, awards to grantees and sub-grantees based upon connections and not merit, failure of grantees to comply with grant requirements, failed matching requirements, poor record keeping, failure of grantees to achieve program goals, and little or no oversight by the Office of Justice Programs (OJP), Office of Violence Against Women (OVW) , and Community Oriented Policing Services (COPS) —the three entities overseeing and awarding grants. With DOJ awarding billions of dollars a year in grants, any failure in adequately managing and monitoring grants could lead to millions of taxpayer dollars lost to fraud, waste, or abuse.
- a. Given the serious financial difficulties facing the Government, do you believe DOJ should revamp grant programs at DOJ by consolidating overlapping grant programs to ensure that federal funds expended by DOJ are free from duplication and waste?

Answer: To the extent that overlapping grant programs can be consolidated in a manner that eliminates duplication and waste, I believe that they should be. The OIG has made a number of important recommendations in its recent reports regarding grant management (most recently in March 2011), including avoiding duplication and waste. I will be committed, if confirmed, to following up on these recommendations and to undertaking further reviews, as necessary, to ensure that duplication and waste in the grant process is exposed and addressed.

- b. How do you plan to ensure accountability and transparency in the grant making process?

Answer: If confirmed, I would be committed to continuing the significant audit work

that has been performed by the OIG over the past several years on the grant-making process, which I believe has contributed to greater accountability and transparency. I also would discuss with the Office's staff what new and additional steps they believe the Office could undertake to ensure greater accountability and transparency. I believe that accountability and transparency in the grant making process is important.

- c. Do you have any specific recommendations for reforms?

Answer: At the present time, I do not have specific recommendations. I believe it is important, if confirmed, for me to consult first with the OIG staff before making specific recommendations for reforms. I am committed to continuing to have grant management as one of the DOJ's top management challenges, and to consider additional reforms that can be made in this area. If confirmed, I intend to have that discussion with the OIG staff.

- d. If you are confirmed, will you undertake a top to bottom review of all grant programs at DOJ to determine what works, what doesn't work, and where savings can be achieved? If not, why not?

Answer: I am particularly interested in grant management, how grant programs can be more effectively and efficiently managed, and what metrics can be applied to determine whether and how the programs are working. Before determining what specific approach should be undertaken, I would need to consult with the OIG staff and obtain their views and recommendations. If confirmed, I intend to have that discussion with the OIG staff.

- e. Each year the Inspector General audits only a handful of individual grant recipients to determine if they are in compliance with program requirements. For example, in the past decade the Inspector General has only reviewed twenty-two randomly selected individual grant recipients under the Violence Against Women Act (VAWA). However, twenty-one of those random audits uncovered some sort of fraud, waste, or abuse of the VAWA program grants. Will you commit to increasing the number of individual grantees audited annually? If so, how many additional audits will you undertake? If not, why not?

Answer: I believe the OIG should consider increasing the number of annual audits it conducts of grant recipients. I also believe it is important, however, before reaching a determination on this issue that I consult with the OIG staff and obtain their views and recommendations. If confirmed, I intend to have that discussion with the OIG staff.