

**STATEMENT OF THE HONORABLE BRIAN D. MILLER**  
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BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

AUGUST 5, 2015

Chairman Grassley, Ranking Member Leahy, and distinguished Members of the Committee, thank you for inviting me to testify. I appreciate the Committee's longstanding interest in oversight and support for inspectors general. After serving in the Department of Justice (DOJ) for about 15 years, I had the honor of serving as Inspector General (IG) of the General Services Administration from 2005 through 2014.<sup>1</sup> I consider myself extremely fortunate to have served with so many principled public servants and so many brilliant lawyers.

I am concerned about the impact that the Department of Justice's Office of Legal Counsel (OLC) opinion<sup>2</sup> will have on the work of inspectors general. I am not as much concerned about the legal analysis as I am in the policy results. Simply stated, the OLC opinion leads to bad policy by making oversight more difficult.

The Office of Legal Counsel specifically states that it is not addressing the policy issue of what access the IG should have.<sup>3</sup> But the OLC opinion has policy implications, and it is for this Committee to evaluate those policy implications and draft appropriate legislation.

Support for effective oversight of how large federal agencies spend taxpayer dollars is almost universal. OLC states the policy behind the IG Act: ". . . Congress created OIG precisely because it believed that establishing an independent and objective entity to evaluate the Department's programs and operations would *enhance* the quality of such evaluations."<sup>4</sup> In fact, that support also extends to oversight of how federal officials handle our most sensitive information, including information obtained by wiretaps, surveillance, and grand juries. The American public expects effective oversight of the FBI and other law enforcement agencies,

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<sup>1</sup> The views expressed in my testimony are mine alone and do not necessarily reflect the views of Navigant.

<sup>2</sup> Memorandum for Sally Quillian Yates, Deputy Attorney General, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel (July 20, 2015)(OLC Opinion).

<sup>3</sup> "In reaching these conclusions, our Office's role has not been to decide what access OIG should receive *as a matter of policy*." OLC Op. at 3 (Emphasis added).

<sup>4</sup> OLC Op. at 15 (original emphasis).

especially because they have such sensitive information. A responsible, Senate-confirmed IG should make sure that this sensitive information is not mishandled by the FBI or others, especially in handling grand jury, wiretap, and surveillance information. Effective oversight means that the IG gets this information whenever the IG considers it necessary and without delay.

To have effective oversight, an IG must have independence to conduct an investigation, review, or audit. This includes determining what information is needed. In making this determination, it is the judgment of the IG in conducting oversight that matters--not the judgment of the agency being investigated. The OLC opinion reverses this by subjecting the IG to the judgment of DOJ that the information is necessary to the IG and helpful to the DOJ in its law enforcement activity. This is exactly backwards and forces the IG to come and ask permission.

Without all the information, the IG is thwarted and cannot reach valid conclusions about possible misconduct or wrongdoing. All the facts are necessary. This in effect makes oversight ineffective. Either you have oversight or you don't. There's no partial oversight. This is an either/or situation.

The procedure that DOJ has put into place gives this judgment and discretion to agency officials. Instead of relying on the judgment of the Senate-confirmed IG, agency officials will have to go through the material and second guess the IG. The IG has already made this determination by requesting it. He would not have requested it if he didn't think it was important.

The result is that the investigation is stalled while waiting for the agency officials to meet and rule on the IG's access. Investigations run on information, just as cars run on gasoline. Deny an investigation information, and you've stopped it – just as an automobile denied gasoline

will stop. An agency may not be able to stop embarrassing information from coming out ultimately, but agencies can delay it. Prior to the report on the GSA Las Vegas conference being published, GSA officials wanted it suppressed.<sup>5</sup> Government officials have a legitimate concern for the reputation of their agencies, and they do not want their agencies to be embarrassed. This concern, however, must give way to effective oversight.

I am fearful that the OLC opinion will chill potential whistleblowers. If an FBI special agent wants to make a complaint about the FBI's handling of wiretap information, he or she may need to bring an example to be convincing. But after the OLC opinion, that would be improper and the special agent may be disciplined for sharing this information with the OIG.

If the OIG has the wiretap information in the above hypothetical, the OIG can better protect the identity of the special agent. Otherwise, to follow up on the whistleblower's information may mean disclosing the special agent's identity. Because of the OLC opinion, the special agent will have to be vague. Even paraphrasing the wiretap information might be forbidden by the OLC opinion. Ironically, the more the special agent tries to explain the wiretap information without handing over a transcript, for example, the more the special agent is in danger of violating the OLC opinion and possibly being disciplined. So why bother? Without the wiretap information itself, or an explanation of it, the OIG cannot access the credibility of the complaint.

IGs already have enough problems getting information from agency officials. Various legal reasons are often raised to block IG access. Most frequently, documents are withheld out of a concern for confidential information, such as personally identifiable information (PII) or

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<sup>5</sup> For example, one high ranking official wrote in an email: "Is there something we can do to prevent another potential embarrassing episode from unfolding and keep this report from being made public?" See Jim McElhatton, "Top GSA official tried to hide report on Vegas bash," Washington Times, June 5, 2012, found at: <http://www.washingtontimes.com/news/2012/jun/5/top-gsa-official-tried-to-hide-report-on-vegas-bas/?page=all>.

financial information. IGs do handle and protect very sensitive information on a regular basis and have a good record for protecting sensitive information. My former office, for example, keeps contractors' proprietary pricing information confidential. OIGs also protect bank records obtained from banks through IG subpoenas.

Nevertheless, agency attorneys do sometimes withhold information for reasons such as these. For example at GSA, a new attorney denied documents to the OIG because of attorney-client privilege. After a telephone call to the General Counsel, the new attorney learned that attorney-client privilege was not a valid reason for withholding information from the OIG. Likewise, information about GSA-related childcare facilities was withheld for privacy reasons. It was later produced after the appropriate officials were educated about the role of the Office of Inspector General. In the meantime, the review was slowed down.

Unfortunately, the OLC opinion will encourage this kind of behavior. Perhaps, agency management can also get an OLC opinion that would allow them to withhold information.<sup>6</sup> And think of the delays while everyone is waiting.<sup>7</sup> The rationale may simply be to delay embarrassing information about the agency being revealed when it may not be so newsworthy.

At GSA, the OIG had difficulty getting read-only access to electronic databases because the managers were requiring the OIG to show a "need to know." The result: our audits were delayed. The OIG eventually got access, but again it delayed the audits. In language very similar to the current issue, I explained in an article several years ago:

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<sup>6</sup> The FBI has asserted the right to refuse the OIG access to: "federal taxpayer information, child victim, child witness, or federal juvenile court information, patient medical information, credit reports, FISA information, foreign government or international organization information, information subject to non-disclosure agreements, memoranda of understanding or court order, attorney-client information, and human source identity information." Letter from DOJ IG, Michael Horowitz, to Senator Grassley, May 13, 2014, attachment, "Summary of the DOJ OIG's Position Regarding Access to Documents and Materials Gathered by the FBI," at 1-2.

<sup>7</sup> The Department of Commerce, for example, denied the IG access to certain information until the OLC opinion came out. See Letter to the Honorable John Thune and the Honorable Bill Nelson from Acting IG David Smith, June 24, 2015.

In my view, these controls, as implemented, may place too many restrictions on the IG access contemplated in the IG Act. Frequently, the IG may want to conduct various reviews on information in agency IT systems simply to look for potential weaknesses or problems. To have to explain to the agency in each case why the IG wants access, and obtain the agency's permission, seems to contradict the intent of the IG Act.<sup>8</sup>

The remedy I proposed was:

Providing IGs with explicit, unrestricted read-only access to agency information systems would remove a current roadblock to effective oversight of agency programs. The Federal Information Security Management Act and implementing procedures, such as the controls prescribed in National Institute of Standards and Technology Special Publication 800- 53A, require federal agencies to control access to their information systems. The IG Act, in turn, provides that IGs are to have access to all agency "records, reports, audits, reviews, documents, papers, recommendations, or other material" related to the programs and operations of the agency. Systems owners' understanding of the types of access controls required can result in limiting or delaying IGs' access to material, impeding the unrestricted access contemplated by the IG Act. The lack of an explicit provision for access by IGs as oversight bodies has caused confusion and inconsistency in information security management and can result in unnecessary delays to IG reviews and oversight.<sup>9</sup>

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<sup>8</sup> 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>.

<sup>9</sup> *Id.*

In 2010, GSA failed to produce documents to my former office. The GSA OIG issued an alert report about how GSA failed to produce relevant documents to the GSA OIG and under FOIA.<sup>10</sup> GSA failed to produce a letter and other documents from the Missouri Department of Natural Resources (MDNR) informing GSA of environmental dangers. My former office requested this document, but it was not produced. The MDNR gave the documents, along with relevant emails, to the GSA OIG, but GSA still refused to produce the letter and emails, saying that the letter could not be located. OIG staff did a simple search of the electronic database and found it right away. At a hearing before the Ad Hoc Subcommittee on Contracting Oversight of the Senate Homeland Security and Governmental Affairs Committee, GSA tried to explain:

**Senator McCaskill.** But they asked you about the presence of the letter and you said you still did not have it.

Correct me if I am wrong, Mr. Miller: They get a letter from the Department of Natural Resources (DNR) they had not gotten from you about TCE testing. They say to you, why did you not produce this letter. You say, we do not have it. . . .  
--we do not know what you are talking about. We do not have that letter. They then go in your database, OK, and with simple search terms, find the letter.

Now, you understand that this is problematic.

**Ms. Ruwwe.** That is the case and that is what happened.

The staff, when asked, why did you not have that letter, they simply did not recall.

**Senator McCaskill.** Did they do a database search for the letter when they were asked by the Inspector General for the letter?

**Ms. Ruwwe.** I am not sure what kind of a search that they did to find that letter.

**Senator McCaskill.** I would think that would be something you would want to know.

**Ms. Ruwwe.** They did find--

**Senator McCaskill.** Because are these people not working for you?

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<sup>10</sup> Alert Report, "Review of Health and Safety Conditions at the Bannister Federal Complex Kansas City," Missouri Assignment Number A100116 (June 24, 2010), found at: <http://www.gsaig.gov/?LinkServID=670E9C28-CB34-0C92-EE554A72AC81273A&showMeta=0>.

**Ms. Ruwwe.** Yes, they did----

**Senator McCaskill.** And you are telling me that you are in the middle of an Inspector General investigation and a letter turns up that you have not presented to the Inspector General, they find this letter, they come to you and say, why is this letter not--and the other emails--part of what you produced? And you go to your people and say, why did we not produce this letter, and they say, we do not have it, we cannot find it. You then find out they find it using your database and simple search terms.

Did you go back to the personnel accountable for this and did you ask them why you could not find this? Did you do a database search? Who is the person that is responsible, Ms. Ruwwe.<sup>11</sup>

It's often unclear whether the agency is withholding documents because of a lack of knowledge of the IG's role (or even their own document system) or whether there may be something more sinister there.

As a concluding thought, I would like to point out that even the OLC opinion suggests that adding language to the IG Act such as “the inspector general’s right of access shall apply ‘notwithstanding any other law’ or ‘notwithstanding any statutory prohibition on disclosure’— language that might, at least in some circumstances, provide a clearer indication that the general access language was supposed to override more specific statutory protections of confidential information.”<sup>12</sup> OLC’s search for a clear statement<sup>13</sup> may be met by adding language that “no law or provision restricting access to information applies to Inspectors General unless that law

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<sup>11</sup> “Examination of Public Relations Contracts at the General Services Administration’s Heartland Region,” S. Hearing 112-49, *Ad Hoc* Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, 112<sup>th</sup> Congress (March 1, 2011), found at: <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg66624/html/CHRG-112shrg66624.htm>.

<sup>12</sup> OLC Opinion at 46.

<sup>13</sup> See OLC Opinion at 54.



expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form.”<sup>14</sup>

In summary, no one likes to have embarrassing information produced. IGs already have difficulties getting all the information they need to evaluate whether federal agencies are operating programs effectively, economically, and efficiently. The OLC opinion now makes it even more difficult for IGs to get this information. As lawmakers, you are in a position to correct this problem by clarifying again that “all” means “all” in Section 6(a)(1) of the IG Act—that IGs are “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . .”

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<sup>14</sup> Quoted from 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.