



Department of Justice

**STATEMENT OF THE
U.S. DEPARTMENT OF JUSTICE**

**BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**FOR A HEARING CONCERNING
INSPECTOR GENERAL ACCESS**

**PRESENTED
AUGUST 5, 2015**

**Statement of the
U.S. Department of Justice
Committee on the Judiciary
United States Senate
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Good morning Chairman Grassley, Ranking Member Leahy, and Members of the Committee. We are pleased to appear before you today to discuss the Department of Justice's unwavering commitment to ensuring that the Office of the Inspector General (OIG) has timely access to all records necessary to complete its reviews, audits, and investigations, consistent with existing law.

The Department greatly appreciates the commitment that the Chairman, the Ranking Member, and other Members of the Committee have shown to guaranteeing that the OIG can effectively and efficiently fulfill its critical oversight functions. As Attorney General Lynch and Deputy Attorney General Yates have stated consistently and unequivocally, the Department shares the belief that an effective, efficient, and independent OIG is absolutely critical to a well-functioning Department of Justice. We recognize and appreciate the critical role of the OIG in identifying misconduct and malfeasance, as well as waste, fraud, and abuse. To that end, the Department has been and remains committed to ensuring that the OIG has access to the information it needs to perform effectively its oversight mission and complete its reviews.

Notwithstanding the Department's view that the OIG should be able to obtain all of the information that it believes is necessary to perform its important oversight role within the Department, the Department has grappled with two different, and potentially conflicting, sets of statutory commands when responding to the OIG's requests for records that could include the contents of intercepted communications, grand jury materials, and consumer credit information. On the one hand, Congress has enacted three statutes that tightly regulate the disclosure of such information: the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (2012) ("Title III"), which prohibits law enforcement and investigative officers from disclosing intercepted communications except in narrow circumstances; Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule 6(e)"), which prohibits attorneys for the government from disclosing grand jury information except pursuant to one of the Rule's express exceptions; and section 626 of the Fair Credit Reporting Act, 15 U.S.C. § 1681u (2012) ("FCRA"), which prohibits the Federal Bureau of Investigation (FBI) from disclosing consumer credit information obtained pursuant to a National Security Letter except in two narrow circumstances. It is important to underscore the sensitivity of all three of these categories of information, which is precisely why Congress designed elaborate statutory schemes to limit their disclosure. On the other hand, however, another statute—the Inspector General Act of 1978 ("IG Act")—grants each inspector general in the federal government a right to obtain access to "all records" of the agency within its jurisdiction.

Background

To assist the Department in resolving the complex legal issues implicated by the interaction of the three statutes described above and the IG Act, in May 2014, then Deputy Attorney General James Cole requested a formal opinion from the Office of Legal Counsel (OLC) to address this issue. Since that time, the Department has continued to work with the OIG to ensure access to the materials the OIG needed, and has directed all components and agencies to provide to the OIG, in a timely fashion, all of the documents needed to complete its reviews to the extent permitted by law. The Department is unaware of any occasion in which the OIG sought access to Title III, grand jury, or FCRA materials and did not receive them. Additionally, it is the experience of the Department that these three categories of information have historically constituted a very small minority of the overall information sought by the OIG in its investigations. Deputy Attorney General Cole also committed to work with the OIG on any legislative remedies necessary, following the OLC opinion, to ensure its access to all the information it needs to effectively perform its oversight mission and complete its reviews, a commitment shared by the current Deputy Attorney General and leadership throughout the Department.

Since her appointment as Acting Deputy Attorney General and following her confirmation, Deputy Attorney General Yates and the Department have worked diligently to find a solution to these issues and continue to work with the OIG, in a genuine spirit of cooperation and collaboration, to expedite its access to the records it needs. Pending the completion of the OLC opinion, the Department took further steps to ensure timely OIG access to the greatest extent possible under the current law. Specifically, on April 23, 2015, Deputy Attorney General Yates issued a Department-wide memorandum to implement a new process to ensure that the OIG promptly receives Title III, grand jury, and FCRA material when it believes that material is necessary for it to complete its reviews, consistent with current controlling statutes. The memorandum noted that the OIG “serves an important function in ensuring that the Department of Justice is run efficiently, effectively, and with integrity,” and the memorandum made clear that “[r]esponding to OIG’s requests is of the highest priority.”

The FBI takes very seriously its obligation to enable the OIG to conduct effective oversight of all of its activities and has been transparent with the Department, the OIG, and Congress concerning the challenges presented by the potentially conflicting statutory commands described above. Notwithstanding these challenges, over the past year, the FBI has provided nearly 400,000 pages of documents and 136,000 e-mails to the OIG. These documents were produced in response to 118 document requests submitted by the OIG to the FBI, with 343 subparts therein. During this same time, the OIG initiated 20 new audits and over 30 investigations directed at the FBI. To fulfill the OIG’s requests, the FBI has dedicated almost a dozen individuals to these tasks.

The FBI and the OIG have worked cooperatively to expedite the OIG’s access to materials consistent with the law and in accordance with the commitments and goals discussed above. In the past few months, the FBI has taken a number of steps to ensure the OIG receives documents in a timely manner. Specifically, the FBI has moved its document collection and production function back to the Inspection Division. Since that time, the FBI has consistently

provided documents to the OIG in advance of requested deadlines. In addition, the Bureau is actively working to complete one remaining aspect of a document request that was the subject of a prior notification to Congress under Section 218 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2200 (Dec. 16, 2014). In that instance, the OIG has already received all requested e-mails, yet the FBI continues to process 1,325 attachments contained therein. The other three document requests that were the subject of prior notifications to Congress under section 218 have been completed in their entirety.

OLC Opinion

On July 23, 2015, OLC published its memorandum dated July 20, 2015, to Deputy Attorney General Yates, entitled *The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act* (OLC Opinion). See <http://www.justice.gov/olc/opinions>. In drafting this opinion, OLC had to reconcile two different, and potentially conflicting, sets of statutory commands. On the one hand, in Title III, Rule 6(e), and FCRA, Congress stated that it is unlawful—and sometimes criminal—for Department officials to share the contents of intercepted communications, grand jury materials, and consumer credit information obtained pursuant to a National Security Letter with anyone, except pursuant to specific statutory exceptions. On the other hand, in the IG Act, Congress stated that the OIG may obtain access to “all records” available to the Department, without any express restriction. OLC’s role was to determine as a matter of law, in light of these potentially conflicting statutory commands, how much access Congress intended to give the OIG.

OLC began by determining whether Title III, Rule 6(e), and FCRA themselves permit the Department to disclose covered information to the OIG, thereby avoiding any conflict with the IG Act. The opinion concludes that these three statutes permit the Department to disclose covered information to the OIG in connection with many—but not all—of the OIG’s investigations and reviews. In particular:

Title III Wiretap Information. The OLC Opinion concludes that Department investigative and law enforcement officers may disclose directly to the OIG the contents of intercepted communications protected by Title III when doing so could aid the disclosing official or the OIG in the performance of their duties related to law enforcement. Such duties could include the OIG’s duty to investigate criminal misconduct, to investigate administrative misconduct that has a reasonable prospect of uncovering criminal misconduct, or to conduct broad programmatic reviews of the Department’s criminal law enforcement programs, policies, or practices. Consistent with this conclusion, any investigative or law enforcement officer within the Department may disclose the contents of intercepted communications *directly* to the OIG in connection with any investigation or review that meets this objective standard. The OIG does not need to obtain the approval of the Attorney General or anyone else in Department leadership to access Title III information.

Rule 6(e) Grand Jury Material. The OLC Opinion concludes that an “attorney for the government”—which the Federal Rules of Criminal Procedure define as an attorney who may conduct criminal proceedings, such as a prosecutor—may disclose (or authorize disclosure of)

grand jury materials to the OIG if that attorney determines that doing so could assist the attorney in performing her duty to enforce federal criminal law. Much like Title III, Rule 6(e) thus permits Department prosecutors to disclose grand jury information in connection with an OIG investigation of criminal misconduct, an investigation of administrative misconduct that has a reasonable prospect of uncovering criminal misconduct, or a broad programmatic review of the Department's criminal law enforcement programs, policies or practices. And while, unlike Title III, the text of Rule 6(e) requires that a Department prosecutor make the determination that an OIG investigation meets the relevant legal standard, it is critical to underscore that many different Department prosecutors—from Assistant U.S. Attorneys to the Deputy Attorney General—may be the appropriate attorney to make this determination depending on the circumstances, and that the need to seek disclosure from a prosecutor places the OIG on the exact same footing and in the exact same position as any other law enforcement entity—including the FBI or others—seeking access to grand jury materials; and that the determination to be made is an objective determination about the nature of the OIG's investigation, not a determination about whether a prosecutor is inclined to give particular documents to the OIG.

FCRA Material. The OLC Opinion concludes that the FBI may disclose to the OIG consumer information obtained pursuant to section 626 of FCRA if such disclosure could assist in the approval or conduct of foreign counterintelligence investigations, including in the supervision of such investigations on a programmatic or policy basis. Consistent with this conclusion, any employee within the FBI may disclose information protected by FCRA *directly* to the OIG in connection with any investigation or review that meets this objective standard. As with Title III information, the OIG does not need to obtain the approval of anyone in the Department leadership to access FCRA information.

The OLC Opinion also concludes that Title III, Rule 6(e), and FCRA do not permit the Department to disclose covered information to the OIG where these standards are not met. Thus, for example, Department officials may not disclose such information to the OIG in connection with a review that has little or no connection with the Department's criminal activities or foreign counterintelligence investigations, such as a financial audit. But they do permit disclosure in connection with most of the circumstances in which such information would be relevant.

In addition, the OLC Opinion concludes that the IG Act does not override the limits on disclosure contained in Title III, Rule 6(e), and FCRA. As the opinion explains in detail, the IG Act does not refer to those statutes or the information they protect, and its broad, general language does not contain a sufficiently clear statement that Congress intended to override the statutes' carefully crafted limitations. Moreover, the legislative history of the IG Act affirmatively indicates that Congress expected an inspector general's right of access to be subject to statutory limits on disclosure. The opinion also concludes that section 218 of the Consolidated and Further Continuing Appropriations Act, 2015, does not alter this conclusion, in light of the same clear statement of principles that apply to the IG Act, and the strong presumption that appropriations riders do not amend substantive law.

On July 27, 2015, Deputy Attorney General Yates issued a Department-wide memorandum providing guidance consistent with the OLC Opinion. As outlined by Deputy Attorney General Yates in this Department-wide guidance, responding to the OIG's requests is

of the highest priority. Consistent with the OLC Opinion, the guidance directs components to provide Title III and FCRA material directly to the OIG, and states that different attorneys for the government, as defined in the Federal Rules of Criminal Procedure, may provide grand jury material to the OIG depending on the circumstances.

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We remain committed to continuing to work with Congress and the OIG to ensure that the OIG has access to all of the information it requires to fulfill its essential oversight functions of the Department. More specifically, we reiterate our commitment—shared by the Attorney General, Deputy Attorney General, FBI Director, Drug Enforcement Administrator, Bureau of Alcohol, Tobacco, Firearms and Explosives Director, U.S. Marshals Service Director, and leadership throughout the Department—to work with the OIG and Members of Congress on legislation that enables the Department to comply with the law while providing the OIG with the documents it needs as quickly as possible. Thank you for the opportunity to provide the Department’s perspective on these issues.