



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Progress and Remaining Challenges Regarding Impediments to Access Faced by Office of Inspector General for EPA and CSB

**Statement of Arthur A. Elkins Jr.
Inspector General**

**Before the Committee on Oversight and Government Reform
U.S. House of Representatives**

February 3, 2015

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Good morning, Chairman Chaffetz, Ranking Member Cummings and members of the committee. I am Arthur Elkins, Inspector General (IG) at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you today. I appeared before this committee on June 19, 2014, to address impediments to access at the U.S. Chemical Safety and Hazard Investigation Board (CSB), for which I also am the IG, and again on September 10, 2014, to address broader issues of access and whether there is a need to strengthen or clarify the Inspector General Act to address impediments and access issues. Today, I would like to report to you on the progress we have made since those hearings and the challenges that still remain. Before I begin, I would like to publicly commend the expertise, dedication, diligence and professionalism of Office of Inspector General (OIG) staff—not only at the EPA, but across the federal government—who work hard each day to carry out our very important mission of promoting economy, efficiency and effectiveness; and preventing and detecting fraud, waste and abuse through independent oversight of programs and operations.

Overview of the EPA OIG

The EPA OIG is charged with conducting investigations and audits related to programs and operations at the EPA and CSB. The EPA OIG operates with a separate budget and decision-making authority, and neither EPA nor CSB senior leaders may prohibit, prevent or obstruct us from conducting our work.

CSB Has Substantially (But Not Fully) Complied With the OIG Requests

First, with regard to the CSB officials' refusal to provide documents, you will recall that we had requested certain documents in the course of an investigation. CSB officials refused to provide them, asserting that the denial was based on attorney/client privilege. However, we explained that such denial violated the IG Act, specifically Section 6(a)(1), which provides for the IG's unfettered access to all materials and information available to the agency. After more than a year of refusals by the CSB, I sent a "Seven Day letter"—a tool provided for in the IG Act—to Chairman Rafael Moure-Eraso. A Seven Day Letter requires the agency head to transmit the IG's letter and the agency's response to appropriate committees or subcommittees of Congress within seven calendar days. Although the CSB did forward my letter to committees, including this one, CSB officials continued to refuse to produce the documents.

At the June 2014 hearing before this committee, the Chairman and Ranking Member both instructed the CSB to provide the documents that the OIG sought. The CSB substantially

complied with those instructions; however, they have yet to provide an affirmation of full compliance with our requests. To elaborate, in August 2014, the OIG asked Chairman Moure-Eraso and other senior CSB officials to affirm their methodology for searching and identifying documents within the scope of OIG's requests, and that they had fully complied with the requests. At this time, none of the CSB officials have done so.

While the OIG cannot attest to the receipt of all requested documents from the CSB, as explained above, we were able to proceed with and complete our investigation. Last week, I sent the OIG's report of investigative results to President Obama, as there is no one higher than Chairman Moure-Eraso at the CSB, and he is appointed by the President. That report finds that there is evidence sufficient to support a conclusion that the Chairman and two of his senior officials violated the Federal Records Act, and implementing regulations, by using non-governmental email systems to conduct official government business and not capturing those emails in the CSB records system.

I would like to thank the committee for taking action in response to our Seven Day Letter, which allowed us to proceed with and conclude our investigation.

Progress and Remaining Challenges Regarding EPA's Office of Homeland Security

Next, I will address progress with regard to impediments to the OIG's ability to carry out its functions as imposed by the EPA's Office of Homeland Security (OHS). You will recall that in my testimony at the September 2014 hearing, I advised the committee that the EPA had asserted there was a category of activity defined as "intelligence" to which the OIG may have access only subject to the EPA's granting of permission. This situation impeded the OIG's ability to investigate threats against EPA employees and facilities, conduct certain misconduct investigations and investigate computer intrusions. In addition, OHS was conducting investigative activities of its own, without any legal authority to do so, thereby interfering with—and in some cases fouling—OIG investigations.

Since that hearing, senior OIG officials have met multiple times with senior agency officials to address a range of issues falling under these general categories. We have reached at least a theoretical agreement on a substantial portion of the issues, although I must offer two caveats: first, we are only now beginning to implement agreements, and second, we have not resolved the issue of OHS having a criminal investigator assigned to it while OHS lacks any investigative authority.

What we have agreed upon is that there is no category of activity at the EPA to which OIG does not have unfettered access, as provided by the IG Act. The "intelligence" activities can and are to be shared with the OIG if the OIG seeks access or an issue is within OIG purview. One specific impediment to being able to reach agreement previously was a memorandum of understanding (MOU) that the EPA had entered into unilaterally with the Federal Bureau of Investigation (FBI). The OIG was not party to, nor was it consulted in, creating that MOU. The EPA asserted that the MOU precluded it from sharing information with the OIG.

However, FBI senior management has since confirmed to the EPA that the FBI does not require withholding information from the OIG, and the EPA has confirmed to the OIG that it will now share the information we had been seeking, both with regard to previous matters and going forward on an ongoing basis. We have yet to have a three-way meeting among the EPA, the OIG and the FBI to confirm all of this, and to rescind or substantially modify the MOU.

With regard to the OHS criminal investigator, we cannot know whether OHS continues to conduct investigative activity.

These are important impediment issues that we have not yet resolved with the agency.

I am pleased to note that on January 2, 2015, Administrator McCarthy sent to the EPA workforce a memorandum addressing cooperation with and providing information to the OIG. She told employees that one of the ways employees can ensure that they all perform at their best is to support the internal review and oversight carried out by the OIG. She noted that the vigilance of EPA staff is key to successful OIG oversight, and she specifically stated that she expects all employees to report fraud, waste and abuse to the OIG if they see it.

Federal Agencies Lack Enforceable Mechanisms to Compel Employees to Cooperate with the OIG

I trust that these updates on specific matters discussed at previous hearings will help inform the committee's deliberations about any further investigative or legislative actions it may need to take. I would like to close by addressing big-picture challenges that my office, and many other OIGs across government, continue to face.

On August 1, 2014, my office received information from the Security Management Division at the EPA alleging serious employee misconduct by a senior EPA official. The information initially provided alleged that on July 30, 2014, the senior official had engaged in improper behavior with a 21-year-old female intern from another agency.

The investigation into the initial allegation uncovered allegations of several other improper actions by that senior official. The allegations investigated in this case were: (1) the senior official's inappropriate behavior toward at least 16 women, from 2004 to present; (2) violation of security procedures by the senior official; (3) mishandling of classified information by the senior official; and (4) lack of due diligence by other senior EPA executives (by not acting on information about this senior official) that resulted in six additional women being subjected to the senior official's inappropriate behavior from January 2014 to July 2014. During this latter period, the senior official was promoted.

While the OIG had interviewed the senior official during the initial stages of the investigation with the uncovering of information about additional allegations, the OIG determined it needed to interview this official again. By that time, the senior official was on paid administrative leave. OIG investigators attempted to interview the senior official again on January 12, 2015. However, the senior official declined to cooperate with the OIG investigation and refused to be interviewed, despite EPA supervisors directing the official to cooperate with the OIG. That senior official retired from federal service, that day, after spending approximately five months on

paid administrative leave. At that point, the OIG had no further access to the official and the agency had no disciplinary remedies available to it.

In addition to this senior official's unwillingness to cooperate with our administrative investigation, over the last two years, my office has been presented with other situations in which individuals refused to cooperate in administrative interviews. In one case, an Office of General Counsel attorney refused to cooperate with the OIG, even when prompted (although not directed) by the agency to cooperate. To my knowledge, the agency did not take any action against this attorney. Instead the attorney left the agency to work for another federal agency. Another instance involved a GS-15 program advisor in the Office of Research and Development who refused to cooperate with my office as part of an administrative investigation regarding violations of security policies. This case is still pending, but the agency, to my knowledge, has not taken any action against the EPA employee for not cooperating with my office.

As you know, the IG Act at Section 6(a) gives the OIG unfettered access to all information "available" to its department or agency. This authority predominantly has been applied to obtaining documents. But it also applies to access to people. If an OIG determines that it needs to interview an agency employee who may have relevant information, other than in an investigation with possible criminal exposure where the subject would be so advised by the OIG, that employee is obligated to provide the information requested.

But the IG Act provides no remedy for an employee's violation of this obligation. We have had situations where we attempt to interview an employee and the employee refuses. We can and do then tell the agency that it needs to require the employee to comply with the OIG's request. If the employee continues to refuse to comply with both the OIG and the agency, we are left without recourse. Further, in some of the recent cases we have encountered, the employee refuses to be interviewed and then resigns or retires, putting himself or herself permanently beyond the reach of the OIG. Of course, if there is a criminal violation, the employee can still be charged by prosecutors.

I believe that this committee should look into the "gap" between what the IG Act requires and OIGs' ability to achieve those requirements in such circumstances. Subject to constitutional due process rights, there might be ways to strengthen an agency's ability to discipline an employee for failure to comply with an OIG request. For example, Congress could provide for placing the employee on leave without pay status, rather than administrative leave with pay. Alternatively, Congress might consider restricting the availability of appropriated funds to pay the employee.

Finally, I know that this committee has recognized and thanked me personally, and the OIG community generally, for the good work we do in protecting taxpayer funds. We appreciate that. But, I have to remark on the disconnect between what the oversight committees observe and the appropriations that emerge from Congress as a whole. The budget levels made available to me are impeding our ability to do our work. This is penny-wise and pound-foolish, as Ben Franklin used to say. We returned \$7.33 for every dollar given to us in the past year. When the OIG is not able to carry out its responsibilities because of inadequate funding, it is a net loss to the federal

government and American taxpayers. I know this is not an appropriations committee, but I ask for any help you can provide us in this regard.

Conclusion

I have discussed today three major risks to OIG independence: access to agency documents; access to agency staff; and adequate funding. All of these are necessary to fully accomplish our mission. Yet the OIGs have control over none of these, nor ultimately can we compel solutions. All require external cooperation—from the Executive Branch for document and staff access and from the Legislative Branch for funding access. As I stated when I appeared before this committee in September 2014, the concept underlying the IG Act is fragile, and can be likened to a house of cards. The removal of the cooperation card, as related to the key risks I have discussed, will cause the foundation upon which the house is built to collapse.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions that you or committee members may have.

Biography of Inspector General Arthur A. Elkins, Jr.



Arthur A. Elkins, Jr. became Inspector General of the U.S. Environmental Protection Agency (EPA) on June 25, 2010. Before his appointment, Mr. Elkins served as Associate General Counsel within EPA's Office of General Counsel. While in that position, he supervised the delivery of legal counsel, opinions, litigation support, and other legal services for the Office of General Counsel's Information Law Practice, Employment Law Practice, and Intellectual Property Law Practice.

Previously, Mr. Elkins served as the Chief Legal Officer and General Counsel for the Court Services and Offender Supervision Agency, an independent federal executive branch agency responsible for pretrial services and adult parole and probation community offender supervision; Counsel to the Inspector General of the National Science Foundation; and Counsel within the Department of Defense, Defense Office of Hearings and Appeals.

Prior to joining the Federal Government, Mr. Elkins served as an Assistant Prosecuting Attorney in the Ohio Cuyahoga County Prosecutor's Office and as an Assistant Public Defender in the Ohio Cuyahoga County Public Defender's Office.

Mr. Elkins earned a Bachelor degree in social sciences from Thomas A. Edison State College; a Master of Business Administration degree from Baldwin-Wallace College; a Juris Doctor degree from Cleveland-Marshall College of Law, Cleveland State University; and a Master of Laws in Law and Government from Washington College of Law, The American University.

Mr. Elkins is a member of the bar in Ohio, District of Columbia, United States District Court for Northern Ohio, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States of America.

Mr. Elkins is the recipient of the Council of Counsels to the Inspector Generals Leadership Award, Federal Executive Council on Integrity and Efficiency Award for Excellence in Investigations, and the National Science Foundation Office of Inspector General Commendable Service Award.

Mr. Elkins is the proud father of three children and resides in Bowie, Maryland, with his wife, Gail.