U.S. Senator Chuck Grassley • Iowa
Ranking Member • Senate Judiciary Committee
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Statement of Ranking Member Grassley of Iowa
U.S. Senate Committee on the Judiciary
Hearing on Oversight of the FBI
Wednesday, May 21, 2014

Mr. Chairman, thank you for holding today's oversight hearing. I welcome Director Comey for his first hearing as Director of the Federal Bureau of Investigation (FBI). There are many issues to discuss about the FBI's important work protecting the United States from many different threats.

Unfortunately, I must start by pointing out that it was only on Monday that we received answers to our questions for the record from our last FBI oversight hearing eleven months ago. In addition, the answers we received are marked current as of August 26, 2013 – almost nine months ago. I understand that this is because the FBI completed its answers in August and submitted them to the Justice Department. Then they apparently disappeared into a black hole.

As I told the Attorney General in January when he appeared for an oversight hearing without having responded to the previous year's hearing questions, this is simply not acceptable.

When we met before Director Comey's confirmation, I provided him with a binder of all the letters and questions for the record still pending with his predecessor. The FBI has a pretty dismal record of responding to my questions.

I wish I could say that all of those unanswered issues have been fully dealt with, but they have not. However, I would like to commend Director Comey for recently beginning to make an effort to improve the FBI's level of communication with my office.

Ignoring my questions does not make them go away. They need to be answered fully and completely, and in good faith.

Turning to the FBI's priorities, counterterrorism rightfully remains at the top. Since the September 11 attacks, the wall between intelligence and criminal cases has come down, and our country is safer as a result.

I'm glad Congress is now in the process of considering reforms to some of the national security legal authorities, even as the President keeps changing his view about what is needed to keep us safe. However, Director Comey pointed out in the press a few months ago that some of these reforms would actually make it harder for the FBI to do terrorism investigations than bank fraud investigations. I hope we'll have the opportunity to discuss this topic more today. At least those types of reforms seem unwise.

Of course, the threats to our Nation are broader than just terrorism. Cybercrime of all types is on the rise, as this week's events illustrate. I applaud the FBI's efforts to hold the Chinese government accountable for stealing the trade secrets of U.S. companies and as a result, American jobs as well.

I also congratulate the FBI on its work to hold the developers of Blackshades accountable for unleashing a computer program that can steal users' passwords and files, as well as activate their webcams, all without their knowledge. Crimes are increasingly high-tech, and the tools available to the FBI to combat them must be as well. But in many cases, these tools have at least the potential for misuse that could jeopardize the privacy of innocent Americans.

I'd like to discuss the Department of Justice Inspector General's recommendation that the FBI develop special privacy guidelines concerning its use of drones. I'd also like to inquire about a proposal by the Department of Justice that would make it easier for the FBI to hack into computers for investigative purposes.

Despite the FBI's external successes, I find its internal lack of cooperation with its Inspector General troubling. According to the Inspector General, the FBI has significantly delayed his office's work by refusing to turn over grand jury and wiretap information when he deems it necessary for one of his reviews. The Inspector General Act authorizes the Inspector General to access these records.

However, the Inspector General informed me last week that, "All of the Department's components provided . . . full access to the material sought, with the notable exception of the FBI." According to the Inspector General, "the FBI's position with respect to production of grand jury material . . . is a change from its longstanding practice."

From 2001 through 2009, the FBI routinely provided this information to the Inspector General. So, I'd like to know why the FBI has been stonewalling the Inspector General, and what changed after 2009 to cut off the flow of information from the FBI.

In addition, I have questions about the status of the Justice Department's report on the FBI's whistleblower and anti-retaliation procedures. Nineteen months ago, President Obama issued a Presidential Directive related to the FBI's whistleblower procedures. It directed that the Attorney General produce a report within six months on how well the FBI follows its own whistleblower and anti-retaliation procedures.That report was also to examine the effectiveness of the procedures themselves and whether they could be improved.

The Attorney General's report is now more than a year overdue, which is simply unacceptable. The FBI is in dire need of an update to these provisions. For years, I have asked the Bureau about specific whistleblowers who came to my office, going back to Fred Whitehurst in the 1990s. Time and time again, I have heard from whistleblowers that the FBI procedures are an ineffective protection against retaliation.

When the Attorney General's report didn't come out at the six-month mark, I also asked the Government Accountability Office to look at this same issue. The FBI needs to cooperate with GAO on its review.

Finally, as Director Comey points out in his testimony, the FBI is actively investigating wrongdoing and getting results every day. That is why it is so perplexing to hear nothing at all from the FBI concerning its investigation into the targeting of Tea Party groups by the Internal Revenue Service.

It's been just about a year since the investigation was opened. I hope we'll have the time today to talk about the status of that investigation.

I'm also concerned about how the FBI handled the Boston Marathon bombing. The bombing reminded America that it is not immune from major terrorist attacks. There is still much to be learned from events prior to and following the incident.

The FBI has been given vast powers under Title 18 and Title 28 of the U.S. Code. However, a report issued by the Inspector Generals of the Intelligence Committee in April 2014 found that many of these investigative powers were not even used in a counter-terrorism assessment of one of the alleged bombers, Tamerlan Tsarnaev.

The report notes that the FBI did not visit Tamerlan Tsarnaev's mosque and failed to interview several people with intimate knowledge of him, including his wife or former girlfriend. The report states the FBI did not search all available databases for information on Tsarnaev, including several telephone databases and databases with information collected under the Foreign Intelligence Surveillance Act. Especially in light of all the controversy over bulk collection, it is curious that the FBI didn't even use all the tools available to it.

If the FBI and its agents choose, for whatever reason, not to use all available tools we have provided to root out terrorists, then we risk future attacks. Following the bombing, while the FBI made great efforts to keep us informed of their investigative actions to identify and capture the bombers, there were questions my staff asked that remain unanswered. Simple questions like: when were the brothers identified as suspects on surveillance video? Who made the identifications?

Leaving these questions hanging in the wind creates a perception that the FBI is hiding something. While I don't believe this to be the case, I also don't understand why Director Comey, who promised transparency in his confirmation hearing only a year ago, would allow this to occur.

Over two and a half years ago, Director Mueller promised us a report on the FBI's handing of Boston mobster Mark Rossetti. At the time, the FBI admitted that it broke its own rules by hiding Mr. Rossetti's status as an informant from the Massachusetts State Police.

This is especially significant given that the FBI also hid information from the State Police regarding Whitey Bulger. Given the Bulger case and Mr. Rossetti's own history, this delay is unacceptable.

I also still have questions about the FBI's investigation of conservative commentator Dinesh D'Souza. When Mr. D'Souza was arrested, prosecutors asserted that the case was the result of "a routine review by the FBI of campaign filings with the FEC." This raised questions for many observers, including liberal legal scholar Alan Dershowitz. Senators Sessions, Cruz, Lee, and I wrote the FBI on February 19, 2014, asking whether these "routine reviews" existed.

The FBI refused to answer the questions raised on the grounds that Mr. D'Souza might use the defense that he was being selectively prosecuted. Yesterday, Mr. D'Souza pled guilty. Now that it's clear that Mr. D'Souza will not use this defense, the FBI should be transparent and answer the

questions we asked over three months ago. If the facts would rebut the perception expressed by Mr. Dershowitz and others who were skeptical about this case, then there is no reason the FBI should resist talking about those facts.

I look forward to discussing these and a variety of other issues, time permitting. Thank you.

U.S. Department of Justice

Office of the Inspector General

May 13, 2014

The Honorable Charles E. Grassley
Ranking Member
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I write in response to your correspondence dated March 28, 2014, requesting communications and documents between the Department of Justice Office of the Inspector General (OIG) and the Department of Justice (Department) regarding the OIG's attempts to gain access to certain Department records pursuant to the Inspector General Act in connection with several recent OIG reviews.

We have enclosed 12 documents with this correspondence that are responsive to your request in that they describe the substantive legal issues, and provide much of the background and history and the positions taken on these access issues by the OIG, the Department, and the Federal Bureau of Investigation (FBI). The 12 documents enclosed with this correspondence include the following:

- Summary of the OIG's Position Regarding Access to Documents and Materials Gathered by the FBI, which was created by the OIG in October 2011.

- Letter from Deputy Attorney General James M. Cole to FBI General Counsel Andrew Weissmann and OIG Acting Inspector General Cynthia Schnedar, dated November 18, 2011, regarding access to credit reports obtained pursuant to Section 1681u of the Fair Credit Reporting Act (FCRA) related to the OIG's review of the FBI's use of national security letters (NSLs).

- Letter from Attorney General Eric H. Holder to OIG Acting Inspector General Cynthia Schnedar, dated November 18, 2011, regarding access to grand jury material related to the OIG's review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) investigation known as Operation Fast and Furious.

- Letter from Deputy Attorney General James M. Cole to FBI General Counsel Andrew Weissmann and OIG Acting Inspector General Cynthia Schnedar, dated December 5, 2011, regarding access to Title III documents related to the OIG's review of the Department's use of the material witness warrant statute, 18 U.S.C § 3144.

- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Deputy Attorney General James M. Cole, dated December 6, 2011, regarding access to credit reports obtained pursuant to Section 1681u of FCRA related to the OIG's review of the FBI's use of national security letters (NSLs).

- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Attorney General Eric H. Holder, dated December 16, 2011, regarding access to grand jury material related to the OIG's review of ATF's investigation known as Operation Fast and Furious.

- Memorandum from OIG Acting Inspector General Cynthia Schnedar to Deputy Attorney General James M. Cole, dated December 16, 2011, regarding access to Title III documents related to the OIG's review of the Department's use of the material witness warrant statute, 18 U.S.C § 3144.

- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated January 4, 2012, informing the OIG that the Department asked the Office of Legal Counsel (OLC) to provide a formal opinion regarding the OIG's access to grand jury material, information obtained pursuant to Section 1681u of FCRA, and information obtained pursuant to Title III.

- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated March 16, 2012, regarding the OIG's request that the Department withdraw the request for an opinion from OLC.

- Letter from Deputy Attorney General James M. Cole to OIG Acting Inspector General Cynthia Schnedar, dated April 11, 2012, authorizing the Criminal Division to disclose Title III information to the OIG related to the OIG's review of the ATF investigation known as Operation Fast and Furious.

Two of the 12 documents responsive to your request are classified:

- Letter from FBI General Counsel Valerie Caproni to OIG Assistant Inspector General for Oversight and Review Carol Ochoa, dated March 4, 2011, providing the FBI's view of dissemination restrictions for documents in FBI investigative files.

- Memorandum from FBI General Counsel Andrew Weissmann and Special Assistant to the General Counsel Catherine Bruno to Inspector General Michael Horowitz, dated February 29, 2013 [sic], regarding legal restrictions on dissemination of FBI information to the OIG for OIG criminal investigations.

We are providing a redacted version of these two documents with this unclassified letter. If you would like to review these documents in classified form, the Department has requested that arrangements be made to review them in the OIG offices. We will work with your staff to make such arrangements at a convenient time.

Consistent with our usual practice when we are asked to produce documents that were created by the Department or a Department component, or that involved a communication by the OIG with the Department or a Department component, the OIG provided the above-referenced 12 documents and other documents that we believe are responsive to your request to the Department for its review. The Department has informed us that it is asserting the deliberative process privilege and/or the attorney-client privilege over the other responsive documents, and therefore they are not included in this production.

Thank you for your continued support for the work of our Office. If you have any questions, please do not hesitate to call me or my Chief of Staff, Jay Lerner, at (202) 514-3435.

Sincerely,

Michael E. Horowitz
Inspector General

Enclosures

Summary of the Department of Justice Office of the Inspector General's Position Regarding Access to Documents and Materials Gathered by the Federal Bureau of Investigation

Introduction

In November 2009, the Office of the Inspector General (OIG) initiated a review of the Department's use of the material witness statute, 18 U.S.C. § 3144. Pursuant to our responsibilities under Section 1001 of the Patriot Act, a significant part of our review is to assess whether Department officials violated the civil rights and civil liberties of individuals detained as material witnesses in national security cases in the wake of the September 11 terrorist attacks. In addition, the review will provide an overview of the types and trends of the Department's uses of the statute over time; assess the Department's controls over the use of material witness warrants; and address issues such as the length and costs of detention, conditions of confinement, access to counsel, and the benefit to the Department's enforcement of criminal law derived from the use of the statute.

In the course of our investigation, we learned that most of the material witnesses in the investigations related to the September 11 attacks were detained for testimony before a grand jury. At our request, between February and September 2010 the Department of Justice National Security Division and three U.S. Attorneys' offices (SDNY, NDIL, EDVA) provided us with grand jury information concerning material witnesses pursuant to Fed. R. Crim. P. 6(e)(3)(D), which permits disclosure of grand jury matters involving foreign intelligence information to any federal law enforcement official to assist in the performance of that official's duties. We also sought a wide range of materials from other Department components, including the U.S. Marshals Service, the Federal Bureau of Prisons, and the Federal Bureau of Investigation (FBI). All of the Department's components provided us with full access to the material we sought, with the notable exception of the FBI.

In August 2010, we requested files from the FBI relating to the first of 13 material witnesses. In October 2010, representatives of the FBI's Office of General Counsel informed us that the FBI believed grand jury secrecy rules prohibited the FBI from providing grand jury material to the OIG. The FBI took the position that it was required to withhold from the OIG all of the grand jury material it gathered in the course of these investigations. The FBI has also asserted that, in addition to grand jury information, it can refuse the OIG access to other categories of information in this and other reviews, including Title III materials, 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. The information we have requested is critical to our review. Among other things, we are examining the Department's controls over the use of material witness warrants, the benefit to the Department from the use of the statute, and allegations of civil rights and civil liberties abuses in the Department's post-9/11 use of the statute in the national security context. The requested grand jury information is necessary for our assessment of these issues.

The FBI has also asserted that page-by-page preproduction review of all case files and e-mails requested by the OIG in the material witness review is necessary to ensure that grand jury and any other information the FBI asserts must legally be withheld from the OIG is redacted. These preproduction reviews have caused substantial delays to OIG reviews and have undermined the OIG's independence by giving the entity we are reviewing unilateral control over what information the OIG receives, and what it does not.

The FBI's position with respect to production of grand jury material to the OIG is a change from its longstanding practice.[1] It is also markedly different from the practices adopted by other components of the Department of Justice. The OIG routinely has been provided full and prompt access to grand jury and other sensitive materials in its reviews involving Department components in high profile and sensitive matters, such as our review of the President's Surveillance Program and the investigation into the removal of nine U.S. Attorneys in 2006. Those reviews would have been substantially delayed, if not thwarted, had the Department employed the FBI's new approach.

In many respects, the material witness warrant review is no different from other recent OIG reviews conducted in connection with our civil rights and civil liberties oversight responsibilities under the Patriot Act in which Department components granted the OIG access to grand jury and other sensitive material. For example, in our review of the FBI's use of "exigent letters" to obtain telephone records, at our request the Department of Justice Criminal Division and the FBI provided us grand jury materials in two then

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[1] Since 2001, when the OIG assumed primary oversight responsibility for the FBI, the OIG has undertaken numerous investigations which required review of the most sensitive material, including grand jury material and documents classified at the highest levels of secrecy. Through all of these reviews, the FBI never refused to produce documents and other material to the OIG, including the most sensitive human and technical source information, and it never asserted the right to make unilateral determinations about what requested documents were relevant to the OIG reviews. On the rare occasion when the FBI voiced concern based on some of the grounds now more broadly asserted in this matter, quick compromises were reached by the OIG and the FBI. Indeed, with only minor exceptions, the FBI's historical cooperation with the OIG has been exemplary, and that cooperation has enabled the OIG to conduct thorough and accurate reviews in a timely manner, consistent with its statutorily based oversight mission and its duty to assist in maintaining public confidence in the Department of Justice.

ongoing sensitive media leak investigations involving information classified at the TS/SCI level. The grand jury materials were essential to our findings that FBI personnel had improperly sought reporters' toll records in contravention of the Electronic Communications Privacy Act and Department of Justice policy. [2]

Similarly, in our review of the FBI's investigations pertaining to certain domestic advocacy groups, the OIG assessed allegations that the FBI had improperly targeted domestic advocacy groups for investigation based upon their exercise of First Amendment rights. In the course of this review, the FBI provided OIG investigators access to grand jury information in the investigations we examined. This information was necessary to the OIG's review as it informed our judgment about the FBI's predication for and decision to extend certain investigations. The lack of access to this information would have critically impaired our ability to reach any conclusions about the FBI's investigative decisions and, consequently, our ability to address concerns that the FBI's conduct in these criminal investigations may have violated civil rights and civil liberties.[3]

When the OIG has obtained grand jury material, the OIG has carefully adhered to the legal prohibitions on disclosure of such information. We routinely conduct extensive pre-publication reviews with affected components in the Department. The OIG has ensured that sensitive information – whether it be law enforcement sensitive, classified, or information that would identify the subjects or direction of a grand jury investigation – is removed or redacted from our public reports. In all of our reviews and investigations, the OIG has scrupulously protected sensitive information and has taken great pains to prevent any unauthorized disclosure of classified, grand jury, or otherwise sensitive information.

For the reasons discussed below, the OIG is entitled to access to the material the FBI is withholding. First, the Inspector General Act of 1978, as amended (Inspector General Act or the Act), provides the OIG with the authority to obtain access to all of the documents and materials we seek. Second, in the same way that attorneys performing an oversight function in the Department's Office of Professional Responsibility (OPR) are "attorneys for the government" under the legal exceptions to grand jury secrecy rules, the OIG attorneys conducting the material witness review are attorneys for the government entitled to receive grand jury material because they perform the same oversight function. Third, the OIG also qualifies for disclosure of the grand jury material requested in the material witness review under

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[2] We described this issue in our report, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, (January 2010).

[3] Our findings are described in our report, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups* (September 2010).

amendments to the grand jury secrecy rules designed to enhance sharing of information relating to terrorism investigations.

I. THE INSPECTOR GENERAL ACT

The FBI's refusal to provide prompt and full access to the materials we requested on the basis of grand jury secrecy rules and other statutes and Department policies stands in direct conflict with the Inspector General Act. The Act provides the OIG with access to all documents and materials available to the Department, including the FBI. No other rule or statute should be interpreted, and no policy should be written, in a manner that impedes the Inspector General's statutory mandate to conduct independent oversight of Department programs. *See, e.g., Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.").

A. The Inspector General Act Grants the OIG Full and Prompt Access to any Documents and Materials Available to the DOJ, Including the FBI, that Relate to the OIG's Oversight Responsibilities

The Inspector General Act is an explicit statement of Congress's desire to create and maintain independent and objective oversight organizations inside of certain federal agencies, including the Department of Justice, without agency interference. Crucial to the Inspectors General (IGs) independent and objective oversight is having prompt and complete access to documents and information relating to the programs they oversee. Recognizing this, the Inspector General Act authorizes IGs "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. App. 3 § 6(a)(1). The Act also authorizes the IGs to "request" necessary "information or assistance" from "any Federal, State, or local governmental agency or unit thereof," including the particular establishments the IGs oversee. *Id.* § 6(a)(3); *id.* § 12(5) (defining the term "Federal agency" to include the establishments overseen by the Inspectors General). Together, these two statutory provisions operate to ensure that the Inspectors General are able to access the information necessary to fulfill their oversight responsibilities.

The only explicit limitation on IGs' right of access to information contained in the Inspector General Act concerns all agencies' obligation to provide "information or assistance" to the Inspectors General. However, this limitation does not apply to IGs' absolute right of access to documents from their particular agency. This circumscribed limitation provides that all federal

agencies shall furnish information or assistance to a requesting IG "insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested[.]"5 U.S.C. § 6(b)(1) (emphasis added).[4]

Another provision of the Inspector General Act grants the Inspectors General discretion to report instances of noncooperation to the head of the relevant agency, whether that noncooperation impedes on the IGs' authority to obtain documents or "information and assistance." Under that section, when an IG believes "information or assistance" is "unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." 5 U.S.C. App. 3 § 6(b)(2) The FBI contends this reporting provision of the Act is a further limitation on the agencies' obligation to provide documents and "information and assistance" to the Inspectors General. The FBI has argued that the provision implicitly recognizes that requests for both documents and "information and assistance can be "reasonably refused."

The OIG believes the FBI's reliance on this reporting section as limiting an IG's right of access to documents in the custody of the agency it oversees is misplaced. This provision of the Act is entirely consistent with the right of full and prompt access to documents and materials and does not create a limitation, explicit or implicit, on the authorities provided elsewhere in the Act. By granting the Inspectors General the discretion to decide that some instances of noncooperation by an agency do not rise to the level of a reportable incident, the provision accounts for the practical reality that many instances where

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[4] The legislative history is silent on the reason for conditioning agencies' furnishing of "information or assistance" to all IGs on practicability or statutory restriction, but imposing no such limitation on an agency's absolute requirement to provide its documents to its own IG. However, there are possible explanations for the distinction. For example, providing access to documents and materials maintained in agency systems and files is simple, inexpensive, and an undeniable precondition to the fair, objective, and successful exercise of the IGs' oversight responsibilities. Accordingly, the Act's unconditional language authorizing IGs to have access to the documents and materials of the agency it oversees is understandable and sensible. In contrast, agencies may not always be able to fulfill requests for "information or assistance" immediately, even from their agency's IG. A request of one agency from another agency's IG may require more careful scrutiny because it would entail information being transmitted outside of the requested agency. In addition, busy agency schedules must be accommodated when fulfilling a request for an interview; subject matter experts may not be immediately available to interpret documents or may have left the agency's employment; responses to interrogatories often require revisions and approvals; and annotations, explanations, and written analyses of existing documents and materials can take significant amounts of time. Despite the OIG's historical success at reaching reasonable compromises with components of the DOJ responding to requests for "information or assistance," the OIG readily acknowledges that circumstances could arise where a component's delay, difficulty, or even refusal in responding to a request for "information or assistance" would be reasonable. These considerations are not applicable, however, to IGs' access to documents and materials of the agency it oversees, and therefore, that provision of the Act authorizes access in absolute terms.

Inspectors General are not granted access to documents or materials, or are not provided "information or assistance" in response to a request, do not merit a report to agency management.[5]

To summarize, the Inspector General Act provides the Inspectors General a right of full and prompt access to documents and materials in the custody of the agency they oversee, a right to request "information or assistance" from any agency that is modestly limited, and an obligation to report instances of agency noncooperation to the agency head when, in the judgment of the Inspector General, such noncooperation is unreasonable. Accordingly, the Act provides Inspectors General unconditional authority to gather documents and records in the custody of the agency they oversee, an authority necessary to obtain the basic information to conduct independent and objective reviews and investigations.

B. The Only Limitation on the OIG's Authority to Conduct Audits and Investigations within its Jurisdiction is Section 8E of the Inspector General Act, and that Limitation Must Be Invoked by the Attorney General

In the law creating the DOJ OIG, Congress inserted an exception to the normal authority granted to Inspectors General. In a section captioned "Special provisions concerning the Department of Justice," the IG Act provides the Attorney General the authority, under specified circumstances and using a specific procedure, to prohibit the OIG from carrying out or completing an audit or investigation, or from issuing any subpoena. *See* 5 U.S.C. App. 3 § 8E. This authority may only be exercised by the Attorney General, 5 U.S.C. App. 3 § 8E(a)(1)-(2), and only with respect to specific kinds of sensitive information. *Id.* § 8E(a)(1). The Attorney General must specifically determine that the prohibition on the Inspector General's exercise of authority is necessary to prevent the disclosure of certain specifically described categories of information, or to prevent the significant impairment to the national interests of the United States. *Id.* § 8E(a)(2). The Attorney General's decision must be conducted in writing, must state the reasons for the decision, and the Inspector General must report the decision to Congress within thirty days. *Id.* § 8E(a)(3). These provisions represent an acknowledgement of the fact that the Department of Justice often handles highly sensitive criminal and national security information, the premature disclosure of which could pose a threat to the national interests.

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[5] For example, IG document requests can be very broad, particularly before IG investigators have learned the details of the program under review. In such instances, formal requests are often informally and consensually narrowed after discussions with the agency under review, and a report to the agency head is unnecessary. Similarly, an agency's failure to provide the Inspector General with access to a document is often inadvertent or such a minor inconvenience that the Inspector General could reasonably view the noncooperation as *de minimis*.

These exacting procedures confirm that the special provisions of Section 8E represent an extraordinary departure from the baseline rule that the Inspectors General shall have unconditional access to documents and materials, and broad authority to initiate and conduct independent and objective oversight investigations. These procedures also confirm that only the Attorney General, and not the FBI, has the power to prohibit the OIG's access to relevant documents and materials available to the Department.

II. GRAND JURY SECRECY RULES

The Federal Rules of Criminal Procedure provide the general rule of secrecy applicable to grand jury information and various exceptions to that general rule. One of the exceptions allows disclosure of grand jury information to "an attorney for the government." This exception provides a basis, additional to and independent of the Inspector General Act, for disclosing the requested grand jury materials to the OIG.[6] The OIG's reliance on the "attorney for the government" exception to obtain access to grand jury material is supported by an Office of Legal Counsel (OLC) opinion and a federal court decision. OIG access to grand jury material under this exception is consistent with the broad authority granted to the OIG under the Inspector General Act, and it avoids an oversight gap so that Department employees cannot use grand jury secrecy rules to shield from review their adherence to Department policies, Attorney General Guidelines, and the Constitution. The "attorney for the government" exception allows for automatic disclosure of grand jury materials and is, therefore, particularly well suited to ensure that the OIG's ability to access documents and materials, and to access them promptly, is coextensive with that of the Department and the FBI.

A. OIG Attorneys Are "Attorneys for the Government"

In an unpublished opinion issued subsequent to *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) (a Supreme Court opinion narrowly construing the term "attorney for the government" as used in the exception to the general rule of grand jury secrecy), the OLC determined that, even in light of the Court's decision, the Rule was broad enough to encompass Office of Professional Responsibility (OPR) attorneys exercising their oversight authority with regard to Department attorneys.

In *Sells*, Civil Division attorneys pursuing a civil fraud case sought automatic access to grand jury materials generated in a parallel criminal proceeding. The Supreme Court interpreted the exception that provides for

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[6] Rule 6(e)(3)(A)(i) provides: "Disclosure of a grand jury matter – other than the grand jury's deliberations or any grand juror's vote – may be made to: (i) an attorney for the government for use in performing that attorney's duty . . . ." Fed. R. Crim. P. 6(e)(3)(A)(i).

automatic disclosure of grand jury materials to "attorney[s] for the government" for use in their official duties, as limited to government attorneys working on the criminal matter to which the material pertains. *Sells*, 463 U.S. at 427. The Court held that all other disclosures must be "judicially supervised rather than automatic," *id.* at 435, because allowing disclosure other than to the prosecutors and their assistants would unacceptably undermine the effectiveness of grand jury proceedings by: (1) creating an incentive to use the grand jury's investigative powers improperly to elicit evidence for use in a civil case; (2) increasing the risk that release of grand jury material could potentially undermine full and candid witness testimony; and (3) by circumventing limits on the government's powers of discovery and investigation in cases otherwise outside the grand jury process. *See id.* at 432-33.

In its unpublished opinion, OLC concluded that the three concerns the Supreme Court expressed in Sells were not present when OPR attorneys conduct their oversight function of the conduct of Department attorneys in grand jury proceedings. OLC concluded that as a delegee of the Attorney General for purposes of overseeing and advising with respect to the ethical conduct of department attorneys and reporting its findings and recommendations to the Attorney General, OPR is part of the prosecution team's supervisory chain. Thus, OPR attorneys may receive automatic access to grand jury information under the supervisory component inherent in the "attorney for the government" exception.

OIG attorneys should be allowed automatic access to grand jury material in the performance of their oversight duties because OIG and OPR perform the identical functions within the scope of their respective jurisdictions. Like OPR attorneys conducting oversight of Department attorneys in their use of the grand jury to perform their litigating function, OIG attorneys are part of the supervisory chain conducting oversight of the conduct of law enforcement officials assisting the grand jury. Both the OIG and OPR are under the general supervision of the Attorney General, *compare* 28 C.F.R. 0.29a(a) (OIG) *with* 28 C.F.R. 0.39. Just like OPR, the Inspector General must "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3, §§ 4(d) & 8E(b)(2). OIG attorneys make findings and recommendations to the Attorney General regarding the conduct of law enforcement officials assisting the grand jury, and the Attorney General then imposes any discipline or implements reform. Therefore, for purposes of the "attorney of the government" exception, the OIG is in the same position as OPR, both with respect to its oversight function and its relationship to the Attorney General.

More to the point, whatever formal differences exist in the relative structures of the OIG and OPR, the two offices are functionally indistinguishable for purposes of access to grand jury materials for all of their oversight purposes. The risks to the secrecy of the underlying grand jury

proceedings from disclosure to the OIG, if any, are no different from those created by automatic disclosure to OPR. OPR's oversight of the conduct of Department attorneys is an after-the-fact examination of what happened during the grand jury process, just as is OIG's oversight of law enforcement agents' conduct. OIG review of law enforcement conduct in such circumstances is not undertaken to affect the outcome of a civil proceeding related to the target of an underlying criminal investigation. Therefore, disclosure of grand jury materials to the OIG runs no risk of creating an incentive to misuse the grand jury process in order to improperly elicit evidence for use in a separate administrative or criminal misconduct proceeding against the target of the grand jury's investigation. Similarly, because our review is of law enforcement conduct and not of lay witnesses who are called to testify, the willingness of those witnesses to testify should not be implicated. OIG oversight also ensures that the Department's law enforcement officials who testify before the grand jury do so fully and candidly, and that Department employees do not ignore their legal obligations to the grand jury.

Moreover, the OIG's inherent supervisory role with regard to Department employees who assist the grand jury was recognized by a federal court overseeing proceedings relating to the death of Bureau of Prisons inmate Kenneth Michael Trentadue. The district court granted the government's motion for access to grand jury materials, finding that the OIG's investigation of alleged misconduct "is supervisory in nature with respect to the ethical conduct of Department employees." The court stated that "disclosure of grand jury materials to the OIG constitutes disclosure to 'an attorney for the government for use in the performance of such attorney's duty[.]'" *In re Matters Occurring Before the Grand Jury Impaneled July 16, 1996*, Misc. #39, W.D. Okla. (June 4, 1998).

Accordingly, there is no principled basis upon which to deny OIG attorneys the same access as OPR is allowed to review grand jury materials necessary to carry out its oversight function. Both OPR and OIG attorneys require access to grand jury materials to fulfill a supervisory function directed at maintaining the highest standards of conduct for Department employees who assist the grand jury. As such, OIG attorneys should also be able to obtain automatic access to matters that pertain to law enforcement conduct in matters related to the grand jury within the jurisdiction of the OIG.

B. The OIG is entitled to Receive Grand Jury Materials Involving Foreign Intelligence Information

Another exception to the general rule of grand jury secrecy allows an attorney for the government to disclose "any grand-jury matter involving foreign intelligence, counterintelligence . . . , or foreign intelligence information . . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the

information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D). This exception was added in 2001 as part of the USA PATRIOT Act and was designed to enable greater sharing of information among law enforcement agencies and the intelligence community to enhance the government's effort to combat terrorism.[7]

This exception encompasses the OIG's request for the grand jury materials at issue in its material witness warrant review. The grand jury proceedings pursuant to which the materials were collected were all investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001. All of the grand jury information gathered in them is thus necessarily "related to," "gathered . . . to protect against," or "relates to the ability of the United States to protect against," among other things, "international terrorist activities." *See* 50 U.S.C. § 401a and Rule 6(e)(3)(D). All of the grand jury material gathered in those investigations thus constitutes foreign intelligence, counter intelligence, or foreign intelligence information (collectively, Foreign Intelligence Information).

In addition, OIG officials qualify as law enforcement officials within the meaning of the rule by virtue of the Inspector General's authority to conduct criminal investigations, apply for search warrants, make arrests, and investigate violations of civil rights and civil liberties. *See, e.g.*, 5 U.S.C. App. 3 § 6(e)(1); USA PATRIOT ACT, Pub. L. 107-56, § 1001, 115 Stat. 272, 391 (2001). Also, the OIG's oversight activities constitute law enforcement duties for purposes of the foreign intelligence exception because they directly affect the design and implementation of the Department's law enforcement programs.

The OIG has discussed the access issues with Department leadership and sought their assistance in resolving the dispute with the FBI. Although the Department's consideration of all these issues is ongoing, in July 2011, the Department concluded that, at a minimum, the foreign intelligence exception authorizes an "attorney for the government" to disclose grand jury information to the OIG for use in connection with OIG's law enforcement duties, such as the material witness warrant review, to the extent that the attorney for the government determines that the grand jury information in question involves foreign intelligence. Since then, an "attorney for the government" in the Department's National Security Division (a Department component under review in the Material Witness Warrant review), has been conducting a page-by-page review of the materials withheld by the FBI to determine whether they qualify as Foreign Intelligence Information under the exception before providing them to the OIG. In addition, the FBI has continued its own page-by-page review of some of the requested files to identify and redact grand jury and other categories of information, before the National Security Division attorney

[7] Pub. L. 107-56, § 203(A)(1), 115 Stat. 272, 279-81 (2001).

performs yet another review for the purpose of sending the material back to the FBI for the removal of grand jury foreign intelligence information redactions.

The Department's confirmation that the foreign intelligence exception is one basis for authorizing the OIG to obtain access to grand jury information was helpful. However, the page-by-page review of the material being conducted by the FBI and National Security Division to implement that decision is unnecessary. In our view, such page-by-page review is not necessary here because all of the grand jury material we have sought to date in the material witness review was collected in investigations of international terrorist activity conducted in the wake of the terrorist attacks of September 11, 2001, and thus necessarily falls within the very broad definitions of foreign intelligence, counterintelligence, or foreign intelligence information. *See* 50 U.S.C. § 401a and Rule 6(e)(3)(D). Therefore, the exception allows the OIG to receive all of the grand jury information from those investigations.[8]

Although the Department's determination that the OIG is entitled to access to the requested grand jury information in the material witness review under the foreign intelligence exception is helpful, that decision does not resolve the access issue. First, it does not address access to grand jury material that does not involve foreign intelligence information. Second, the Department's preliminary decision under the foreign intelligence exception does not address access to grand jury material in other OIG reviews. And third, the decision has been construed by the National Security Division and the FBI to require page-by-page review of the information, thereby undermining the independence and timeliness of the OIG's review as described above. Accordingly, a full decision confirming the OIG's right of access to grand jury and other information under the Inspector General Act and the "attorney for the government" exception is still necessary to enable the OIG effectively to carry out its oversight mission.

III. CONCLUSION

The objective and independent oversight mandated by the Inspector General Act depends on the fundamental principle that the Inspectors General should have access to the same documents and materials as the establishments they oversee. This principle explains why the Inspector General Act grants the IGs access to the documents and materials that are available to their establishments. It explains why OIG investigators are routinely granted

[8] As noted above, such page-by-page reviews are also improper because they are contrary to the provisions of the Inspector General Act granting the OIG broad access to any document or material that is available to the agency overseen; undermine the independence of the Inspector General by granting a component under review unilateral authority to determine what materials the Inspector General receives, and result in unacceptable delays in the production of materials necessary for the OIG to conduct its oversight.

access to TS/SCI materials when reviewing TS/SCI programs. It explains why OIG investigators are routinely read into some of the government's most highly classified and tightly compartmented programs, such as the President's Surveillance Program and the programs involved in the Robert Hanssen matter. And it explains why any instance of unreasonable denial of access to documents or materials under the Inspector General Act must be reported to the head of the agency, and why the Attorney General's decision to preclude an OIG audit, investigation, or subpoena must be reported to Congress.

The FBI's withholding of grand jury and other information is unsupported in law and contrary to the Inspector General Act and exceptions to the general rule of grand jury secrecy. The OIG is entitled to access under the Inspector General Act. Moreover, the OIG qualifies for two exceptions to the general rule of grand jury secrecy. *See supra*; *see also* 5 U.S.C. App. 3 § 6; Fed. R. Crim. P. 6(e)(3)(D), 6(e)(3)(A)(i). It is true, of course, that under Section 8E of the Inspector General Act, the Attorney General could deny the OIG access to the documents at issue, as many of the documents constitute sensitive information within the scope of that Section. *See* 5 U.S.C. App. 3 § 8E. But the Attorney General has not done so, and until he makes the written determination required in Section 8E(a)(2) and sets out the reasons for his decision, the OIG is entitled to prompt and full access to the materials.

Denying the OIG access to the materials it is seeking would also represent an unnecessary and problematic departure from a working relationship that has proven highly successful for years. Since its inception, the OIG has routinely received highly sensitive materials, including strictly compartmented counterterrorism and counterintelligence information, classified information owned by other agencies, and grand jury information, and it has always handled this information without incident. The OIG has always conducted careful sensitivity reviews with all concerned individuals and entities, both inside and outside the Department, prior to any publication of sensitive information, and it has been entirely reasonable and cooperative in its negotiations over such publications. The OIG's access to sensitive materials has never created a security vulnerability or harmed the nation's interests; far from it, the OIG's access to sensitive information has markedly advanced the nation's interests by enabling the independent and objective oversight mandated by Congress.

Simply put, there is no reason, legal or otherwise, to depart from the time-tested approach of allowing the OIG full and prompt access to documents and using a thorough prepublication sensitivity review to safeguard against unauthorized disclosure of the information therein. Access to grand jury and other sensitive materials is essential to the OIG's work, perhaps never more so than when the OIG is overseeing such important national security matters as the Department's use of material witness warrants and the FBI's use of its Patriot Act authorities. But whatever the subject matter, the authorities and

mandates of the Inspector General are clear, and neither grand jury secrecy rules nor any other statutory or internal policy restrictions should be read in a manner that frustrates or precludes the OIG's ability to fulfill its mission.

Office of the Deputy Attorney General
Washington, D.C. 20530

November 18, 2011

Andrew Weissmann
General Counsel
Federal Bureau of Investigation
Washington, DC 20535

Cynthia Schneider
Acting Inspector General
Department of Justice
Washington, DC 20530

Dear Mr. Weissmann and Ms. Schneider:

The Office of the Inspector General (OIG) is conducting a review regarding the effectiveness and use, including any improper or illegal use, of national security letters (NSLs) issued by the Department. In the course of this review, the FBI has identified and withheld from disclosure twelve credit reports obtained pursuant to section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681. As explained below, I have determined that disclosing these reports to the OIG in connection with its review is permissible under section 1681u(f) because such disclosure is necessary to my informed decision-making regarding the approval or conduct of future foreign intelligence investigations.

Section 1681u of the Fair Credit Reporting Act provides that the FBI may obtain certain limited information from credit reporting agencies if an appropriately authorized senior FBI official makes a written request certifying that the information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities. Upon such a request, the credit agency may provide the "names and addresses of all financial institutions . . . at which a consumer maintains or has maintained an account," 15 U.S.C. § 1681u(a), and "identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment," *Id.* at § 1681u(b). The FBI is barred from disseminating this information outside of the FBI except as specified by section 1681u(f):

> The [FBI] may not disseminate information obtained pursuant to this section outside of the [FBI], except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to

appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

15 U.S.C. § 1681u(f).

After consultation with the Office of Legal Counsel, I have determined that the FBI is authorized under this provision to disclose the credit report information in question to the OIG in connection with the NSL review. Specifically, section 1681u(f) authorizes the FBI to disclose the covered information to "other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation." In my view, this includes dissemination to the Department of Justice, including to prosecutors and Department officials with a supervisory responsibility regarding the approval or conduct of a foreign counterintelligence investigation. As Deputy Attorney General, I have such a supervisory responsibility, and providing the OIG with access to the information in question in connection with its NSL review is necessary to assist me in discharging this responsibility. The OIG has informed me that this information is necessary to its completion of a thorough review regarding the effectiveness and propriety of the FBI's use of section 1681u NSLs. In turn, I fully expect that the OIG's completion of, and report regarding, that review will directly assist me in making informed decisions regarding the future approval or conduct of foreign counterintelligence investigations.

I note that this decision bears only upon the propriety of disclosure for purposes of OIG's current review. Additionally, only OIG personnel and supervisors with direct responsibility for completing the NSL review and report may use the information disclosed, and may not further disseminate this information.

Thank you for your attention to this matter.

Sincerely,

James M. Cole
Deputy Attorney General

Office of the Attorney General
Washington, D. C. 20530

November 18, 2011

Ms. Cynthia Schnedar
Acting Inspector General
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

Re: Inspector General's Request for Grand Jury Material
Obtained in Certain ATF Criminal Investigations

Dear Ms. Schnedar:

The Acting Inspector General of the Department of Justice has requested that the Attorney General authorize the Federal Bureau of Investigation ("FBI") (and other Department components) to disclose to the Office of the Inspector General ("OIG") grand jury material related to its review of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigations known as Operation Fast and Furious and Operation Wide Receiver, as well as the ATF investigation of alleged criminal conduct by Jean-Baptiste Kingery. As explained below, I have determined that disclosing the grand jury information in question to the OIG in connection with this review is permissible under Rule 6(e) of the Federal Rules of Criminal Procedure because I have determined that such disclosure is necessary to assist me in performing my duty to enforce federal criminal law.

Rule 6(e)(3)(A)(ii) authorizes the disclosure of grand jury information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." As Attorney General and head of the Department of Justice, I am an "attorney for the government" under Rule 6(e)(3)(A)(ii) and the senior supervisor of the Department's programs, policies, and practices related to the enforcement of federal criminal law. My performance of my "duty to enforce federal criminal law" includes exercising this supervisory authority.

I have determined that providing the OIG with access to the grand jury information in question in connection with its review of these investigations is necessary to assist me in discharging these criminal law enforcement supervisory responsibilities. I fully expect that the Acting Inspector General's report to me upon completion of the OIG review will provide information that will directly assist me in evaluating the circumstances surrounding Operation

Fast and Furious and in performing my duty to supervise the Department's criminal law enforcement programs, policies, and practices. After I learned of allegations regarding the inappropriate investigative tactics employed in Operation Fast and Furious, I directed the Deputy Attorney General to refer the matter to OIG for a thorough review of the facts surrounding that investigation and for a report of OIG's findings. Subsequent to that referral, I understand that the OIG expanded its review to include Operation Wide Receiver and the Kingery investigation because they may have involved similar investigative strategy and practices.

Obtaining a complete understanding of the conduct of these investigations is necessary to my discharge of my criminal law enforcement responsibilities, and I believe that to do a thorough review of these investigations, it is necessary that the OIG have access to any relevant grand jury materials, and therefore I authorize the FBI (and other Department components) to disclose grand jury materials relating to these investigations to the OIG. In making this decision, I have determined that providing the OIG access to the grand jury material at issue will not impair the Department's conduct of these ongoing investigations and associated prosecutions.

I note that under Rule 6(e)(3)(B), a person to whom information is disclosed under Rule 6(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. Thus, only OIG personnel with direct responsibility for completing the review and report that I have requested may review and use the grand jury information disclosed to them. This is the only purpose for which this review may take place. Moreover, the Inspector General should promptly provide me, in writing, a list of the names of the persons within her Office who will have access to the Rule 6(e) material in connection with this OIG review. Once I receive that information, the Department, on my behalf, will promptly inform the court that impaneled the grand jury or juries of the names of all persons to whom a disclosure has been made, as Rule 6(e) requires. That notice will also certify, as required by Rule 6(e)(3)(B), that the OIG personnel working on the review have been advised of their obligation of secrecy under Rule 6(e).

Sincerely,

Eric H. Holder, Jr.
Attorney General

Office of the Deputy Attorney General
Washington, D.C. 20530

December 5, 2011

Mr. Andrew Weissmann
General Counsel
Federal Bureau of Investigation
Washington, DC 20535

Ms. Cynthia Schneider
Acting Inspector General
Department of Justice
Washington, DC 20530

Dear Mr. Weissmann and Ms. Schneider:

The Office of the Inspector General ("OIG") is conducting a review regarding the Department's use of the material witness warrant statute, 18 U.S.C. § 3144. In the course of this review, the Federal Bureau of Investigation ("FBI") has identified and withheld from disclosure certain information obtained pursuant to 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 (hereinafter "Title III"). As explained below, I have determined that disclosing this information to the OIG in connection with its ongoing review is permissible under Title III because such disclosure is necessary to the OIG's performance of its investigative or law enforcement duties.

Section 2517 governs an investigative or law enforcement officer's disclosure and use of Title III information. It provides in relevant part:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

18 U.S.C. § 2517(1). Section 2510(7) defines "[i]nvestigative or law enforcement officer" to mean "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses."

After consultation with the Office of Legal Counsel ("OLC"), I have determined that the FBI is authorized under section 2517 to disclose the information in question to the OIG in connection with its current review. OLC has previously concluded that OIG agents qualify as "investigative officers" authorized to disclose or receive Title III information. *See Whether Agents of the Department of Justice Office of Inspector General are "Investigative or Law Enforcement Officers" Within the Meaning of 18 U.S.C. § 2510(7)*, 14 Op. O.L.C. 107, 109-10 (1990). OIG agents may therefore obtain and use Title III information as "appropriate to the proper performance of the official duties" of the investigative or law enforcement officer disclosing or receiving the information. The meaning of "official duties" has been construed narrowly, as used in a parallel provision, 18 U.S.C. § 2517(2), to permit disclosure by a law enforcement official when related to the law enforcement duties of the officer. *See Intelligence Community*, 24 Op. O.L.C. 261, 265 (2000). Consistent with this interpretation, it is my view that OIG agents, as authorized investigative officers, may receive and use Title III information in conjunction with the performance of their investigative or law enforcement duties.

In this case, the OIG has informed me that the Title III information in question is necessary to its completion of a thorough review of the Department's use of the material witness warrant statute. This review is expected to address, among other things, allegations of misconduct by law enforcement agents that potentially reflect a violation of criminal law. Obtaining access to and use of Title III information relevant to the OIG's review is therefore directly related to the performance of its investigative or law enforcement duties, and disclosure is appropriate for this purpose. I note that only OIG personnel with direct responsibility for completing this review and report may use the information disclosed.

Thank you for your attention to this matter.

Sincerely,

James M. Cole
Deputy Attorney General

U.S. Department of Justice

Office of the Inspector General

December 6, 2011

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: CYNTHIA A. SCHNEDAR
ACTING INSPECTOR GENERAL

SUBJECT: Inspector General Access to Department Documents Obtained Pursuant to FCRA Section 1681u

Thank you for your letter dated November 18, 2011. As you noted, the Office of the Inspector General (OIG) is conducting a review of the use of national security letters by the Department of Justice (Department). In connection with that review, on October 28, 2011, the OIG requested access to certain Federal Bureau of Investigation (FBI) field office files containing national security letters and return information, including credit report information the FBI obtained pursuant to Section 1681u of the Fair Credit Reporting Act (FCRA), 15 U.S.C. Section 1681u. When the OIG's team arrived at the FBI's San Francisco office on November 14 for a field review of the requested files, the FBI informed the OIG for the first time that it was withholding from the OIG credit report information in 12 files based on the provision of the FCRA that limits dissemination of such information outside the FBI, Section 1681u(f).[1]

Although I appreciate the decision in your letter instructing the FBI to provide the credit report information to the OIG, I am writing to express my concerns about the basis for your decision. We were particularly troubled by two aspects of your letter.

First, you invoked the exception to the limitation on dissemination in Section 1681u(f), which authorizes the FBI to disseminate return information "to other Federal agencies as may be necessary for the approval or conduct of a

[1] Section 1681u(f) of the FCRA provides: "The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation."

foreign counterintelligence investigation." Your letter states that this exception includes dissemination to the Department, and that you have decided the material can be disclosed to the OIG because disclosure is "necessary to [the Deputy Attorney General's] informed decision-making regarding the approval or conduct of future foreign intelligence investigations." However, the Department is not an "other Federal agency" with respect to the FBI; to the contrary, the FBI is a part of the Department, as is the OIG. Moreover, the FBI has routinely provided and the Department has allowed the National Security Division (NSD) to have access to such information without first seeking a case-by-case determination from the Deputy Attorney General that such disclosure is "necessary for the approval or conduct of a foreign intelligence investigation." As we describe below, NSD regularly obtains such access for oversight as well as operational purposes.

Second, the letter states that your decision that the OIG should have access to the Section 1681u credit report information obtained by the FBI pursuant to national security letters "bears only upon the propriety of disclosure for purposes of OIG's current review." Thus, your letter appears not to envision disclosure of FCRA Section 1681u credit report information to the OIG in any of its other reviews or investigations unless the Department consents in advance to the disclosure based upon a determination that the OIG's access is necessary for the exercise of the Deputy Attorney General's supervisory responsibility in foreign intelligence investigations.

The OIG continues to maintain that under Section 6(a)(1) of the Inspector General Act (the Act), 5 U.S.C. App. 3, it is authorized to have access to all documents available to the Department and its components. The OIG believes that a process that allows the OIG access to documents only with advance permission from the Department on a case-by-case basis is contrary to this and other provisions of the Act. Moreover, such a process is contrary to the policy and practice of the Department and its components, including the FBI, since the inception of the OIG and the expansion of our jurisdiction in 2001 to include oversight over the FBI.

Significantly, the Act provides that once the Inspector General (IG) decides to initiate a review, only the Attorney General(AG) may prohibit the IG from carrying out or completing the review, and only in certain carefully circumscribed instances, in writing, and with notice to Congress. See Inspector General Act, Section 8E. In short, the Act mandates that the IG receive access to Department documents unless the AG invokes the Section 8E process to prohibit such access, not that the IG receives access only when the Department consents to it.

Moreover, the statutory limitation on the FBI's dissemination of information it receives pursuant to FCRA Section 1681u does not preclude the OIG from obtaining access to it. Section 1681u provided the FBI with new

authority to use national security letters to obtain limited credit report information and consumer identifying information in counterintelligence investigations. The limitation on dissemination contained in Section 1681u(f) was designed to ensure that information collected under this expanded authority was not improperly reported or shared with other agencies. The purpose of the limitation on dissemination was to protect privacy and civil liberties of the individuals whose credit information was obtained.[2] In view of the consistent congressional interest in monitoring use of this and other expanded authorities under the USA PATRIOT Act, it makes no sense to read into the dissemination limiting language of Section 1681u a statutory bar to the Department's own IG having access for purposes of oversight. Indeed, such a reading is strained, and inconsistent with the language and intent of the FCRA.

Our reading of the statute is consistent with subsequent congressional action and past practice in the Department. As you know, our current review of the Department's use of national security letters is a follow-up review to two previous congressionally mandated reviews. In the USA PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Reauthorization Act), Congress directed the OIG to "perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice." Pub. L. 109-177, Section 119 (2005). This same section of the Act defined national security letters to include requests made pursuant to Section 1681u. It also listed among specific items to be addressed in the audit the manner in which information obtained through national security letters was "collected, retained, analyzed, and disseminated by the Department, including any direct access to such information *(such as access to 'raw data')* provided to any other department, agency, or instrumentality of Federal, State, local or tribal governments or any private sector entity" (emphasis added).

Fulfilling the mandates of the Patriot Reauthorization Act clearly required the OIG to have access to the "raw data" the Department obtained through national security letters -- including Section 1681u credit report information -- yet the Patriot Reauthorization Act contained no provision granting the OIG access to Section 1681u information. This shows that in 2005, Congress believed the OIG already had access to Section 1681u information in order to

[2] See, e.g., House Conference Report 104-427, p. 36 (1995) ("In addition, FBI presently has authority to use the National Security Letter mechanism to obtain two types of records: financial institution records (under the Right to Financial Privacy Act, 12 U.S.C. 3414(a)(5)) and telephone subscriber and toll billing information (under the Electronic Communications Privacy Act, 18 U.S.C. 2709). Expansion of this extraordinary authority is not taken lightly by the conferees, but the conferees have concluded that in this instance the need is genuine, the threshold for use is sufficiently rigorous, and, given the safeguards built in to the legislation, the threat to privacy is minimized.")

audit such dissemination. Accordingly, Section 1681u(f) should not be read as limiting the Department of Justice Inspector General's access to such information.

The Department's past practice is also consistent with our reading of Section 1681u(f). In our prior national security letter reviews and during our first site visit in the ongoing review, the FBI provided the OIG full access to Section 1681u credit report information as well as to all other information it obtained through its use of national security letters, without suggesting that FCRA Section 1681u limited such access. Our past reviews resulted in findings that the FBI had used national security letters (including what the FBI called "exigent letters") in violation of applicable national security letters statutes, Attorney General Guidelines, and internal FBI policies. With respect to Section 1681u specifically, we found that FBI personnel did not fully understand the statutory requirements of the FCRA and had in certain cases requested or received information they were not entitled to receive pursuant to Section 1681u.

In response to our findings, the FBI and other Department components instituted corrective actions, including implementation by the NSD of oversight reviews (patterned after the OIG's reviews) that examine whether the FBI is using national security letters in accordance with applicable laws and policies. The FBI has since routinely provided the Oversight Section of NSD with access to Section 1681u credit report information in field office files on a quarterly basis, without first seeking a case-by-case determination from the Deputy Attorney General that such disclosure is "necessary for the approval or conduct of a foreign intelligence investigation." We see no need to invoke the exception to the dissemination limitations of Section 1681u(f) to allow the OIG access to this credit report information when the Oversight Section of NSD routinely obtains it without reference to the exception for the identical purpose of conducting oversight of the FBI. Indeed, especially in light of our prior national security letter and "exigent letter" reviews, it would be remarkable if the Department now – at the FBI's request – restricted the OIG's access to Section 1681u material to only those reviews to which the Department consented.

In sum, the process contemplated by the November 18 memorandum – that the OIG may obtain access to Department documents related to an OIG review only after receiving advance consent from the Department on a case-by-case basis – is directly contrary to the broad authority and access granted to the IG in the Act, is not required by the terms of Section 1681u, is contrary to the purpose of the dissemination limitations contained in the statute, as well as the intent of Congress demonstrated by its subsequent legislation, and is a disturbing break from the long standing policy and practice within the Department.

I appreciate the sentiment that you expressed at our meeting about this subject on November 18 that the goal of the Department was to ensure that the OIG is able to have access, consistent with the law, to the materials it needs to conduct its oversight mission. I request that you reconsider your basis for allowing the OIG to have access to FCRA Section 1681u information. Consistent with the law for the reasons described herein, I ask that you issue a memorandum to the FBI informing it that the OIG can have access to FCRA Section 1681u information for its oversight reviews and investigations unless and until the AG finds it necessary to invoke the Section 8E process to prevent such access.

U.S. Department of Justice

Office of the Inspector General

December 16, 2011

MEMORANDUM FOR THE ATTORNEY GENERAL

FROM: CYNTHIA A. SCHNEDAR
ACTING INSPECTOR GENERAL

SUBJECT: Inspector General Access to Grand Jury Materials

Thank you for your letter of November 18, 2011, stating that the Office of the Inspector General (OIG) is authorized to receive grand jury material in its review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) firearms trafficking investigation known as Operation Fast and Furious, and other investigations with similar objectives, methods, and strategies. Your letter stated that you have determined that disclosing the grand jury material to the OIG is permissible under Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure because you have determined that such disclosure is necessary to assist you, an attorney for the government, in performing your duty to enforce federal criminal law.

I appreciate your decision that the OIG may have access to grand jury information for the purpose of completing this review. While it remains our position that we are entitled to this information, I am writing to express my disagreement with the rationale for your decision as to why we should be allowed this access. We were particularly concerned by the following aspects of your letter.

First, your letter incorrectly stated that I requested you to authorize the Federal Bureau of Investigation (FBI) and other Department components to disclose grand jury information to the OIG for our review. We do not believe Department components must seek authorization from the Attorney General to disclose grand jury information to the OIG for our use in conducting our investigations and reviews. Thus, while we notified Department officials that we were seeking certain grand jury information in Fast and Furious, that conversation was merely to provide notification and was not a request for the Department's authorization for us to receive such materials. Indeed, prior to receiving your letter, we had already obtained grand jury information from the FBI relevant to the ATF's Operation Fast and Furious, and the U.S. Attorney's

Office for the District of Arizona had notified us that it would provide grand jury information to us for this review. This was consistent with a long-standing policy and practice within the Department and its components, including the FBI, to provide grand jury information to the OIG upon our request for use in oversight reviews, without first obtaining consent to do so from the Attorney General.[1]

I also am concerned that in providing authorization for the disclosure of grand jury information to the OIG, your letter appears to envision that it is necessary for the OIG to obtain authorization from the Attorney General, on a case-by-case basis, prior to obtaining access to grand jury material from the Department's components. A requirement that the OIG must first seek permission from the Attorney General to obtain material necessary for our reviews, however, undermines the OIG's independence and is inconsistent with the Inspector General Act.

As we have discussed with you and the Deputy Attorney General, the OIG believes that Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, entitles us to have access to all documents available to the Department and its components. Significantly, Section 8E of the Act provides that only the Attorney General may prohibit the Inspector General from carrying out or completing a review, and may do so only in certain carefully circumscribed instances, in writing, and with notice to Congress. In short, the Act mandates that the OIG receive access to Department documents unless the Attorney General invokes the Section 8E process to prohibit such access. The Act does not limit the OIG's access to Department documents to only those circumstances when the Attorney General consents to it.

In addition,, while we agree that Rule 6(e) provides authority for the OIG to obtain access to grand jury information independent from the Inspector General Act, I am troubled that your letter relied on Rule 6(e)(3)(A)(ii) to grant the OIG access to grand jury material in Operation Fast and Furious. That provision authorizes the disclosure of grand jury information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Your letter stated that the provision applied to the OIG's access

[1] As we have discussed with you, in contrast to its provision of grand jury material to the OIG in the Fast and Furious review, the FBI departed from its long-standing compliance with the practice of providing the OIG with access to grand jury and numerous other categories of materials and refused to provide such access to the OIG in connection with the OIG's ongoing review of the Department's use of the material witness warrant statute, 18 U.S.C. Section 3144. As you know, in that review, the OIG requested and eventually obtained the Department's intervention to direct the FBI to provide the OIG with what we believe the FBI is required by law to provide us. We have since received grand jury information from the FBI for use in our material witness warrant review pursuant to Federal Rule of Criminal Procedure 6(e)(3)(D).

to grand jury information in the Fast and Furious review because you referred the matter to the OIG for investigation. You reasoned that the OIG's access to grand jury information is necessary for you to exercise your supervisory authority over the Department's enforcement of federal criminal law.

Conditioning the OIG's access to grand jury information upon your determination that access is necessary for the exercise of the Attorney General's supervisory responsibilities again is inconsistent with the Inspector General Act. Moreover, it is unnecessary under Rule 6(e). Attorneys for the OIG may receive direct access to grand jury information pursuant to Rule 6(e)(3)(A)(i), which provides that disclosure of grand jury information may be made to "an attorney for the government for use in performing that attorney's duty."

The Department has routinely provided attorneys in the Office of Professional Responsibility (OPR) access to grand jury information to enable them to conduct oversight investigations of alleged misconduct by Department attorneys in the performance of their litigation functions. Such access has been allowed pursuant to Rule 6(e)(3)(A)(i), and it has not required a case-by-case determination of need for the Attorney General's exercise of supervisory authority. Indeed, an Office of Legal Counsel (OLC) opinion issued in 1984 concluded that OPR attorneys qualify for automatic access under Rule 6(e)(3)(A)(i) because they are part of the supervisory chain conducting oversight of the conduct of Department attorneys before the grand jury. *See* Memorandum of OLC Deputy Assistant Attorney General Robert B. Shanks, *Disclosure of Grand Jury Material to the Office of Professional Responsibility*, January 5, 1984. OIG attorneys are similarly part of the supervisory chain conducting oversight of the conduct of law enforcement officials, fulfilling a supervisory function directed at maintaining the highest standards of conduct by Department employees. OIG attorneys therefore should receive the same automatic access to grand jury information for use in oversight reviews as OPR attorneys do pursuant to Rule 6(e)(3)(A)(i).

In sum, the premise of your November 18 letter – that the OIG may obtain access to grand jury material relevant to an OIG review only after the Attorney General or other Department official determines on a case-by-case basis that such access is necessary to assist an attorney for the government in performing your duty to enforce federal criminal law – is contrary to the broad authority and access granted to the Inspector General in the Inspector General Act. It also breaks with the long standing policy and practice of Department components providing grand jury material to the OIG without obtaining the consent of Department leadership. Moreover, Rule 6(e)(3)(A)(i) provides authority for the OIG to obtain access to grand jury information independent from the Inspector General Act, just as OPR is allowed automatic access pursuant to that rule.

I appreciate the sentiment that the Deputy Attorney General expressed at our meeting with him about this subject on November 18 that the goal of the Department was to ensure that the OIG is able to have access, consistent with the law, to the materials it needs to conduct its oversight mission. I request that you reconsider your basis for allowing the OIG to have access to grand jury information. Consistent with the law for the reasons described herein, I ask that you make clear that the OIG can have access to grand jury information for its oversight reviews and investigations pursuant to the Inspector General Act and Rule 6(e)(3)(A)(i), unless and until the Attorney General finds it necessary to invoke the Section 8E process to prevent such access.

U.S. Department of Justice

Office of the Inspector General

December 16, 2011

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: CYNTHIA A. SCHNEDAR
ACTING INSPECTOR GENERAL

SUBJECT: Inspector General Access to Department Documents Relating to Title III Electronic Surveillance

I received your letter dated December 5, 2011, directing the Federal Bureau of Investigation (FBI) to disclose to the Office of the Inspector General (OIG) material the FBI gathered pursuant to 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 (Title III), for our ongoing review regarding the Department's use of the material witness warrant statute, 18 U.S.C. § 3144. In your letter, you cite an opinion from the Office of Legal Counsel (OLC) issued in 1990 concluding that OIG agents qualify as "investigative officers" authorized to obtain and use Title III information as appropriate to the proper performance of their official duties. You state that you have determined that disclosing Title III information to the OIG for the material witness warrant review is permissible because it is necessary to the OIG's performances of its investigative or law enforcement duties. You also state that disclosure in this circumstance is appropriate because "the Title III information in question is necessary to [the OIG's] completion of a thorough review of the Department's use of the material witness warrant statute."

Although I appreciate your decision that the FBI is authorized to disclose the Title III material it has been withholding in response to our request for it, I do not agree with the rationale contained in your letter that it is necessary for the OIG to obtain authorization from Department leadership, on a case-by-case basis, prior to obtaining access to Title III material from the Department's components. As we have previously discussed with you, we believe a requirement that the OIG must first seek permission from the Department to obtain material necessary for its reviews undermines the OIG's independence and is contrary to the access provisions of the Inspector General Act (the Act). See 5 U.S.C. App. 3.

As I noted in my letter to you dated December 6, 2011, regarding the OIG's authority to obtain credit report information gathered pursuant to 15 U.S.C. § 1681u, the OIG believes that Section 6(a)(1) of the Act entitles us to

access to all documents available to the Department and its components, unless the Attorney General himself formally, in writing and with notice to Congress, exercises his authority pursuant to section 8E of the Act to prohibit the OIG from completing or carrying out a review in circumstances specifically enumerated in Section 8E.

Title III itself provides a basis independent of the Act for the OIG to obtain access to Title III materials. As you note, the 1990 OLC opinion interpreted 18 U.S.C. § 2517(1) to include OIG agents as investigative officers authorized under Title III to receive such information for the performance of their investigative or law enforcement duties. However, you also cite a 2000 OLC opinion regarding dissemination of Title III material as narrowly construing the term "official duties," to limit disclosure to law enforcement officials to situations when it is "related to the law enforcement duties" of the receiving officer. Because the 2000 OLC opinion arose in the context of dissemination of Title III material outside of the Department to the intelligence community, we do not believe it precludes the OIG or other officials within the Department from obtaining Title III material to conduct supervision or oversight of law enforcement.

In sum, we believe the OIG is authorized to receive Title III materials under both the Inspector General Act and Title III. Indeed the OIG has historically received such information from Department components, including the FBI, in recognition that the OIG's function includes ensuring that criminal law enforcement personnel are conducting investigations in compliance with applicable laws and policies. Moreover, it is common sense that our role of conducting oversight of law enforcement activities must encompass access to the materials and information derived from the techniques employed by law enforcement officers.

Accordingly, I ask that you reconsider the basis for allowing the OIG to have access to Title III information in our material witness warrant review. Consistent with the law as described in this memorandum, I request that you determine that the FBI and other Department components should provide the OIG access to Title III material for its oversight reviews and investigations in all such matters, unless the Attorney General invokes Section 8E of the Act to prevent such access.

Office of the Deputy Attorney General
Washington, D.C. 20530

January 4, 2012

Cynthia Schnedar
Acting Inspector General
Department of Justice
Washington, DC 20530

Dear Ms. Schnedar:

I am in receipt of your letters dated December 6 and December 16, 2011, setting forth your views regarding the Office of the Inspector General's (OIG) ability to access grand jury material under Rule 6(e) of the Federal Rules of Criminal Procedure, information obtained pursuant to Section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (FCRA), and information obtained pursuant to 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 (Title III).

As you know, the Office of Legal Counsel (OLC), the entity within the Executive Branch responsible for providing authoritative legal advice about these types of matters, has been considering the issues raised by your requests. OLC's established practice is to refrain from reaching any final conclusions until it has solicited and received the views of all affected parties, including OIG, a process that I understand is currently underway. OLC has advised me that at this time, however, they are not persuaded that the Inspector General Act provides authority to access documents notwithstanding the restrictions on their use or dissemination contained in the statutes referenced above.

I have consulted with OLC at length about ways that, consistent with applicable law, the Department can ensure that OIG continues to have access to the materials it needs for its essential work. Within the limits of the law, the Attorney General and I have endeavored to find solutions that provide OIG with immediate access to documents necessary for its thorough and effective review of specific matters. Whenever you have raised concerns with us about a component withholding documents that you need, we have found ways to provide you access. We understand that, as you confirmed at our meeting on December 19, 2011, OIG currently has access to the information that it needs for its ongoing reviews. In the meantime, as we explained at our December meeting, where possible under existing law, we will continue to work with OLC to develop Department-wide policies that would ensure that documents are made available to OIG without the need for case-by-case determinations.

To obtain a definitive answer to these legal questions, I have shared your letters with OLC and asked that OLC provide a formal opinion regarding the construction of Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, and the OIG's access to grand jury material, information obtained pursuant to Section 1681u of FCRA, and information obtained pursuant to Title III. Please continue to work with OLC to ensure that they have the benefit of your views and perspective on these issues. If, after OLC has completed its opinion, you believe the existing statutes do not provide your office with access on terms that allow it to perform its oversight mission, legislative action may be necessary. I look forward to working with you if such action is ultimately required.

Sincerely,

James M. Cole
Deputy Attorney General

Office of the Deputy Attorney General
Washington, D.C. 20530

March 16, 2012

Ms. Cynthia Schnedar
Acting Inspector General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Dear Ms. Schnedar:

As I explained in our recent discussions and my letter of January 4, 2012, I am committed to ensuring that the Office of the Inspector General (OIG) has access to the information it needs to perform effectively its oversight mission. Toward that end, the Attorney General and I have worked over the past several months to make certain that OIG has the materials necessary to conduct its ongoing reviews. We have also indicated that we are committed to developing Department-wide policies to make documents available to your office without the need for case-by-case determinations.

Your office responded that, although you were grateful for our efforts, you believed that the approach we proposed was inconsistent with Section 6(a)(1) of the Inspector General Act, 5 U.S.C. App. 3, and the specific statutory provisions at issue. To resolve the legal questions presented, I asked for an opinion from the Office of Legal Counsel (OLC), the entity within the Executive Branch that resolves such disputes.

Both your office and the Council of Inspectors General on Integrity and Efficiency (CIGIE) have requested that the Department withdraw the request for an opinion from OLC because OIG and CIGIE have indicated to me that they are satisfied with the terms of access currently being provided. You have also indicated that OIG has received all material responsive to its pending reviews and no longer believes there is a need to resolve the legal questions presented. From our discussions, I understand that OIG now believes that the best course is to proceed with developing Department-wide policies concerning its access to information. These policies would seek to facilitate your reviews by providing presumptive access to certain categories of information to the extent permitted by the terms of the specific statutory provisions at issue. We will work to maximize your ability to obtain information, but you understand that access to some categories of information may be legally permissible on these terms only in certain circumstances, and access to other categories of information may not be possible at all.

In light of the foregoing, I intend to inform OLC that a formal opinion is no longer needed on the legal issues that have been raised. It bears noting that OLC has already provided informal legal advice upon which the Attorney General and I have relied as a basis for ensuring

that OIG has had access to information in specific reviews. I encourage you to contact OLC to provide your legal views concerning prospective access by OIG to the type of information at issue in those reviews—specifically, grand jury material, financial information received pursuant to Section1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 (FCRA), and information obtained pursuant to 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 (Title III).

Please let me know if you disagree with any of the foregoing. If I do not hear from you within a week, I will withdraw the request for an opinion from OLC.

Sincerely,

James M. Cole
Deputy Attorney General

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

April 11, 2012

Ms. Cynthia Schnedar
Acting Inspector General
U.S. Department of Justice
Washington, DC 20530

Dear Ms. Schnedar:

The Office of the Inspector General ("OIG") is conducting a review of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigations known as Operation Fast and Furious and Operation Wide Receiver, as well as the ATF investigation of alleged criminal conduct by Jean-Baptiste Kingery. In the course of this review, the OIG has sought pertinent information from various Department components. The Criminal Division has identified certain information obtained pursuant to 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 (hereinafter "Title III"), as responsive to the OIG's request. The Criminal Division has advised me of the nature of this Title III information and has asked if it may disclose that information to the OIG. As explained below, I have authorized the Criminal Division to disclose this information to the OIG on my behalf, for the OIG's use in connection with its ongoing review.

Section 2517 governs an investigative or law enforcement officer's disclosure and use of Title III information. It provides in relevant part:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2). As Deputy Attorney General, I am a "law enforcement officer" as defined in 18 U.S.C. § 2510(7), and my official duties as such include supervisory responsibility for the Department's criminal law enforcement programs, policies, and practices. Pursuant to section 2517(2), I may therefore "use" Title III information by disclosing it in a manner that enables me to perform appropriately my law enforcement duties, which include these supervisory responsibilities.

After consultation with the Office of Legal Counsel, I have determined that providing the OIG with access to the Title III information in question in connection with its review of these investigations will assist the appropriate performance and discharge of my criminal law enforcement supervisory responsibilities. Indeed, I fully expect that both the OIG's investigation and its subsequent report will provide information that will directly assist me in supervising the

Department's criminal law enforcement programs, policies, and practices. I therefore authorize the Criminal Division and other Department components to provide the OIG with responsive Title III information for its use in connection with this review. In making this decision, and because it will not result in protected materials being disclosed outside the Department, I have determined that providing the OIG with access to this information will not impair the Department's conduct of the ongoing investigations and associated prosecutions. I note that only OIG personnel with express responsibility for completing this review and subsequent report may use the information disclosed.

Thank you for your attention to this matter.

Sincerely,

James M. Cole
Deputy Attorney General

U.S. Department of Justice

Federal Bureau of Investigation

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Office of the General Counsel

Washington, D.C. 20535

March 4, 2011

Carol F. Ochoa
Assistant Inspector General
Oversight and Review Division
Office of the Inspector General
U.S. Department of Justice
1425 New York Avenue, NW, Suite 13100
Washington, DC 20530

Dear Ms. Ochoa:

You have asked for an explanation of the dissemination restrictions that exist on documents that the Federal Bureau of Investigation ("FBI") may have in its investigative files. You have raised concerns that if such dissemination restrictions are observed by the FBI in connection with requests from the Office of the Inspector General ("OIG"), OIG's oversight ability will be impaired. While we appreciate your concerns, restrictions on dissemination affect a relatively small number of documents relating to a small number of OIG audits, investigations or reviews. Nevertheless, the FBI is eager to understand the OIG's argument that the statutory limitations cited below do not apply to disseminations from the FBI to OIG. (U)

In prior discussions, the OIG has noted that section 6(a)(1) of the Inspector General Act of 1978, 5 U.S.C. app. § 6 (hereinafter "IG Act") authorizes the OIG to have access to "all records, reports, . . . documents, papers, . . . or other material available to the applicable establishment which relate to programs and operations with respect to which th[e] Inspector General has responsibilities under this Act." Section 6(a)(3) further authorizes the OIG "to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal . . . agency or unit thereof." (U)

Although Section 6(a)(1) grants broad access, section 6(b) makes clear that access is not without limit. Section 6(b)(1) provides that, "[u]pon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable *and not in contravention of any existing statutory restriction or regulation of the Federal Agency from which the information is requested*, furnish to such Inspector General . . . such information or assistance." (Emphasis added.) Although Section 6(b)(1) applies by its terms only to requests pursuant to Section 6(a)(3), Section 6(b)(2) also recognizes that section 6(a)(1) is not absolute: "Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, *unreasonably* refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay." (Emphasis added). Thus, the statute implicitly

recognizes that requests under (a)(1) can be "reasonably" refused (otherwise section 6(b)(2) would not have included subsection (a)(1) within its scope). This interpretation is supported by legislative history strongly suggesting Congress did not intend for the IG Act to supersede statutes that restrict dissemination of certain types of information. According to the Senate Report on the Legislation, "the committee intends [subsection 6(a)] to be a broad mandate permitting the inspector and auditor general the access he needs to do an effective job, subject, of course, to the provisions of other statues, such as the Privacy Act." S. REP. NO. 95-1071, at 34 (1978). Given the legislative history and the plain language of section 6(b)(2), absent a contrary decision from the Office of Legal Counsel or a persuasive legal argument from the OIG, we believe that it is "reasonable" for the FBI not to produce materials the dissemination of which would violate an existing statutory, regulatory or other legal requirement. (U)

The dissemination restrictions discussed below do not apply to requests from the OIG that are made as part of criminal investigations that are being conducted jointly by the OIG and the FBI. (U)

A. Grand Jury Information (U)

The disclosure of federal grand jury material is governed by Federal Rule of Criminal Procedure 6(e) and implementing guidelines promulgated by DOJ. Rule 6(e)'s restrictions on dissemination vary depending on the nature of the investigation being conducted by the entity seeking the information and the nature of information being sought. If the OIG requests materials that contain information protected by Rule 6(e), and if the requirements described below are not met, the information may not be produced to the OIG. (U)

"Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury." See USA Book, Federal Grand Jury Practice, Office of Legal Education, October 2008 at § 3.6 (citing United States v. Smith, 123 F.3d 140, 148 (3d Cir. 1997)). Moreover, the question whether a specific document is or is not 6(e) material may depend on the quantity of Grand Jury information requested or the federal circuit in which the Grand Jury is sitting. Id. at §§ 3.6 through 3.10. Requests for entire investigative files – the disclosure of which will necessarily disclose the nature of evidence that was collected by and produced to the grand jury – may raise different legal concerns than focused requests for limited materials that have independent significance (e.g., bank records, telephone records). (U)

1. Criminal Investigations (U)

Rules 6(e)(3)(A) and (B) provide that an attorney for the government may disclose Grand Jury material to any other government personnel necessary to assist in performing that attorney's duty to enforce federal criminal law and the information disclosed is to be used only for those purposes. Disclosure under Rule 6(e)(3)(A) is permitted only when necessary to assist in

enforcing federal criminal laws. Furthermore, the rule does not permit disclosure of grand jury materials after the completion of a prosecution. (U)

Thus, if the OIG seeks material from the FBI on the basis of Rules 6(e)(3)(A) and (B), and if the prosecution is not complete, the Grand Jury information that is necessary to assist the OIG in enforcing federal criminal laws may be provided to the OIG. On the other hand, Rules 6(e)(3)(A) and (B) cannot be relied upon as a basis to produce documents requested as part of an audit or as part of a general oversight review. (U)

2. Foreign Intelligence, Counterintelligence, or Foreign Intelligence Information (U)

Our prior submission to the Office of Legal Counsel has fully explained our view of the scope of our ability to produce material to the OIG pursuant to Rule 6(e)(3)(D) and that discussion will not be repeated here. (U)

3. Threat Information (U)

Rule 6(e)(3)(D) also permits the disclosure of Grand Jury matters involving a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent. Such disclosures may be made to any appropriate federal official for the purpose of preventing or responding to such a threat. There is no requirement that the threat be imminent or specific. It is highly unlikely that this provision will ever be triggered when responding to an OIG request for documents. Nevertheless, if the FBI were to determine that providing to the OIG Grand Jury information that involves a threat may aid in preventing or responding to such a threat, the information may be disclosed. Absent such a determination, however, Rule 6(e) would preclude such a disclosure. (U)

From a logistics perspective, Rule 6(e) is only implicated for investigative files in which grand jury subpoenas were issued. Accordingly, requested documents will only be reviewed for Rule 6(e) material if grand jury subpoenas were utilized during the investigations.

B. Title III Materials (U)

The disclosure and use of information intercepted under the authority of the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Title III or T-III), is controlled by 18 U.S.C. § 2517. As with 6(e) information, the authority to disclose or use T-III material contained in FBI files depends on the nature of the investigation being conducted by the entity seeking the information and the nature of information being sought. Unless one of the exceptions below is satisfied, the T-III information may not be produced. (U)

1. Foreign Intelligence, Counterintelligence, or Foreign Intelligence Information (U)

Section 2517 (6) of Title 18, United States Code, permits the disclosure of T-III-derived information that is foreign intelligence or counterintelligence, or foreign intelligence information to any other federal law enforcement or national security official to assist the official in the performance of his or her official duty. As with grand jury material, it is OGC's position that a piece by piece determination must be made that the T-III information is foreign intelligence, counterintelligence or foreign intelligence information. Such information can be shared with the OIG under this provision only when the OIG is acting in a law enforcement capacity. If either condition is not met (i.e., a particular piece of information is not foreign intelligence, counterintelligence or foreign intelligence information or the OIG is not functioning as a law enforcement official) then T-III information may not be provided. (U)

2. Threat Information (U)

18 U.S.C. § 2517 (8) permits the disclosure of T-III-derived information to any federal government official, to the extent that such information reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, for the purpose of preventing or responding to such a threat. In order for information to be disseminated under this provision, the individual or entity receiving the information must use it to respond to the threat, and not for other purposes. As with the similar provision in Rule 6(e), it is highly unlikely that an OIG request will satisfy this provision. Nevertheless, if the provision is satisfied, such T-III information may be produced to the OIG. (U)

In terms of production logistics, the vast majority of FBI investigative files do not include Title III information because Title III surveillance was not utilized during the investigation. In addition, the FBI recently issued a policy restricting the manner in which Title III information is included in FBI files. Thus, in the majority of cases, the FBI does not anticipate that it will need to search requested documents for Title III information. (U)

C. Federal Taxpayer Information (FTI) (U)

The dissemination of federal taxpayer information is governed by 26 U.S.C. § 6103. Section 6103 applies to taxpayer information that is obtained from the Internal Revenue Service (IRS) or from another agency that originally received the information from the IRS. The FBI can obtain § 6103 information only for one of three purposes: (1) for use in a (non-tax) criminal investigation; (2) to locate a fugitive; or (3) for use in a terrorism investigation. 26 U.S.C. § 6103(i). Information obtained for one purpose may not be used by FBI personnel or disseminated to other agencies or subdivisions of agencies for another purpose.[1] 26 U.S.C.

[1] Section 5 of IRS Publication 1075 discusses restricting access to FTI. Section 5.4 states, "However, in most cases, the disclosure authority does not permit agencies or subdivisions of agencies to exchange or make

§ 6103 states that the tax return information obtained by the Department of Justice may only be disclosed to officers or employees who are "personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or Federal or state court." 26 U.S.C. § 6103(h)(2). Accordingly, FTI may not be produced to the OIG unless they are relevant to a criminal investigation being conducted by the OIG. (U)

In terms of production logistics, by long standing FBI policy, FTI must be retained in a restricted subfile. Accordingly, the unrestricted portions of the file will not be searched for FTI, absent some specific indication that FBI policy was not followed in the particular case at issue. (U)

D. Child Victim, Child Witness or Federal Juvenile Court Information (U)

The identities of child victims or child witnesses are restricted by the Child Victim and Witnesses Information Act, 18 U.S.C. § 3509(d), which provides that DOJ employees may disclose documents that contain "the name or any other information concerning the child" only to "persons who, by reason of their participation in the proceeding, have reason to know such information." Accordingly, the names of child victims and child witness identities may not be produced to the OIG. (U)

Information derived from court records prepared for ongoing or closed juvenile delinquency proceedings in U.S. federal courts is restricted by the Juvenile Delinquency Act, 18 U.S.C. § 5038. These juvenile court records may be disclosed only in response to an inquiry from a law enforcement agency when the request for information is "related to the investigation of a crime." 18 U.S.C. § 5038(a)(3). Thus, only if the OIG is conducting a criminal investigation as to which the federal juvenile court records are relevant may such records be produced to the OIG. (U)

From a production logistics perspective, few FBI files include the names of child victims, witnesses or juvenile delinquents. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such materials. If not, the file will not be reviewed to search for such information. (U)

E. Patient Medical Information (U)

The FBI's ability to re-disseminate medical information that identifies an individual as the recipient of medical services or diagnoses may be restricted depending upon the type of information, how the information was obtained, and for what purpose it was obtained. Information obtained by patient consent or court order may have limitations regarding the purpose for which the information will be used. Other legal authorities, such as Executive Order 13181 and 18 U.S.C. § 3486(e), may also limit re-dissemination of the information absent

subsequent disclosure of the information." It notes that, "Unless specifically authorized by [Internal Revenue Code], agencies are not permitted to allow access to FTI to agents, representatives, or contractors." (U)

specific approvals being obtained. Psychotherapy notes and substance abuse patient medical records in particular have very stringent confidentiality protections. See 42 U.S.C. § 290dd-2; 42 C.F.R. Chapter 1, subchapter A, Part 2; 45 CFR § 164.508(2). Thus, if the OIG requests materials that contain individually-identifiable patient medical information, the Office of General Counsel must be consulted prior to producing such materials. (U)

From a production logistics perspective, few FBI files outside of the health care fraud classification include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such information. If not, the file will not be reviewed to search for such information. (U)

F. Credit Reports (U)

The Fair Credit Reporting Act governs the dissemination of credit reports and information from credit reports. Because the statutory scheme is quite complicated, if the OIG requests materials that include credit reports or information from credit reports, we are recommending that the Office of the General Counsel be consulted prior to production. (U)

G. FISA Information (U)

[redacted] (S/NF)

[redacted] (S/NF)

[redacted]

BR008129

[redacted] (S/NF)

From a production logistics perspective, FBI files outside of the national security area will not contain FISA information and many FBI national security files do not include the use of FISA surveillance authorities. Moreover, under the current SMPs, raw FISA information is unlikely to be present in FBI investigative files. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains raw FISA information. If not, the file will not be reviewed to search for such information. (U)

H. Foreign Government or International Organization Information (U)

If a foreign government has imposed restrictions on the dissemination of information it provides to the FBI and the information has not been disseminated within DOJ, that information should not be produced to the OIG absent permission from the entity that provided the information to the FBI. (U)

From a production logistics perspective, few FBI files outside of the national security area will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains information provided by a foreign government that has imposed restrictions on the dissemination of the information. If not, the file will not be reviewed to search for such information. (U)

I. Information Subject to Non-Disclosure Agreements, Memoranda of Understanding or Court Order (U)

A non-disclosure agreement (NDA) or Memorandum of Understanding (MOU) may, depending on its terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. Because each NDA or MOU will vary in its terms, an analysis of the ability to share information will turn on the particular terms and conditions of the agreement. Thus, if the requested materials were obtained pursuant to an NDA or an MOU that, on its face, appears to restrict the disclosure of the information outside the FBI, we are recommending that OGC be consulted prior to disclosure. (U)

[redacted] (S)

BR08-130

A court order may, depending on its terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. The FBI's ability to share information will turn on the particular terms and conditions of the order. Thus, if the requested materials are governed by a court order that appears, on its face, to restrict the disclosure of the information outside the FBI, we are recommending consultation with OGC prior to production. (U)

From a production logistics perspective, few FBI files will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains such information. If not, the file will not be reviewed to search for such information. (U)

J. Attorney-Client Information (U)

The FBI's attorney-client information falls into the two general categories: "official capacity" and "individual capacity" information. "Individual capacity" attorney-client information is subject to the standards set forth in 28 C.F.R. §§50.15 and 50.16 and 28 U.S.C. § 517. In sum, the attorney and the employee enter into a "traditional attorney-client relationship" and the information relating to the representation is covered by attorney-client confidentiality rules. The information subject to the privilege includes communications between the attorney and the employee, as well as "confidential information about a client from any source." See Individual Capacity Manual at 34 (citing Model Rules of Professional Conduct 1.6 and 1.8(b), which have been adopted in some form in "most jurisdictions"). (U)

The attorney-client relationship commences with the request for representation and applies to communications made for the purpose of securing representation. Id. at 30. The obligation to safeguard privileged or other confidential client information remains "in perpetuity" and the information must therefore be protected not only while the case is active but also after its disposition. Id. at 35. In the event the OIG requests information from the FBI relating to a matter in which an FBI attorney has handled a request for individual representation or has represented an individual in his or her individual capacity, the FBI attorney handling the matter must be consulted and all attorney-client privileged information must be withheld. (U)

From a production logistics perspective, individual representation materials are included in a file classification that is separate from any underlying investigative file. Attorney client materials should, therefore, not be included in investigative files. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that the requested materials include individual capacity attorney client material. If not, requested materials will not be reviewed to search for such information. (U)

K. Other U.S. Government Information (U)

There are many circumstances through which the FBI comes into possession of information that originates with another government entity (hereinafter "third party information"). In addition, certain statutes restrict the dissemination of information regarding

employees of certain U.S. government entities (See, e.g., 50 U.S.C. § 403g). Such information should not be produced to the OIG. (U)

From a production logistics perspective, few FBI files outside of the national security area will include such information. When FBI investigative files are requested, the FBI will determine whether or not there is any specific reason to suspect that a requested file contains information provided by another government agency or the name of an employee that cannot be disclosed. If not, the file will not be reviewed to search for such information. (U)

L. Source Information (U)

If the OIG requests access to or documents from an FBI source file, the request must be approved by the relevant FBI SAC or his or her designee. See Attorney General Guidelines Regarding the Use of FBI Confidential Human Sources at I.D.4.a.ii. Moreover, the FBI Confidential Human Source Policy Manual requires that the disclosure be documented in the source's main file. See Confidential Human Source Policy Manual POL07-0004-DI (Revised September 5, 2007). (U)

The OIG may have access to source reporting that is contained in FBI investigative files without such approval. During civil litigation and in response to FOIA requests, the FBI withholds such information from disclosure it if would tend to identify the informant. Because the OIG is part of the Department, there is no reason to suspect that it will attempt to piece together disparate pieces of information in order to identify an FBI informant. Thus, if the information at issue is available generally to FBI employees who have access to ACS, it can also be produced to the OIG. (U)

As noted above, we believe these dissemination restrictions will affect only a small number of OIG document requests. Nonetheless, we are working to enhance our capacity to gather and review requested documents so that we can continue to provide the OIG with the information it needs to carry out its oversight responsibilities. Moreover, as we discussed, I am eager to understand the OIG's position regarding the applicability of the above-discussed restrictions on the dissemination of FBI information. (U)

Very truly yours,

Valerie Caproni

Valerie Caproni
General Counsel

MEMORANDUM

To: Michael Horowitz, Inspector General
From: Andrew Weissmann, General Counsel, FBI
Catherine Bruno, Special Assistant to the General Counsel, FBI CAB
Re: Legal restrictions on dissemination of FBI information to the Department of Justice Office of the Inspector General (OIG) for OIG criminal investigations
Date: February 29, 2013

I. (U) Background

(U) The Memorandum is provided as a follow-up to our meeting on February 22, 2013, at which we discussed OIG access to FBI information. The FBI understands that the OIG, by virtue of its statute and mission, is generally entitled to broad access to information that is within the possession of the FBI. 5 U.S.C. App. 3 § 6(a). Section 6(a)(1) of the Inspector General Act states that, "[E]ach Inspector General . . . is authorized – to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under the Act . . . ." Id. In the fall of 2011, the OIG raised concerns to the Office of the Deputy Attorney General (ODAG) regarding the level of access to certain categories of information DOJ components were providing to OIG. Upon ODAG request, the FBI provided ODAG with a memorandum describing the categories of information that the FBI determined may be subject to legal restrictions on dissemination to the DOJ OIG. See Memorandum from P. Kelley, Acting General Counsel, FBI, to ODAG (October 5, 2011) (hereinafter "October 2011 Memorandum") (Attachment A).

(U) This memorandum specifically addresses the scope of OIG access to those previously-identified categories of FBI information when the OIG is conducting a criminal investigation. Even when the OIG is exercising its criminal investigative authority (rather than pursuing an administrative misconduct investigation, audit, inspection, or program review) some legal restrictions limit the FBI's ability to release information to the OIG. In most instances, however, the FBI can produce the restricted information to the OIG for use in its criminal cases after the FBI or the OIG have followed the appropriate process for obtaining access (for example, seeking permission from the court for information that is under seal), as described below.

(U) In this memorandum, we first address the categories of information identified in the FBI's October 2011 Memorandum where, if requested in connection with an OIG criminal case, there are no restrictions on dissemination. We then address those categories of information identified in the FBI's October 2011 Memorandum where, even where the OIG is conducting a criminal case, the restrictions on dissemination may apply.

II. (U) Categories of Information Not Subject to Restriction on Dissemination where the OIG is Pursuing a Criminal Case

A. (U) Title III Information

(U) Section 2511(1)(e) of Title 18 generally prohibits a person from disclosing what that person knows to be material collected from a wiretap ("Title III information"). Section 2517(1), however, permits the disclosure of Title III information from "one investigative or law enforcement officer . . . to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. § 2517(1). Section 2517(2) allows for an investigative or law enforcement officer to make use of Title III information "to the extent such use is appropriate to the proper performance of his official duties." Therefore, where the OIG is pursuing a criminal case, there is no restriction on dissemination of Title III information from the FBI to the OIG.

B. (U) Federal Juvenile Court Records

(U) The Juvenile Delinquency Act, 18 U.S.C. § 5038(a)(3) states that "Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances: . . . (3) inquiries *from law enforcement agencies where the request for information is related to the investigation of a crime* or a position within that agency." (Emphasis added). Thus, the OIG may have access to such information as part of its criminal investigatory function to which the records are relevant.

C. (U) Bank Secrecy Act Information

(U) Information obtained pursuant to the Bank Secrecy Act (BSA) (31 U.S.C. § 5311 et. al.) from the Financial Criminal Enforcement Network (FINCEN) is prohibited from disclosure except in compliance with applicable memoranda of understanding between the FBI and FINCEN. However, FINCEN's Office of General Counsel's Office has stated to the FBI Office of General Counsel that such information may be shared with the OIG where the OIG is conducting a criminal case. Therefore, the FBI may provide information from FINCEN that is protected by the BSA to the OIG for its criminal cases.

D. (U) Source Identifying Information

(U) The Attorney General Guidelines Regarding the Use of FBI Confidential Human Sources ("AGG-CHS") generally prohibits the disclosure of "the identity of any Confidential Human Source or information that the source has provided that would have a tendency to identify the Source," though there are exceptions, one of which is applicable. Specifically, DOJ personnel may make appropriate disclosures to "other law enforcement, intelligence, immigration, diplomatic, and military officials who need to know the identity to perform their official duties, subject to prior approval of the FBI-SAC or his or her designee." Thus, pursuant to the AGG-

CHS, if the OIG is acting in a law enforcement capacity and demonstrates a need to know, then the FBI may produce documents which identify or provide information which tends to identify a CHS to the OIG, subject to the approval of the FBI-SAC or his designee.

III. (U) Categories of Information that May be Subject to Restriction on Dissemination where the OIG is Pursuing a Criminal Case

A. (U) Grand Jury Information

(U) Rule 6(e) of the Federal Rules of Criminal Procedure generally prohibits government officials from disclosing information about any matter occurring before grand jury. The rule, however, contains some exceptions which may apply to the OIG's access in criminal cases.

i. (U) Disclosure to assist attorney in performing duty to enforce criminal law

(U) An individual otherwise restricted from disclosing grand jury information may provide such information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(a)(ii). This exception does not authorize the FBI to provide the OIG with all 6(e) information from FBI records whenever the OIG requests 6(e) information during the course of a criminal investigation. Rather, the OIG must seek appropriate authorization – either from the prosecutor assigned to the case in which the 6(e) information was obtained, or from the Attorney General as part of his general supervisory authority.[1] Disclosure based on this exception also requires court notification. See Fed. R. Crim. P. 6(e)(3)(B).

ii. (U) Disclosure to assist attorney in performing intelligence-related duties

(U) "An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence . . . or foreign intelligence information . . . to any federal law enforcement . . . official to assist that official receiving the information in the performance of that official's duties." Fed. R. Crim. P. 6(e)(3)(D). When the OIG seeks to avail itself of this exemption, the determination that the Grand Jury matter involves foreign intelligence or counterintelligence information must still be made by an attorney for the government. Disclosure based on this exception also requires court notification. See Fed. R. Crim. P. 6(e)(3)(d)(ii).

iii. (U) Disclosure with leave of court

(U) In addition to access granted by a government attorney, Rule 6(e) allows the court that empanelled the grand jury to authorize disclosure of grand jury material. "The court may authorize disclosure . . . preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E). This exemption, too, would require the OIG to obtain such specific permission before the FBI would be authorized to release the information.

[1] (U) This position is consistent with oral guidance OLC provided to the FBI in April 2012. See Notes of Mtg. between FBI and OLC (Apr. 11, 2012) (Attachment C).

B. (U) Federal Tax Information

(U) Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, prohibits a federal employee from disseminating federal tax return or return information (FTI) obtained directly from the Internal Revenue Service (IRS), or from another agency that originally received the information from the IRS, except in limited circumstances. One permissible circumstance is that FBI employees may share such tax information with other "officers and employees of any Federal agency who are personally and directly engaged in" an investigation directly relating to tax liability. *See* 26 U.S.C. § 6103(h)(2). Standing alone, the fact that the OIG is conducting a criminal investigation is not sufficient to permit the FBI to categorically provide the OIG access to such tax information. In order to obtain the information, the OIG would need to establish that the OIG employees receiving the information are personally and directly engaged in the investigation for which the records were initially and appropriately obtained. This information is also subject to strict handling controls, so it can easily be identified and is, generally speaking, already segregated from non-FTI material.

C. (U) Individual-Capacity Attorney-Client Information

(U) Most often FBI attorneys' attorney-client relationship and corresponding privilege runs on behalf of the organization. We understand that sharing such "official-capacity" attorney-client information with the DOJ OIG does not constitute a waiver of attorney-client privilege. Such information is therefore not restricted from dissemination to the OIG for its criminal cases (though the OIG is restricted from disclosing the information outside the Department of Justice without prior consultation).

(U) In some cases, however, such as when an individual FBI employee is sued for official actions, an FBI attorney's attorney-client relationship and corresponding privilege does extend to an individual FBI employee. Such "individual capacity" attorney-client information is subject to the standards set forth in 28 C.F.R. §§50.15 and 50.16 and 28 U.S.C. § 517. The attorney and the employee enter into a "traditional attorney-client relationship" and the information relating to the representation is covered by attorney-client confidentiality rules. See, generally, Individual Capacity Representation of Federal Employees in Civil and Criminal Proceedings: Process, Procedures, Ethical Considerations and Professional Responsibility Concerns, Constitutional & Specialized Torts Staff, Civil Division, Torts Branch (July 2010) at page 4 (hereinafter "Individual Capacity Manual"). The information subject to the privilege includes communications between the attorney and the employee, as well as "confidential information about a client from any source." See Individual Capacity Manual at 34.

(U) The scope of the protection for individual-capacity attorney-client information is broad. The attorney-client relationship commences with the request for representation and applies to communications made for the purpose of securing representation. Id. at 30. The obligation to safeguard privileged or other confidential client information remains "in perpetuity" and the information must therefore be protected not only while the case is active but also after its disposition. Id. at 35. Because these protections exist whether the OIG is conducting a criminal

or non-criminal investigation, where the OIG requests information from the FBI relating to a matter in which an FBI attorney has handled a request for individual representation or has represented an individual in his or her individual capacity, the FBI attorney handling the matter must be consulted and all individual capacity attorney-client privileged information must be withheld.

D. (U) Child Victim or Child Witness Information

(U) The release of information concerning the identities of child victims or child witnesses is restricted by the *Child Victim and Witnesses Information Act*. 18 U.S.C. § 3509. Government employees may only disclose documents containing information about a child victim or witness as described in the statute to individuals who have a need to know such information "by reason of their participation in the proceeding" in which the documents arise. 18 U.S.C. § 3509(d)(1)(A)(ii). Therefore, release to the OIG should be limited to those who have a need to know the information in the performance of official duties related to the particular investigation or prosecution in which the child is a victim or witness. Alternatively, the relevant court may order disclosure if "disclosure is necessary to the welfare and well-being of the child." 18 U.S.C. § 3509(d)(4). Accordingly, the OIG is not entitled to access such information simply because the OIG is investigating a different criminal matter. The FBI may only provide such information to the OIG for its criminal cases where the OIG employees to whom such information would be released meet the statutory requirement for access or have obtained a court order permitting disclosure.

E. (U) Patient Medical Information

(U) Executive Order 13181 restricts the derivative use of protected health information obtained from the provider by all federal agencies including federal law enforcement personnel. Executive Order 13181 provides that "law enforcement may not use protected health information concerning an individual that is discovered during the course of health care oversight activities for unrelated civil, administrative, or criminal investigations of non-health care oversight matters." The Deputy Attorney General (DAG) must approve any use of such information to pursue a non-health-care-oversight investigation. See EO 1381 § 3(b). The DAG may only grant such approval if disclosure is in the interest of the public and would outweigh the potential injury to the patient. Id. Accordingly, the FBI may provide such information to the OIG for its criminal cases after the DAG has approved the disclosure.

(U) Information obtained by patient consent, court order or subpoena, has certain limitations regarding the purpose for which the information will be used. Title 18 U.S.C. § 3486(e)(2) provides that "[h]ealth information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health . . ." In addition, health records obtained pursuant to a court order for oversight purposes can be used against that patient upon a finding by the court of "good cause" such that the need for disclosure outweighs the potential for injury to the patient and the doctor-patient relationship. Thus, where the OIG seeks

information for use in criminal cases that are directly related to receipt of health care or payment for health care, or action involving a fraudulent claim related to health, the FBI may provide the information. Otherwise, the OIG may obtain permission from the court to use the information in its criminal cases.

(U) As discussed at more length in our October 5, 2011 Memorandum to ODAG (Attachment A), psychotherapy notes and substance abuse patient medical records also have very stringent protections on confidentiality. *See also* 42 C.F.R. §§ 2.1, 2.13, 2.32 and 42 C.F.R. Chapter 1, subchapter A, Part 2; 45 C.F.R 164.508(2). In some instances, however, such information may also be disclosed pursuant to a court order for OIG criminal cases. *See e.g.*. 42 C.F.R. § 2.1(b)(2)(C).

(U) In sum, if the OIG requests materials for its criminal cases that contain individually identifiable patient medical information, the disclosure of such information must comport with these statutory restrictions.

F. (U) Credit Information Obtained for Counterintelligence Purposes

(U) Under the *Fair Credit Reporting Act* (FCRA), the FBI may obtain names of financial institutions with which the consumer maintains or has maintained an account or consumer identifying information for counterintelligence purposes. *See* 15 U.S.C. §1681u(a) & (b). The FBI, however, "may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation." 15 U.S.C. § 1681u(f). Where the Deputy Attorney General determines that OIG access in a particular case is necessary for the approval or conduct of a foreign counterintelligence investigation, the FBI may provide such access. We are aware of at least one instance where ODAG made such a determination with respect to a non-criminal OIG matter (See Ltr. From DAG Cole to Acting IG Schnedar (undated) at Attachment D). Thus, in an OIG criminal investigation the OIG may seek access to such information from ODAG if the statutorily required basis can be sustained.

G. (U) FISA Information

[redacted]

i. (U) FISA-acquired electronic surveillance and physical search provisions

[redacted]

[redacted]

ii. (U) FISA-acquired tangible things of a United States Person

[redacted]

H. (U) Intelligence Community Information

[redacted]

[redacted]

[redacted]

[redacted]

[3] [redacted]

[4] (U) While the order's definition of "agency" may be broad enough to encompass the entirety of the Department of Justice (DOJ), *see* E.O. 13526 § 6.1(b), such a reading in the context of Section 4.1(i) would mean that, whenever the FBI receives classified intelligence information from another U.S. government agency, the information would effectively be deemed to have been "made available" to every component of DOJ, to include the OIG, the Bureau of Prisons, the U.S. Marshal's Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, among others. Such a presumption does not comport with the ordinary expectations within the government's intelligence information-sharing environment.

[redacted]

I. (U) Foreign Government or International Organization Information

[redacted]

J. (U) Information Subject to Memoranda of Understanding or Non-Disclosure

(U) The FBI often obtains information or access to databases through Memoranda of Understanding (MOU) or non-disclosure agreements (NDA) with other federal, state, or local agencies, from foreign governments, and from private parties. These MOUs or NDAs may, depending on their terms, impose restrictions on the FBI sharing information with entities outside the FBI, including the OIG. If such information was provided to the FBI in a manner that precludes dissemination to the OIG for its criminal cases, the FBI could work with the entity that provided the information to the FBI to reach agreement on providing the information to the OIG. In addition, going forward, the FBI can include in its MOUs explicit language permitting sharing with the DOJ OIG.

K. (U) Information Restricted by Court Order

(U) The FBI occasionally comes into possession of information that is subject to a court order restricting dissemination to certain individuals or entities. The terms of the court order may not permit FBI dissemination to the OIG for a criminal investigation without prior authorization. In such a case, the FBI could request that the court grant access to the OIG for use in a criminal investigation.

III. (U) Conclusion

(U) Even when the OIG is exercising its criminal investigative authority (rather than pursuing an administrative misconduct investigation, audit, inspection, or program review) some legal restrictions limit the FBI's ability to release information to the OIG. In most instances, however, the FBI can produce the restricted information to the OIG for use in its criminal cases after the FBI or the OIG have followed the appropriate process for obtaining access. We look forward to working with your office to put into place procedures that will provide timely and complete OIG

access to FBI information for all OIG matters, while maintaining appropriate controls to ensure compliance with legal restrictions on dissemination for certain categories of information, as described above.