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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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February 26, 2015

**VIA ELECTRONIC TRANSMISSION**

The Honorable James B. Comey  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Ave., N.W.  
Washington, D.C. 20535

Dear Director Comey:

Section 218 of the 2015 Department of Justice Appropriations Act provides as follows:

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice *timely* access to *all* records, documents, and other materials in the custody or possession of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days any failures to comply with this requirement.<sup>1</sup>

This month, the Justice Department's Office of the Inspector General (OIG) has submitted *three* such reports, each noting a failure of the Federal Bureau of Investigation (FBI) to provide the OIG with timely access to records.<sup>2</sup> According to the OIG, the records were sought in connection with its review of (1) the FBI's use of information collected by the National Security Agency; (2) the Drug Enforcement Administration's use of administrative subpoenas to obtain and utilize certain bulk data collections; and (3) two FBI whistleblower complaints.<sup>3</sup>

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<sup>1</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, (2014), at Div. B, Title II, Sec. 218 (emphasis added).

<sup>2</sup> Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 3, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 19, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 25, 2015).

<sup>3</sup> *Id.*

The OIG reports that the FBI failed to meet deadlines to produce a portion of these records for the “primary reason” that the FBI “desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access.”<sup>4</sup> Further, the OIG states that the FBI “informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG.”<sup>5</sup>

However, under the statute, the Attorney General’s blessing on the Inspector General’s work is not required. That is the essence of independence. In certain limited circumstances, the law does allow the Attorney General to “prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena.”<sup>6</sup> Yet, the Attorney General is required to provide written notice to the Inspector General of the reasons for doing so, and the Inspector General must forward a copy of that written notice to Congress.<sup>7</sup>

The current practice is the opposite of the procedure dictated by the statute. Under the Inspector General Act (IG Act), the Attorney General is required to write to the Inspector General not when *permitting* access to records, but—precisely the opposite—when *denying* the authority to conduct a review. In other words, the burden is placed on the Attorney General to explain in writing why an Inspector General review should *not* proceed, not *vice versa*. The Department’s current practice, however, shifts that burden on to the Inspector General by requiring him to justify his inquiry and obtain the blessing of the Attorney General to proceed, even though his right of access is already clearly established by statute.

Imposing a requirement not found in the statute for written permission from the Attorney General *before* granting access to records unnecessarily delays the work of the OIG. It also circumvents the oversight authority with regard to such disputes, which Congress explicitly reserved for itself through the reporting requirement.<sup>8</sup> This is because inaction in response to a document request allows the Department’s leadership to indefinitely deny or delay a review sought by the OIG under its statutory right of access, without having to report to Congress.

Moreover, Section 218 plainly contemplates that OIG shall have access “to *all* records, documents, and other materials,” subject to the sole limitation of Section 6(a) of the IG Act.<sup>9</sup> Section 6(a) does not limit the OIG’s access to the categories of records the FBI has identified. Accordingly, the FBI appears to be engaging in a continuing pattern of violating the restriction on appropriations in Section 218.

Please respond to the following by March 20, 2015:

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. App. § 8E(a)(1), (2).

<sup>7</sup> 5 U.S.C. App. § 8E(a)(3).

<sup>8</sup> 5 U.S.C. App. § 8E(a)(3).

<sup>9</sup> See note 1, *supra* (emphasis added).

1. Please provide to this Committee a detailed description, in the nature of a Vaughn index, of each record withheld and referenced in the three Section 218 reports that the OIG submitted to the Committees on Appropriation in February 2015, including (a) the date of the document, (b) the number of pages, (c) all sender, recipient, and subject matter designations on the document, and (d) the unit or division of the FBI and the official in possession of the records at the time of the OIG request.
2. In total, what is the amount of the appropriated funds expended to fund the FBI's "review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access" in each of these three cases?
3. Who at the FBI has been conducting the "review[s] of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access" in each of these three cases?
4. Are the FBI employees conducting these reviews paid with Congressional appropriations? If not, what is the source of funding for their activities? If so, then please explain how such reviews can occur without violating the Antideficiency Act<sup>10</sup> in each of these three cases?

Should you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary

cc: The Honorable Michael E. Horowitz  
Inspector General  
U.S. Department of Justice

The Honorable Patrick Leahy  
Ranking Member  
Senate Committee on the Judiciary

The Honorable Karl R. Thompson  
Acting Assistant Attorney General  
Office of Legal Counsel, U.S. Department of Justice

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<sup>10</sup> 31 U.S.C. § 1341.

The Honorable Harold Rogers  
Chairman  
Committee on Appropriations, U.S. House of Representatives

The Honorable Nita Lowey  
Ranking Member  
Committee on Appropriations, U.S. House of Representatives

The Honorable Thad Cochran  
Chairman  
Committee on Appropriations, U.S. Senate

The Honorable Barbara Mikulski  
Vice Chairwoman  
Committee on Appropriations, U.S. Senate

The Honorable Jason Chaffetz  
Chairman  
Committee on Oversight and Government Reform, U.S. House of Representatives

The Honorable Elijah Cummings  
Ranking Member  
Committee on Oversight and Government Reform, U.S. House of Representatives

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary, U.S. House of Representatives

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary, U.S. House of Representatives

The Honorable John Culberson  
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Subcommittee on Commerce, Justice, Science and Related Agencies  
Committee on Appropriations, U.S. House of Representatives

The Honorable Chaka Fattah  
Ranking Member  
Subcommittee on Commerce, Justice, Science and Related Agencies  
Committee on Appropriations, U.S. House of Representatives

The Honorable Richard Shelby  
Chairman  
Subcommittee on Commerce, Justice, Science, and Related Agencies  
Committee on Appropriations, U.S. Senate

The Honorable Barbara Mikulski  
Ranking Member  
Subcommittee on Commerce, Justice, Science, and Related Agencies  
Committee on Appropriations, U.S. Senate

The Honorable Rob Portman  
Chairman  
Permanent Subcommittee on Investigations  
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security and Governmental Affairs, U.S. Senate