

OLC UNDERMINES DOJ INSPECTOR GENERAL INDEPENDENCE

For over a year, DOJ's Inspector General has been trying to ensure it got ready access to things like grand jury materials (this has been pertinent in the Fast and Furious investigation and how DEA and FBI use the latter's dragnet, among other things). As part of this effort, the IG asked OLC to weigh in on whether it should be able to access this information, or whether it needed to ask nicely, as it has been forced to do.

Here's the opinion. Here's the key passage:

In particular, Title III permits Department officials to disclose to OIG the contents of intercepted communications when doing so could aid the disclosing official or OIG in the performance of their duties related to law enforcement, including duties related to Department leadership's supervision of law enforcement activities on a programmatic or policy basis. Rule 6(e) permits disclosure of grand jury materials to OIG if a qualifying attorney determines that such disclosure could assist her in the performance of her criminal law enforcement duties, including any supervisory law enforcement duties she may have. And FCRA permits the FBI to disclose to OIG consumer information obtained pursuant to section 626 if such disclosure could assist in the approval or conduct of foreign counterintelligence investigations, including in the supervision of such investigations on a programmatic or policy basis. In our view, however, Title III and Rule 6(e) forbid disclosures that have either an

attenuated or no connection with the conduct of the Department's criminal law enforcement programs or operations, and section 626 of FCRA forbids disclosures that have either an attenuated or no connection with the approval or conduct of foreign counterintelligence investigations.

And here's OIG's response.

Today's opinion by the OLC undermines the OIG's independence, which is a hallmark of the Inspector General system and is essential to carrying out the OIG's oversight responsibilities under the Inspector General Act. The OLC's opinion restricts the OIG's ability to independently access all records in the Justice Department's possession that are necessary for our audits, reviews, and investigations, and is contrary to the principles and express language set forth in the Inspector General Act.

The opinion also finds that, in adopting Section 218 of the Department of Justice's FY 2015 Appropriations Act, Congress' intent was not sufficiently clear to support independent OIG access to all records in the Department's possession. The OLC's opinion reaches this conclusion even though Congress passed Section 218 "to improve OIG access to Department documents and information" following the Department's failure to independently and timely provide all responsive records to the OIG, and Section 218 explicitly provides that the Department may not use appropriated funds to withhold records from the OIG for reasons other than as expressly provided in the Inspector General Act.

As a result of the OLC's opinion, the OIG will now need to obtain Justice

Department permission in order to get access to important information in the Department's files – putting the agency over which the OIG conducts oversight in the position of deciding whether to give the OIG access to the information necessary to conduct that oversight. The conflict with the principles enshrined in the Inspector General Act could not be clearer and, as a result, the OIG's work will be adversely impacted.

The OIG will immediately ask Congress to pass legislation ensuring that the OIG has independent access to the information it needs for its work. The Attorney General and the Deputy Attorney General have each expressed their commitment to join the OIG in this effort.

Inspector General Michael E. Horowitz stated:

"I strongly disagree with the OLC opinion. Congress meant what it said when it authorized Inspectors General to independently access 'all' documents necessary to conduct effective oversight. Without such access, our Office's ability to conduct its work will be significantly impaired, and it will be more difficult for us to detect and deter waste, fraud, and abuse, and to protect taxpayer dollars. We look forward to working with the Congress and the Justice Department to promptly remedy this serious situation."

[This post has been updated to add the opinion.]