



governmentattic.org

"Rummaging in the government's attic"

Description of document: June 12, 2009 Environmental Protection Agency Inspector General (EPA OIG) response to the Council of the Inspectors General for Integrity and Efficiency (CIGIE) Integrity Committee regarding allegations that investigators assigned to the oversight and special review unit of the EPA were conducting law enforcement functions possibly in violation of the IG Act of 1978

Requested date: 16-December-2012

Released date: 15-February-2013

Posted date: 04-March-2013

Source of document: FOIA Officer
EPA OIG
Mail Code 2411T
Washington, DC 20460-0001
Email: oig.foia@epa.gov
[Online FOIA Request Submission Form](#)

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 15 2013

OFFICE OF
INSPECTOR GENERAL

Re: Freedom of Information Act Request (EPA-HQ-2013-002269)

This letter responds to your Freedom of Information Act (FOIA) request dated December 16, 2012, seeking disclosure of "a copy of the June 12, 2009 response to the CIGIE Integrity Committee regarding allegations that investigators assigned to the oversight and special review unit of the EPA were conducting law enforcement functions possibly in violations of the IG Act of 1978." The document responsive to your request is enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions concerning this matter, you may contact Scott Levine, OIG FOIA Officer at (202) 566-0641.

Sincerely,

A handwritten signature in black ink that reads "Katherine R. Gallo".

Katherine R. Gallo
Senior Associate Counsel

Enclosures
cc: FOIA Office



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

June 12, 2009

Mr. Kenneth W. Kaiser
Chair, Integrity Committee
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W., Rm. 3973
Washington, DC 20535-0001

Re: IC 603

Dear Mr. Kaiser:

Thank you for your April 16, 2009 letter seeking my response to an allegation that I "violated the Inspector General Act of 1978 by assigning investigators under the supervision of the Oversight and Review Unit to perform law enforcement functions." On May 21, 2009, Supervisory Special Agent Scott B. Cheney provided my office with additional information about the anonymous complaint. He also afforded my office an extension of time for our reply. We appreciate his consideration in providing some specifics and the additional time to reply.

I strongly dispute the allegation. My office has used concerted efforts to ensure the propriety and efficacy of the Oversight and Special Review (OSR) function with the EPA OIG Office of Counsel (OC). This has been an ongoing process which, when considered in total, demonstrates compliance with the Inspector General Act of 1978 as amended (IG Act).

This response covers four areas: 1) the factual errors in the complaint; 2) the reasons why I established an OSR function in the OC; 3) the good faith effort we demonstrated to ensure that the special agents assigned could perform their responsibilities with appropriate authority and supervision; and 4) similar arrangements for special agents outside of offices of investigation in other OIGs.

I. Factual Errors in the Complaint

Your April 16, 2009 letter provided the following description of the complaint:

You violated the IG Act of 1978 by assigning investigators under the supervision of the Oversight and Special Review Unit, to perform law enforcement functions.

On May 21, 2009, SSA Cheney provided the following summary:

In May 2007, four criminal investigators were assigned to the EPA Office of Counsel to conduct administrative, civil and criminal employee investigations under the direct supervision of Associate Deputy Inspector General and General Counsel (GC) Mark Bialek. Three of the four were later transferred in mid 2008 to a newly established Oversight and Special Review Unit where they conduct law enforcement functions in violation of the IG Act of '78. The complaint contends neither a legally sufficient Memorandum of Understanding transferring law enforcement authority to the GC's office from the Assistant Inspector General for Investigations office nor U.S. Marshall Service deputization was in place during periods of time that investigators were carrying firearms and conducting criminal investigations, potentially in violation of federal, state and/or local law, as well as the IG Act of '78. These actions were allegedly taken with Deputy IG Bill Roderick's knowledge.

The anonymous complaint contains at least three factual errors.

1. In May 2008, (not 2007) I approved a plan for investigators to be assigned to the OC. The initial plan was for two special agents to perform internal OIG investigations (of OIG employees) and investigations of high-level agency employees (GS 15s and above). Later in the summer of 2008, I changed the plan to include all EPA employee investigations and to assign a total of four special agents to the OC to do the work.
2. One agent was reassigned and one was detailed to the OC on September 14, 2008. Two more were reassigned on September 28, 2008.
3. Mark Bialek is Associate Deputy Inspector General and Counsel, not General Counsel.

II. Why I Established an Oversight and Special Review Function in the Office of Counsel

In an effort to provide context to this matter, I believe it is significant to understand how and why OSR was established. By assigning special agents to the OC, all EPA employee investigations were centralized in the OC. I was persuaded to make this change because:

1. OC attorneys and the IG Counsel have traditionally been closely involved with most employee integrity investigations. It has been the longstanding practice of the OIG that Counsel supervises the conduct of any internal investigation of an OIG employee and is usually involved when high-level agency employees are investigated. Placing special agents within the OC facilitates attorney participation and guidance in these employee investigations.

2. Separating employee investigations from traditional program fraud cases also made practical sense. I wanted to have the OIG Office of Investigations (OI) almost entirely focused upon financial fraud issues (like grant and contract fraud); transferring the employee integrity workload to OSR would enable OI to focus on those financial fraud matters.
3. Although the close working relationships OI has established with EPA assisted with the investigation of program and financial fraud, greater distance and independence is needed for the conduct of investigations of agency employees.
3. Investigations of all EPA employees are handled by this unit, not just high-level agency employees or internal OIG employees. The skill set needed to conduct employee cases can be further developed and concentrated in one organizational unit.

In addition, I approved the plan to reassign special agents to the OC because I maintain the highest level of trust and confidence in the Associate Deputy Inspector General and Counsel, Mark Bialek. I had served as Deputy Inspector General for only four months when the former Inspector General, Nikki Tinsley, decided to retire. At that time in 2006, Mr. Bialek was the Counsel but I came to rely upon him on a daily basis to assist me with the management and planning for the EPA OIG, with a particular focus on our Office of Investigations. Eventually, I insisted upon changing his title to include Associate Deputy Inspector General to reflect the role he plays within the organization.

III. My Office Used Good Faith Efforts to Ensure That the Agents Assigned Could Function and Have Appropriate Authority

A. Planning for OSR

In May 2008, I approved a plan which would reassign two special agents from the OI to the OC to conduct investigations of high level agency employees and OIG employees. During the summer, I modified the plan to expand their responsibility to include all EPA employee investigations and increased the number of special agents from two to four. I told the Associate Deputy Inspector General and Counsel to initiate the necessary administrative steps to accomplish this transfer with a target date of October 1, 2008.

During the summer, the special agent team leader worked closely with Counsel on several investigations. The OC developed position descriptions and requests for personnel actions, organization charts, budget proposals, procurement plans, and received training in access to the case management information system. All of the policies and procedures governing the conduct of investigations were reviewed and the OSR team leader agreed with OC's determination that the reassigned special agents must continue to follow all existing policies and procedures for OI.

B. Preparation of an MOU for EPA OIG

The OC researched similar arrangements in other OIGs (See part IV) and on August 25, 2008, obtained a copy of a Memorandum of Understanding (MOU) used by the

Department of Justice (DOJ) OIG. In 2004, the DOJ OIG had established an Oversight and Review unit with several 1811 special agents, supervised by an attorney, to conduct investigations of high level DOJ employees. We used this MOU as guidance and tailored it to clarify the roles of the Assistant Inspector General for Investigations (AIG/I) and Counsel. See *Enclosures 1 and 2*. In essence, the role of the AIG/I was to assure that all agents assigned or detailed to OC comply with training and qualification requirements of the Attorney General Guidelines.

On or about September 14, 2008, the team leader for OSR was transferred to OC and one agent was detailed to OC as well. Approximately two weeks later, two additional agents were transferred to OC. The unit was named by its function: "Oversight and Special Review," like the name of the DOJ unit. Cases that involved EPA employee integrity issues were transferred to OSR over the next several months although a few cases did to remain with OI.

On September 18, 2008, during a meeting between the OC and OI to discuss budget implications of reassigning three agents, the first version of an MOU was shown to the AIG/I. See *Enclosure 2*. The AIG/I raised concerns about the performance evaluation of any agents detailed to the new unit and about the supervision of law enforcement authority. The Deputy Counsel to the Inspector General, Helen Mollick, agreed to modify the MOU to reflect OIG policy concerning employees on details and to consult with DOJ about the proposed arrangement.

In the following weeks, Deputy Counsel Mollick telephoned an official in the Office of Legal Counsel (OLC), David Karp, at the suggestion of the DOJ OIG Counsel. It took several weeks for him to inform her that he did not have responsibility in this area. While she had obtained the name of an attorney in the Criminal Division's Office of Enforcement Operations on or about September 18 from a colleague in the HHS OIG, she did not contact him until late November, after the contacts with the OLC had proven fruitless.

In the meantime, the MOU was modified to address the performance evaluation of detailed agents as raised by the AIG/I, but the language concerning the supervision of law enforcement authority was not changed in the MOU. The Deputy Counsel presented the modified MOU to the AIG/I for signature on October 8, 2008, during a discussion of other operational issues. He did not sign it. Finally, the revised MOU was again presented to the AIG/I on October 15, 2008 with the signatures of both the Deputy Inspector General and the Associate Deputy Inspector General and Counsel, Messrs. Roderick and Bialek, respectively. See *Enclosure 3*. Again, the AIG/I did not sign the MOU.

C. Seeking DOJ Review and Advice

On or about the middle of November, after being informed that DOJ OLC did not have responsibility in this area, Ms. Mollick initiated contact with the Office of Enforcement Operations in the Criminal Division of DOJ. Beginning November 20, 2008, she engaged in a series of email exchanges with Jeffrey Fogel, an attorney in the office who was represented as the expert on law enforcement authority. She shared the revised

MOU as well as the DOJ OIG MOU for his review. Based on his review of these documents, Mr. Fogel opined that EPA OIG had engaged in a good faith effort to comply with the requirements of the IG Act with respect to the exercise of law enforcement authority by OSR agents while meeting a legitimate operational goal of the OIG. He also thought it might be possible that, in the context of a trial, defense counsel might argue for the suppression of evidence gained by the agent's exercise of law enforcement authority and suggested several alternative courses of action that might prevent such a possibility. (All of the email exchanges are provided herein as See *Enclosure 4*.) At no time did Mr. Fogel state, suggest, or otherwise inform Ms. Mollick that the revised MOU was legally insufficient. EPA OIG decided to follow one of Mr. Fogel's suggestions and sought deputation from the United States Marshals Service (USMS).

D. Seeking U.S. Marshals Service Deputation

On December 19, 2008, OIG hand-delivered a written request for deputation to the USMS that included applications for four special agents, and enclosed each agent's law enforcement qualifications. See *Enclosure 5*. Since December 2008, OC has contacted the USMS several times to inquire as to the status of the request. During January 2009, OC was informed that USMS did not see any legal deficiencies with our arrangements or the exercise of statutory law enforcement authority. In February 2009, they forwarded our request to the Office of the Deputy Attorney General for review. OC has also contacted David Margolis of that office to inquire about the status of the request and was advised that no determination or decision has been issued as of this date. See *Enclosure 6*.

E. The Conduct and Performance of the Special Agents Assigned to the Office of Counsel

From the time the special agents were reassigned and the OSR function was established within the OC, the special agents have adhered to all OI policies and procedures. They have paid particular attention to their compliance with all of the requirements of the Attorney General guidelines. They have maintained their legal and practical training; they have qualified on a quarterly basis with their firearms; and they have submitted all of the certifications required by policy and guidance. See *Enclosure 7*. Their conformance to these requirements has continued to be maintained in the same electronic internal case management system that the agents used when they were assigned to OI.

The special agents have conducted employee integrity investigations as contemplated by their reassignment. They have not had the operational need to execute either an arrest or search warrant. However, they have carried their firearms, as needed, as part of their regular responsibilities. As noted above, they have qualified on a quarterly basis and have gone to the range at times with their fellow agents from the OI. None of the OSR agents has had the need to discharge his weapon at any time since assigned to OSR or previously in OI.

IV. Other OIGs with Statutory Law Enforcement Authority Have Similar Arrangements as EPA OIG

My decision to assign special investigators to OC is consistent with actions and organizational arrangements taken by several other OIGs that have statutory law enforcement authority.

1. As noted above, DOJ has an Oversight and Review (O&R) office with special agents reporting to an attorney. The AIG/I does not supervise the day-to-day work of O&R agents, but the relationship between OI and O&R is cooperative and O&R agents consult with OI agents when they are considering the exercise of law enforcement activities because, for example, the OI agents execute more search warrants. In addition, the O&R agents attend the same training programs, qualify with their firearms, and file the same qualification and training certifications with OI as the agents assigned there do.
2. At least two additional OIGs now have special agents assigned outside of their offices of investigation.¹ In each of these OIGs, the outside unit has a "dotted-line" reporting relationship to the AIG/I to ensure that the law enforcement qualifications set forth in Section 6e of the IG Act are satisfied. Like the O&R agents at DOJ, the special agents in these other OIGs attend the same training programs, qualify with their firearms, and file the same qualification and training certifications as the other agents assigned to OI. Because of the dotted-line reporting relationship, in each of these OIGs, the AIG/Is do not have any direct role in supervising the non-OI agents and do not sign their performance appraisals. Their role is limited to assuring that the training and qualification standards for the agents outside of their offices of investigation are met.
3. Two other OIGs follow the same dotted-line approach to ensure that their agents are in compliance with 6e despite the fact that these two OIGs have statutory law enforcement authority from statutes other than the IG Act. The special agents assigned outside of OI in these two OIGs likewise adhere to all OI policies relating to law enforcement qualifications and file the same qualification and training certifications with their respective AIG/Is as the agents assigned to OI.
4. Another OIG has assigned agents to a function that is, for all intents and purposes, the same as EPA's OSR, but these agents report to an AIG for Inspections and Special Investigations, who is not the AIG/I. This OIG also has program operating responsibilities for additional law enforcement activities that encompass criminal violations other than program fraud or employee integrity. For the purpose of maintaining their law enforcement authority to pursue these violations, this OIG maintains a deputation MOU with the US Marshals Service.
5. Lastly, at least one other OIG contemplated moving some special agents out of their office of investigation but they did not do so. Nonetheless, it considered a

¹ One other OIG had an agent outside of its OI, but eliminated that position for budgetary reasons.

"dotted-line" to the AIG/I for agents outside of OI to satisfy the IG Act requirements regarding law enforcement authority.

As these examples demonstrate, several OIGs have AIG/Is who have dotted-line supervisory authority for purposes of satisfying the law enforcement authority requirements of the IG Act. This means that AIG/Is do not have any direct supervisory role in supervising the non-OI agents and do not sign their performance appraisals; their role is limited to assuring that the training and qualification standards for the non-OI agents are met. Finally, one of these OIGs, DOJ, has an MOU formalizing this role.

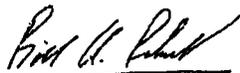
V. Analysis and Conclusion

Over the past year, my office has exercised caution and care in moving an important employee integrity function from the OI to the OC. We researched and consulted with other OIGs and modeled our actions to what had already been undertaken elsewhere in the OIG community. We subsequently confirmed that several other OIGs had criminal investigators who did not report to an AIG/I for their day-to-day work. Out of an abundance of caution and in order to address questions raised by the AIG/I, we followed the model of one of the premiere OIGs (at the DOJ) and developed an MOU to establish appropriate supervision for the exercise of law enforcement authority as mandated by the IG Act and the AG Guidelines. When the AIG/I would not sign the revised MOU, we sought the advice of the DOJ on an appropriate course of action and took the additional cautious route of seeking USMS deputation. During this time the Deputy Counsel and the OSR team leader confirmed that all of the agents involved have adhered to all internal and external policies for the exercise of law enforcement authority.

Notwithstanding my belief that OIG has acted appropriately by having OSR agents under the day-to-day supervision of Counsel while we await deputation, I have determined that, in light of the concerns raised in this complaint, I would clarify that my AIG/I is responsible for assuring that the OSR agents are properly trained and qualified to exercise law enforcement authority, including making arrests, executing searches and seizures, and carrying firearms. See *Enclosure 8*. On June 1, 2009, the AIG/I was provided with a hardcopy of all the information necessary to verify that the OSR Agents were in compliance with the statutory law enforcement requirements. See *Enclosure 9*. The AIG/I has had access to basically the same information in OI's electronic database since September 14, 2008, when the day-to-day supervision of these agents was taken over by Counsel; thus, if the AIG/I believed he was required by the IG Act to verify compliance by the OSR agents, he could have.

My office has done its best to respond fully and truthfully to this complaint. If you have any questions or concerns about this response, please do not hesitate to contact me at 202/566-2212 or Mark Bialek at 202/566-0861. If we receive any new information from the DOJ, we will let you know immediately.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill A. Roderick", written over a horizontal line.

Bill A. Roderick
Acting Inspector General

Enclosures