

# United States Senate

WASHINGTON, DC 20510

October 6, 2010

## Via Electronic Transmission

The Honorable Janet Napolitano  
Secretary  
U.S. Department of Homeland Security  
3801 Nebraska Avenue, NW  
Washington, DC 20528

Dear Secretary Napolitano:

As Ranking Members of the Senate Committee on Finance, and the Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, we sent a letter on April 8, 2010, to 69 Inspectors General, asking among other things, about any agency interference or resistance to the OIG's oversight work.

The OIGs replied, indicating varying degrees of cooperation with their agencies. We were disappointed to learn that Department of the Homeland Security is among those that have not fully cooperated with the OIG. A copy of the Inspector General's letter is attached for your reference. The Inspector General reported that access issues have been a "longstanding problem" at DHS. The most intractable problem identified by the Inspector General deals with Customs and Border Protection (CBP), Office of Internal Affairs (IA).

According to the Inspector General, CBP IA is engaged in activity that not only is hampering OIG's investigative efforts, but poses serious legal consequences for the entire Department. The OIG believes that CBP IA is operating outside the scope of its legal authority by conducting internal criminal investigations. According to DHS OIG, that authority rests squarely and exclusively with the OIG.

The OIG is concerned that CBP IA has withheld important information from the OIG by not entering it timely, or in some cases entering incomplete information, into a centralized database operated by the Joint Intake Center (JIC). The JIC serves as the intake center for allegations of wrongdoing involving employees of CBP and Immigration and Customs Enforcement (ICE). Failure to properly enter this information could or have caused the following problems:

- **Duplication of efforts:** CBP IA and the OIG may have the same subject under investigation for the same offense. Consequently, investigators may be reviewing many of the same documents, though for different purposes, conducting surveillance of the same individuals, and the like.

- **Confidentiality:** The IG Act prohibits “disclos[ure] [of] the identity of the employee [complainant] without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.” CBP IA has no such legal mandate to protect the confidentiality of complainants, and CBP IA investigators could not credibly be expected to maintain such confidences from their chain of command. OIG investigators, by contrast, report to the IG, who is statutorily independent
- **Reporting to Congress and to the Secretary:** Congress has directed that the Inspector General investigate internal matters and report on conditions affecting the integrity of the workforce to the Secretary and to the Congress. Without knowing what activities CBP IA are involved with, the OIG cannot unequivocally report to Congress and the Secretary the status of DHS.
- **Confusion among Stakeholders:** All DHS employees and external law enforcement partners must be clear that the DHS OIG has the lead on internal affairs criminal investigations. Reportedly managers within CBP have received conflicting instructions as a result of CBP IA directives. Prosecutors and other law enforcement agencies are sometimes unsure of the OIG’s jurisdiction, resulting in miscommunication, poor coordination, and unnecessary delay.

Reportedly coordination problems with CBP IA have existed for many years, but these particular issues have become more pronounced over the last twelve months. To that end we request that you answer the following questions:

- 1) Prior to this letter, were you aware of these examples of interference with the OIG’s oversight function?
- 2) If so, when and how did you become aware of these issues and what steps have you taken to correct the problems?
- 3) If not, what steps do you intend to take to correct the problems?
- 4) In 2008 former Secretary Chertoff issued a memorandum to all DHS employees instructing them about how to cooperate with the OIG. Have you issued any similar memoranda? If so, please provide copies.

Thank you for your cooperation and attention to this important matter. Please provide the request set forth in this letter no later than October 20, 2010. Should there be any questions, please contact Jason Foster on Senator Grassley's staff at (202) 224-4515, or Keith Ashdown on Senator Coburn's staff at (202) 224-3721. All formal correspondence should be sent electronically in PDF format to [Brian\\_Downey@finance-rep.senate.gov](mailto:Brian_Downey@finance-rep.senate.gov) or via facsimile to (202) 228-2131.

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on Finance



Tom Coburn  
Ranking Member  
Permanent Subcommittee on Investigations  
Homeland Security and Governmental Affairs Committee

Attachment

*Office of Inspector General*

**U.S. Department of Homeland Security**  
Washington, DC 20528



**Homeland  
Security**

June 15, 2010

Senator Charles E. Grassley  
Committee on Finance  
United States Senate

Senator Tom Coburn  
Permanent Subcommittee on Investigations  
Homeland Security and Governmental Affairs Committee  
United States Senate

Dear Senators Grassley and Coburn:

I am writing in response to your letter of April 8, 2010, asking, among other items, for instances in which the Department resisted or objected to our oversight activities or restricted our access to information between October 1, 2008, and April 8, 2010. I greatly appreciate your interest in this topic. Unfortunately, this has been a long standing problem at DHS, though progress has been made.

By way of background, in the initial years following creation of the Department, we experienced significant difficulties in securing cooperation. For example, in our audit, *Acquisition of the National Security Cutter*, OIG-07-23 (Jan. 2007), we noted our objection to United States Coast Guard procedures that required, inter alia, that all interviews be scheduled by the audit liaison and that all documents requests be coordinated through the audit liaison. Subsequently, Congress held a hearing on OIG's right of access at which the Department's Under Secretary for Management was required to testify, and ultimately withheld \$15 million from the Department's appropriation "until the Secretary [in consultation with the Inspector General] defines in a memorandum to all Department employees the roles and responsibilities of the Department of Homeland Security Inspector General...." Pub.L. 110-161; 121 Stat 2043 (Dec. 26, 2007). On April 8, 2008, Secretary Chertoff, after consulting with the IG, issued a memorandum to all DHS employees entitled "Cooperation With the Office of Inspector General" that satisfied the Congressional directive. This memorandum was intended to amplify and clarify the OIG's statutory rights of access as reflected in the Inspector General Act of 1978, as amended, and DHS Management Directive 0810.1.

Among other matters, the memorandum strongly endorsed the OIG's mission and unambiguously stated that "all DHS employees [are] to cooperate fully with the OIG..." Delving into specific items that had proven problematic for us, the memorandum explained that "[p]roduction of requested materials should be prompt, and the vast majority of such materials may be produced to the OIG directly and immediately upon request." Even legally privileged materials were identified as appropriate for production to the OIG, though employees were advised that they should consult with their supervisor or the Office of General Counsel if there were concerns about the status of certain materials.

For a period of time following issuance of the Secretary's memorandum, our working relationship with the Department improved and we did not experience any significant resistance or objection to our oversight activities or restrictions on our access to information. Over time, though, we did experience some "bumps in the road," which usually resulted from a lack of understanding by certain component personnel and were resolved relatively quickly. One instance, however, has become intractable, which involves the Customs and Border Protection (CBP), Office of Internal Affairs (IA).

CBP IA is engaged in activity that not only is hampering OIG's investigative efforts, but poses serious legal consequences for the entire Department. We believe that CBP IA is operating outside the scope of its legal authority by conducting internal criminal investigations. That authority, in our view, rests squarely and exclusively with the OIG.

Additionally, we are concerned that CBP IA has withheld important information from the OIG by not entering it timely, or in some cases incompletely, into a centralized database operated by the Joint Intake Center (JIC). The JIC serves as the intake center for allegations of wrongdoing involving employees of CBP and Immigrations and Customs Enforcement (ICE). CBP IA's deficient reporting into the JIC prevents the OIG from asserting its statutory authority over criminal employee misconduct matters.

These actions by CBP IA are causing a number of problems, including the following:

- **Potential Duplication of efforts/burdensome coordination:** CBP IA, either alone or in conjunction with a border corruption taskforce headed by the FBI, may have the same subject under investigation for the same offense. Consequently, investigators may be reviewing many of the same documents, though for different purposes, conducting surveillance of the same individuals, and the like.
- **Confidentiality:** The IG Act prohibits "disclos[ure] [of] the identity of the employee [complainant] without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation." 5 U.S.C. App. 3 § 7(b). CBP IA has no such legal mandate to protect the confidentiality of complainants, and CBP IA investigators could not credibly be expected to maintain such confidences from their chain of command. OIG investigators, by contrast, report to the IG, who is statutorily independent from the Department.

- **Reporting to Congress:** Congress has directed that the Inspector General investigate internal matters and report on conditions affecting the integrity of the workforce to the Secretary and to the Congress. 5 U.S.C. App. § 5 (semiannual report to Congress); Id. at § 2 (purpose of the IG). As Inspector General, I cannot keep the Secretary and the Congress “fully and currently informed” of integrity issues at DHS because I cannot assure myself that I am fully informed of (1) all integrity problems, (2) measures being taken to combat them and (3) whether the measures are succeeding or failing when I lack assurance that CBP IA has shared fully all information in its possession.
- **Reporting to the Secretary:** The Secretary reasonably expects that I identify causes of misconduct, construct countermeasures and measure the success of those countermeasures. Again, it is not possible for my office to study the problem of employee misconduct, much less develop and test the success of countermeasures, with CBP IA operating in a secretive manner.
- **Confusion Among Stakeholders:** All DHS employees and external law enforcement partners, whether it be the United States Attorney’s Office, ICE Office of Professional Responsibility, FBI, DEA, ATF, border corruption task forces, state and local law enforcement, and others -- all must be clear that the DHS OIG has the lead on internal affairs criminal investigations. Managers within CBP have received conflicting instructions as result of CBP IA directives. Prosecutors and other law enforcement agencies are sometimes unsure of the OIG’s jurisdiction, resulting in miscommunication, poor coordination, and unnecessary delay.

Coordination problems with CBP IA have existed for many years, but these particular issues have become more pronounced over the last twelve months. We have been actively engaged in discussions with CBP IA and the Department’s Office of General Counsel on this matter. CBP IA believes that it is operating within its mandate and that its participation on FBI taskforces and other activities provides a valuable “redundancy” for DHS. OIG disagrees, and for the reasons discussed above, contends that CBP IA’s activities in this respect are inappropriate and significantly more harmful than helpful. We are continuing discussions, and with the recent confirmation of the new CBP Commissioner, we are hopeful that this matter can be resolved amicably and definitively in the next few weeks.

\* \* \*

Your letter also sought nonpublic Management Implication Reports. We do not issue such nonpublic reports. We strongly endorse the concepts of transparency and accountability and for many years have publicly published all of our reports, consistent with security and legal requirements.

We greatly appreciate your continued vigilance and will immediately report any attempt to threaten our otherwise impede our ability to communicate with Congress.

Pursuant to your request, we have attached summaries of closed investigations for the period January 1, 2009, through April 30, 2010.

Finally, we also have enclosed a copy of the information provided to the Ranking Member of the House Committee on Oversight and Government Reform on outstanding recommendations that have not been fully implemented

I greatly appreciate your continuing interest in ensuring that the Office of Inspector General enjoys the rights of access and cooperation envisioned by the Inspector General Act of 1978, as amended. Should you have any questions, please call me, or your staff may contact Richard N. Reback, Counsel to the Inspector General, at (202) 254-4100.

Sincerely,

A handwritten signature in cursive script that reads "Richard L. Skinner".

Richard L. Skinner  
Inspector General

Enclosures:

Summaries of closed investigations, January 1, 2009 – April 30, 2010

Outstanding recommendations not fully implemented