ASSOCIATION OF INSPECTORS GENERAL

Advancing Professionalism, Accountability & Integrity

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POSITION PAPER:
ENSURING INDEPENDENCE AND EFFECTIVENESS THROUGH UNOBSTRUCTED ACCESS TO OVERSEEN ENTITIES' PRIVILEGED INFORMATION

AIG POSITION

In order to conduct independent and effective investigations, and consistent with federal law, Inspectors General must have unobstructed access to materials belonging to overseen entities, including materials that may otherwise be privileged from disclosure to third parties.

BACKGROUND

The ability of inspectors general to conduct fulsome independent oversight requires IGs to have comprehensive access to documents, communications, and other materials belonging to the overseen entity. The right to comprehensive access necessary for IGs to fulfill their core functions includes the right of access to materials that may otherwise be privileged from disclosure to third parties. Although the issue has been largely resolved with respect to federal inspectors general, some state and local inspectors general are denied access to their governmental body's attorney-client communications and attorney work product. This denial allows political actors or others who wield power within the overseen entity to hide crucial information behind a façade of privilege, with little putative benefit to the public; the practice is a material external impairment to the independence of inspectors general.

Inspectors general exist to provide independent and objective oversight to promote accountability, transparency, and integrity in government. In service of those goals, the Association of Inspectors General's ("AIG") Green Book provides that IGs should be placed in a statutory structure to "allow it to exercise independence in fact and appearance from operations, programs, policies, and procedures over which the OIG has authority." The Green Book further provides that "[f]actors external to the OIG can restrict the efforts or interfere with the OIGs [sic] ability to form independent and objective opinions and conclusions," and specifically enumerates "[i]nterference with OIG access to documents or individuals necessary to perform OIG work" among examples of external impairments to the independence of Inspectors General. *Statement of Principles for Offices of Inspectors General* ("Green Book"), at 5 and 10.[1]

The need for access to otherwise privileged information is essential to both the perception and reality of IGs' effectiveness. At bottom, the denial of IG access to relevant information prevents inspectors general from conducting fulsome oversight by obstructing investigations, denying inspectors general access to key information, unduly protecting political incumbents, and

[1] Available at https://inspectorsgeneral.org/files/2025/03/Principles-and-Standards-for-OIGs-Approved-July-1-2024.pdf

insulating government attorneys from meaningful oversight. It also materially harms the public's faith in government by sending the message that inculpatory communications can be shielded from oversight via inclusion of an attorney. Ultimately, while the legal landscape around this issue varies for each governmental body, the duties of government attorneys to act in the best interest of the public does not. That duty counsels in favor of providing inspectors general broad access to the governmental body's documents and communications, including where the materials at issue may be privileged as to third parties.

ANALYSIS

I. Government Attorneys' Duties to the Public

Government attorneys are differently situated than attorneys for private clients, in that their duties extend to protecting the public at large. Government attorneys' duties extend beyond simply defending the government entity in litigation, or heading off litigation risks— the law has long recognized that a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

This higher duty is reflected in the rules of professional conduct governing attorneys, which warn against a win-at-all-costs approach to government lawyering. The comments to American Bar Association Model Rule of Professional Conduct 1.13 distinguish the obligations of government attorneys from attorneys representing private organizations: "[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved." *See* Comment 9 to American Bar Association Model Rule 1.13.[2] Indeed, courts have recognized that in the context of government lawyering, the demands of transparency and accountability can mandate a disclosure of information that may otherwise be inappropriate. *See, e.g.*, *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) ("With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure.").

[2] Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13/.

The full range of duties government attorneys owe to the public counsel against reflexive elevation of hypothetical litigation risk over-and-above a need to root out wrongdoing in government. *See, e.g.*, Jack B. Weinstein and Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, Touro L. Rev., Vol. 1, No. 1, Art. 3 (1985) (noting that because government attorneys represent not only the government entity, but also the public, it was proper for government attorneys to refuse to allow "that the fisc take precedence over law and justice"). That complete range of duties is essential in considering the question of inspector general access to information that may be privileged as to third parties.

II. Inspector General Access to Privileged Information is Essential to Effective Government Oversight

Inspector general access to the governmental body's attorney-client communications and work product is essential to robust government oversight that ensures the public trust. As a background legal principle, when a governmental actor in their official capacity requests and obtains legal advice, the privilege belongs to the governmental entity—not to the governmental actor as an individual. Government officials accordingly do not have any reasonable expectation that communications with attorneys in the scope of their public employment will remain private from inspectors general. To the extent there is an interest in maintaining a privilege, that interest belongs to the government entity, not to any specific political incumbent or government official.

Government entities' highest interest is in preserving government integrity and ensuring that government officials act in the best interest of the public. Inspector general access to information that may be privileged as between the government body and a third party is crucial to a government oversight apparatus that helps achieve those core aims. It ensures that bad actors cannot hide inculpatory information by including an attorney as a recipient of communications and deprives political actors of a key mechanism used to hide unflattering information from the public. At the same time, where a public body is concerned, the reasons for the privilege are not undermined by inspector general access to otherwise privileged information—indeed, "[i]t would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power." *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002).

Inspector general access to otherwise privileged communications is also necessary for IGs to oversee billions of dollars in public spending. For instance, law departments in major municipalities routinely receive eight-or-nine-figure budgets, engage in additional spending on outside counsel to handle certain matters, and advise municipal leaders on settlement of legal claims for amounts many multiples of the law department's budget. Yet it is impossible to investigate the disposition of those funds if the entirety of the substantive work of government

attorneys is beyond oversight's grasp. Attorneys are and should be subject to the same degree of oversight as other public employees. Moreover, beyond dollars and cents, whether government attorneys act in the public interest and conform to prevailing rules is a core matter of public interest.

Typically, the privilege operates to ensure that parties can speak candidly with their attorneys without risking prosecution or liability. But in IG investigations, the governmental body cannot usually itself be prosecuted or held administratively liable—individual bad actors can be criminally prosecuted or administratively charged, but the governmental entity itself cannot. The typical risks attendant to sharing attorney-client communications and work product thus do not extend to the production of information to an IG. There is not a meaningful risk that producing otherwise privileged communications to an IG will result in those materials being used to prosecute (criminally or administratively) *the holder of the privilege*—here, the government entity, not specific agents thereof. *See, e.g., Grand Jury 2000-2*, 288 F.3d at 293-94 (noting that while "[i]ndividuals and corporations are both subject to criminal liability for their transgressions," a state agency "cannot be held criminally liable by either the state itself or the federal government"). In short, disclosure of otherwise privileged information to inspectors general serves the most fundamental government interests without undermining the justifications for the privilege.

III. The Federal Rule Favors Broad Inspector General Access to Privileged Information

On the federal level, the Inspector General Empowerment Act of 2016 ("IGEA" or "the Act") resolved a dispute among various federal agencies and their inspectors general about IG access to attorney-client communications and work product. The Act came in response to certain federal agencies—including the Peace Corps, the Chemical Safety Board, and various federal law enforcement agencies—unlawfully withholding material, including attorney-client communications, from their respective IGs.

These agency decisions violated the plain terms of the Inspector General Act, which grants inspectors general access to "to all records, reports, audits, reviews, documents, papers, recommendations, or other material available" without qualification for privileges or other bases for withholding documents. 5 U.S.C. § 406(a)(1)(A). The 2016 amendments clarified that the Inspector General Act meant exactly what it said: inspectors general are entitled to *all materials* possessed by their respective agencies. The IGEA added clarifying language to section 6(a) of the Inspector General Act—the right of access provision—reiterating that no materials may be withheld from an inspector general "except pursuant to any provision of law enacted by Congress that expressly—(i) refers to the Inspector General; and (ii) limits the right of access of the Inspector General[.]" 5 U.S.C. § 406(a). This provision clarified that the right of access provided by the Inspector General Act encompassed all materials possessed by each agency, even if they would otherwise be protected from disclosure to third parties by a common law privilege or by a statute

that did not expressly limit the inspector general's right of access. Congress thus emphatically rejected the erroneous position of the federal agencies that asserted they were entitled to withhold privileged (or otherwise protected) materials from their inspectors general.

Statements from bipartisan members of Congress demonstrate that the IGEA was enacted to clarify the scope of the original Inspector General Act, not to grant inspectors general a new right of access. For instance, one member of Congress noted in discussing the legislation that the Chemical Safety Board denied its IG "access to certain documents based on a phony attorney-client privilege claim," and that the Board did so notwithstanding "clear guidance from section 6(a) of the IG Act to provide the IG with access to all records."[3] The Congressman further noted that "[t]he IG Empowerment Act makes clear that section 6(a) means exactly what it says: Every inspector general shall have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials. When agencies refuse or limit IGs' access to agency records, it undermines the intent of Congress and frustrates our mutual interest in government transparency and efficiency."[4] Statements from numerous other members of Congress likewise reflect that the IGEA represented a clarification of existing IG access, rather than an expansion of access.[5]

In short, since at least 2016—and, indeed, since 1978 under a proper reading of the original Inspector General Act—the generally applicable federal rule has accorded with sound government oversight principles: federal inspectors general are entitled to access to their agencies' privileged information.

IV. Hypothetical Litigation Risk is Not a Proper Basis to Deny IG Access to Information

Although government bodies cannot be criminally prosecuted or held administratively liable, they can face civil liability to third parties. Some government entities thus express concern that producing privileged materials to an IG will waive the privilege as between the government entity and third parties. For several reasons, this hypothetical concern is not a legitimate reason to withhold otherwise privileged information from IGs.

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[3] 162 Cong. Rec. H4002-01, H4005 (statement of Rep. Mark Meadows).

[4] *Id.*

[5] See, e.g., 162 Cong. Rec. S7130-05, S7131 (Statement of Sen. Patrick Leahy) (noting that the IGEA "would help clarify" IG access); 162 Cong. Rec. H4002-01, H4006 (Statement of Rep. Elijah Cummings) (noting that IGEA would make complete IG access "crystal clear"); 162 Cong. Rec. S7130-05, S7131 (Statement of Sen. Chuck Grassley) (noting that the Inspector General Act "mean[s] exactly what it says"); 161 Cong. Rec. S8665-02, S8668 (Statement of Sen. Chuck Grassley) (describing efforts to withhold documents from IGs as "an insult" to the legislators who voted to give IGs "access to all records"); 161 Cong. Rec. S8665-02, S8666. (Statement of Sen. Ron Johnson) (noting that IGEA "reiterates" that IGs should have complete access); 161 Cong. Rec. S8665-02, S8665-66 (Statement of Sen. Claire McCaskill) (noting IGEA "restores the intent" of the Inspector General Act to provide complete access).

First, the higher duty of government attorneys to act in the public interest means that rooting out misconduct takes precedent over protecting the government entity from every conceivable litigation risk. *See supra* section I. The risk that a court may find that privilege was waived in hypothetical litigation is purely speculative (and likely unfounded), while the risks of withholding broad swaths of relevant information from IGs is concrete, certain, and palpable.

Second, there is no reason to believe that courts will regularly find that government bodies waive privilege by disclosing information to their own IGs. As an initial matter, since 2016, federal entities have had to disclose privileged information to their IGs. Since that time, AIG has not identified any epidemic of litigation in which federal agencies have been made to disclose privileged information shared with IGs to third parties in discovery.

Indeed, in an analogous context—the disclosure of the government's privileged information to federal grand juries—numerous federal appellate courts have held the government entities may not assert attorney-client privilege to withhold information from grand juries. *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002); *also In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997); *but see In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005) (holding state government could assert attorney-client privilege to withhold materials from federal grand jury). These courts have distinguished between the privileges that government entities can assert during government investigations into government misconduct on the one hand, and civil disputes with private parties on the other. *See, e.g., Grand Jury 2000-2*, 288 F.3d at 291-92 (rejecting the notion that the government's "privilege functions identically in both civil and criminal proceedings."); *see also Ross v. City of Memphis*, 423 F.3d 596, 602 (6th Cir. 2005) ("Much of the reasoning deployed against recognizing a governmental attorney-client privilege in grand jury proceedings supports its recognition in the civil context.").

IG investigations serve an analogous core function to grand jury proceedings directed at government misconduct. They both represent an effort by a government to root out misconduct by government actors, a process in which the justifications for the attorney-client privilege are radically diminished. *See supra* section II. Even the cases that refuse to endorse a categorical rule that government entities may not assert attorney-client privilege over grand jury proceedings recognize that instances in which the subject of the investigation is government misconduct can warrant a rejection of the privilege. *See, e.g., In re Grand Jury Subpoena*, 909 F.3d 26, 32 (1st Cir. 2018) ("On the other hand, the United States' argument gathers much more force when the federal grand jury is investigating potential crimes that state officials or employees may have committed themselves. The public interest in uncovering and stopping crime grows substantially when crime invades the very institutions that establish and preserve our balance of order and freedom."). IG investigations are, of course, generally directed at misconduct by government actors.

The law thus does not demonstrate a likelihood that courts would regularly find that government bodies waived privilege by disclosing materials to an IG, such that those materials would have to be produced to private parties in civil litigation. That would bely the numerous distinctions drawn by courts between private civil litigation on the one hand, and public investigations into government misconduct on the other. As discussed above, ample authority supports the position that the government's attorney-client privilege is operative in the former, but not the latter. Moreover, an order to disclose privileged information provided to an IG would breach the principle that waiver only occurs where the disclosure of privileged information is voluntary—not where it happens by operation of law. *See, e.g., United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) ("[A] party does not waive the attorney-client privilege for documents which he is *compelled* to produce."). In addition, it is not clear that, in many jurisdictions, production of information to an IG is a third-party disclosure at all—IGs are often part of the same legal entity as the government body such that production to the IG is just an internal dissemination of material, rather than a disclosure to a third party capable of waiving privilege.[6]

The remote likelihood of a ruling contrary to law that would hypothetically require disclosure of privileged information to a third party is not a proper basis to deprive IGs of crucial materials in investigations into public misconduct. Withholding materials from IGs on this basis reflexively elevates minimization of litigation risk over and above all other government interests—including fundamental interests in government integrity and honesty.

[6] In addition, to further minimize any legal risk, offices of inspector general can work with overseen entities to develop appropriate procedures to safeguard privileged materials and prevent their disclosure to third parties, including protocols to follow when a third party seeks access to privileged materials.