



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

MAY 14 2018

THE INSPECTOR GENERAL

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Senator Whitehouse:

You wrote to me on May 2, 2018, asking 10 questions, which I answer below. You note that the overall context for your questions was the U.S. Environmental Protection Agency's (EPA's) use of and citation to certain work by the Office of Inspector General (OIG) to justify specific actions decided upon and taken by EPA management. The concern you put forth in your letter is that if the OIG "has formally signed off on spending it is now investigating," the OIG would lack the requisite impartiality to review the agency's actions.

In our answers below, we show specifically that the OIG does not exercise such a role, and specifically with regard to the matters you question did not do so in those instances. We also address below your questions about adequate and appropriate separation of functions between the OIG and the agency, and preservation of independence to allow oversight (the OIG role) of programmatic execution (the agency role):

- 1. What is OIG's statutory or regulatory basis for producing reports like the August 16 report? Has this sort of a summary threat report been authored by OIG in the past or since? If so, please provide us with copies of all such similar reports from the last ten years, and explain differences, if any, in how the August 16 Report was prepared compared with earlier reports. If the August 16 Report was not one produced in the ordinary course of business by OIG, please explain who requested the report and the reasons why OIG provided it.**

There is no statutory or regulatory requirement for producing such reports. It was a discretionary choice for the OIG Office of Investigations, under the general authority set forth in the Inspector General Act, Section 2(1), to conduct and supervise investigations relating to the programs and operations of the EPA. The OIG interprets that authority to permit, but not require, investigating threats of physical harm directed toward EPA employees that would hinder the employees' ability to carry out their duties, or would harm the ability of the agency to carry out its mission.

The term "threat investigation" is a generic term that the OIG uses to classify the type of investigation in the OIG's case management system. It does not necessarily mean that every case opened as "threat investigation" reveals evidence of an actual threat. Similarly, in the OIG case management system, we open investigations based upon allegations of fraud, and these are

called “fraud investigations” even though the investigations often do not uncover any evidence of fraud.

The OIG has never conducted a “threat assessment” for the Administrator. The OIG investigates threats, or potential threats, directed against EPA employees, including the Administrator. An OIG investigative report is a factual account of a given investigation. These reports are not threat assessments. A “threat assessment” is a guide usually used by decision-makers in determining the type and amount of security needed to address the protection of a person, event or facility. It includes all available information, including the results of threat investigations, but also other factors, such as notoriety, history of threats or violence directed against the person or event, other dangers or potential dangers that may be associated with the person or event, and location, to name a few. The OIG is not a decision-maker for the EPA.

In February 2017, the EPA’s Front Office asked the OIG to provide a “threat assessment” for the Administrator. The OIG declined and informed EPA management that it is not the role of the OIG to provide a threat assessment, but rather the OIG is limited to the role of investigating threats and reporting back the facts.

The August 16, 2017, “Summary of Pending and Recent Threat Investigations” (Summary Report) is the first and only one ever produced. The Administrator’s Protective Service Detail was in the process of preparing a threat assessment and requested information from OIG about the various threat investigations we had done. The OIG’s Office of Investigations prepared the August 16 Summary Report to respond to that request. The document was prepared for the Special Agent in Charge of the EPA Administrator’s Protective Service Detail and contained law enforcement- sensitive information. It was marked “For Official Use Only” and was not to be distributed to anyone outside of the EPA.

- 2. EPA’s talking points for Administrator Pruitt say the August 16 Report lists 13 threats made against the Administrator and his family. The report actually lists 14 threats. The tally at the end of the report says 16 threats. Furthermore, several of the incidents listed in the report were determined not to be threats by OIG, but they nevertheless appear to have been included in the Report’s final tally, which has been used to support claims that this Administrator had seen a 400% increase in threats. What is the correct number of actual threats in the August 16 Report? Please explain the criteria you use to determine what a threat is. And please explain any discrepancy between that number, and the 16 threats in the tally at the end of the Report.**

All OIG special agents are trained to recognize the Constitutional rights of citizens, particularly in dealing with First Amendment issues. The OIG does not investigate protected speech. We investigate threats or potential threats. The OIG Office of Counsel has provided the OIG Office of Investigations with the following criteria for addressing potential threats:

“Threats versus First Amendment Protected Speech

Threats have no First Amendment protection. In contrast, however, the First Amendment protects a wide variety of speech that can seem in their literal sense as threatening, harassing or intimidating.

The Constitution, Amendment 1, states:

- ⊙ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The courts have held that the First Amendment protects a wide variety of speech—even speech that many would find vulgar, rude, caustic or deeply offensive. It protects statements that, even if taken literally, appear to be threats but are actually just exaggerated statements (e.g., political hyperbole). Importantly, it protects statements that are vehement, caustic, discourteous or sharp attacks on government or public officials.

How do you distinguish threats from protected speech?

Threats are statements that are a serious expression of an intent to physically harm someone. The Supreme Court's most recent decision in this arena was in 2015, Elonis v. United States, 135 S.Ct. 2001 (2015), set forth two criteria for assessing whether a statement is a “true threat”:

- A statement which a reasonable person would realize would be interpreted by his audience as a serious expression of an intention to inflict bodily harm; AND
- The defendant must have made the statement intending it to be a threat, or with the knowledge that the statement would be viewed as a threat.

How do we determine if a reasonable person would perceive the statement as a true threat?

- ⊙ The context or setting in which the statement is made is important.
- ⊙ The “audience” that the statement is made to (and its reaction to the statement) is important.
- ⊙ The type of statement (e.g. qualified or conditional) must be considered. See below for examples.

The speaker has to be more than just negligent or careless in making the threat.

- The government must show that the speaker made the statement intending it to be a threat, or with the knowledge that the statement would be viewed as a threat.

However:

- ⊙ It is not necessary to prove that the speaker actually intended to inflict harm or carry out the threat.
- ⊙ It is not necessary to prove that the speaker had the ability to actually carry out the threat.”

The August 16 Summary Report lists three different types of threat investigations/complaints that the EPA worked:

- a. The first section listed threats directed against EPA Administrator Scott Pruitt and/or his family, which accounted for 13 cases and one complaint, for a total of 14. A “case” is opened when there are facts or circumstances that reasonably indicate that activity constituting a federal crime within the jurisdiction of the OIG has been, is being or will be committed. A “complaint” is opened where there is an indication of a serious violation of law but may lack some of the pertinent details. Number 1, COMP-2017-75, was a

complaint and did not rise to an actual case. The remaining 13 were actual cases, for a total of 14 threats directed at Administrator Pruitt.

- b. The second section listed Threats Directed Against Former Administrator Gina McCarthy. There were two threat cases directed against Administrator McCarthy.
- c. The third section listed threats directed against EPA employees other than the Administrator or facilities. There was a total of 14 in this category.

3. We understand that many of the threats in the August 16 Report were referred to a United States Attorney's Office (USAO). Please explain your process for referring matters to a USAO, including the criteria you use to determine whether to refer a matter to that office. Have the USAOs prosecuted any of the threats that your office referred?

Inspector General Act Section 4(d) requires that the OIG "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." Thus, the OIG would not report to the Department of Justice every incipient matter that the OIG reviewed, but where we concluded there were no "reasonable grounds" to believe a criminal violation has occurred. When we do see such "reasonable grounds," we coordinate with and refer our investigations to the appropriate USAO or prosecutor. If the investigator is not dealing with exigent circumstance, the prosecutor must be consulted at an early stage to determine whether the prosecutor believes the potential criminal violation we have identified is in fact a violation of the law and whether the allegation, if proven, would be prosecuted. The USAO has prosecuted the following cases that were referred by the OIG:

FY18:

OI-HQ-2016-CAC-0032 (rearrested)

FY17:

OI-HQ-2016-CAC-0032 (arrested and dismissed)

OI-AT-2017-CAC-0064

OI-HQ-2017-CAC-0043

FY15:

OI-AR-2014-CAC-0096

4. The August 16 Report purports to summarize threat data from fiscal year 2017 (FY17), but it is dated August 16, 2017, a month and a half before the end of the fiscal year. Further, the FY17 report includes threat data for Administrator McCarthy. Why was FY17 chosen to be the period of analysis? Have there been any subsequent updates to this report? Has OIG provided any other reports or analysis related to Administrator Pruitt's security?

As noted in answer to question 1, the August 16, 2017, Summary Report was the first and only one ever produced; there were none before or since. The August 16 report was a summary of threat information up to that date. The Administrator's Protective Service Detail was in the process of preparing a threat analysis for the Administrator and requested information on our threat investigations. We included information on threats regarding Administrator McCarthy where the subject of the investigation was threatening whoever holds the position of Administrator, rather than an individual Administrator. FY17 was chosen because it was most

current. There have not been any updates to that report, nor has the OIG provided any other reports or analysis on Administrator Pruitt's security. However, we have continued to provide written updates on individual cases to PSD and other internal EPA stakeholders, for both new and pending threat investigations. These are not summaries of all cases, and again, are not threat analyses. This is usually done via email to the EPA Threat Coordination Group.

- 5. On July 5, 2017, E&E News ran a story detailing the fact that Administrator Pruitt's security spending in his first months in office was nearly double that of his two predecessors. The timing of the August 16 Report suggests it may have been produced to justify Administrator Pruitt's unprecedented security spending. Why was the report issued when it was? Who are the points of contact between OIG and EPA on these issues? Did EPA request OIG prepare this or any other report, or request that OIG engage in any other activities or assessments, related to the Administrator's security?**

The OIG's Office of Investigations prepared the August 16 OIG Summary Report for the Administrator's Protective Service Detail, which was doing a threat assessment. The points of contact were the OIG's Assistant Inspector General for Investigations and Pasquale Perrotta, the acting Special Agent in Charge of the EPA Protective Service Detail.

The EPA Office of Criminal Enforcement, Forensics and Training has informed the OIG that the EPA's Protective Service Detail began providing 24/7 coverage of the Administrator the first day he arrived at the EPA. The decision was made by the Office of Criminal Enforcement, Forensics and Training after being informed that Mr. Pruitt requested 24/7 protection once he was confirmed as Administrator. The OIG played no role in this decision.

- 6. Four of the 14 alleged threats against Administrator Pruitt in the August 16 Report involve postings on social media. The report says the OIG learned of these alleged social media threats in the following manner: OIG received an "investigative referral" for threat one; OIG agents "discovered" threat three; OIG received an "investigative notification" of threat five; and OIG "found" threat nine. Please explain how OIG investigates potential threats posted on the internet and social media. Does OIG affirmatively search for threats against Administrator Pruitt posted on the internet or social media? Has OIG ever affirmatively searched for internet or social media threats against previous administrators? If the answer to any of these questions is yes, please explain the rationale for conducting these searches and what safeguards are in place to protect First Amendment rights of individuals who post messages on social media.**

Normally the OIG does not proactively search social media or other sources for threats or potential threats directed at the Administrator or other EPA employees. The OIG usually receives reports of threatening posts on social media from outside sources, such as agency officials or other law enforcement agencies. In case three in the Summary Report, an OIG special agent was searching a social media site for another, unrelated investigation and discovered the threat by accident in the course of that other search. Because the post also threatened a member of the U.S. Senate, the OIG immediately contacted the U.S. Capitol Police, as well as the FBI. In case nine in the Summary Report, a threatening post on Twitter had already been referred to the OIG from the Administrator's office, and the OIG investigated the matter referred. After that case was opened, an OIG special agent, while reviewing the public Twitter page for the subject of that investigation, discovered an additional, serious threat

from that subject. Although it is possible, we can find no records indicating that the OIG affirmatively searched the internet or social media for threats against previous Administrators.

The OIG treats all threat information the same, whether it is directed to an Administrator, other employee, contractor or facility. We set forth in answer to question two the OIG criteria for protecting First Amendment rights of individuals to communicate their opinions, whether via social media or otherwise.

7. Is it part of OIG's mission to advise the Administrator as to the appropriate level s/be should have?

No, and the OIG does not do so.

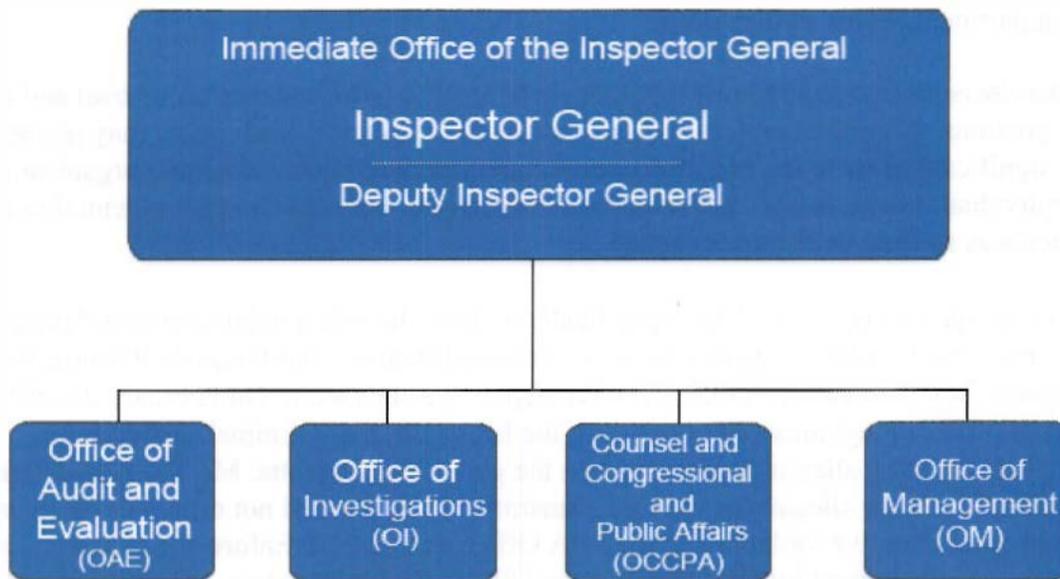
8. Has the Administrator or his staff consulted with you or your staff on the appropriateness of relying on OIG's statements to increase his spending or award raises to his staff? Specifically, did anyone at EPA speak with OIG about the Administrator's talking points for his April 26 hearings? What steps has and will OIG take to ensure going forward that any reports or assessments it may produce are not improperly represented as justification for programmatic decisions by the agency?

The OIG plays no role in determining how the agency protects the Administrator or other employees or facilities. Nor does the OIG have any role in determining how much money the agency spends on protection or the manner in which it spends funds. Neither the Administrator nor his staff consulted with the OIG on the appropriateness of relying on the OIG's statements to justify increasing spending or award raises to his staff. No one from the EPA spoke with the OIG about the Administrator's talking points prior to his April 26, 2018, hearing.

The OIG does have a statutory obligation to keep both Congress and the head of the agency fully and currently informed. We do this by issuing reports and through other means. We cannot dictate what use the agency or the Congress makes of the information the OIG provides. However, if the agency states that work produced by the OIG stands for a certain proposition, and the OIG is asked by Congress whether that is an accurate statement and whether the agency has asserted an improper justification using that OIG material, the OIG will answer whether the OIG material stands for the asserted proposition.

9. What steps are being taken by OIG to create a firewall between OIG employees who have assessed or investigated threats against Administrator Pruitt and those tasked with conducting audits of his security spending?

OIG employees who have assessed or investigated threats against Administrator Pruitt are assigned to the Office of Investigations. OIG employees who are tasked with conducting the audits of his security spending are assigned to the Office of Audit and Evaluation. This is a practical firewall, not a legal one, such as when a law firm isolates a "tainted" partner. The investigators do not participate in audits, and have not participated in any of the audits the OIG has announced regarding Administrator Pruitt's travel, security detail or "administratively determined" hiring. Following is the EPA OIG's organization chart.



To ensure independence, objectivity and impartiality of staff members who participate in a given investigation or audit, the OIG employs and adheres to professional standards governing each discipline.

The EPA OIG Office of Investigations adheres to the Council of the Inspectors General on Integrity and Efficiency’s Quality Standards for Investigations. Specifically, Standard B states in part: “In all matters relating to investigative work, the investigative organization must be free, both in fact and appearance, from impairments to independence; must be organizationally independent; and must maintain an independent attitude.” This standard places upon our agency the responsibility for maintaining independence so that decisions used in obtaining evidence, conducting interviews, and making recommendations will be impartial and be viewed as impartial by third parties.

The Office of Audit and Evaluation staff adhere to internal policies and procedures, including OIG Policy and Procedure 102, *OIG Independence*. The policy and procedure require all OIG employees to:

- Conduct themselves in a professional manner consistent with generally accepted government auditing standards and Council of the Inspectors General on Integrity and Efficiency’s Quality Standards for Investigations.
- Inform their supervisor of any perceived threats to independence as they occur.
- Sign a Personal Impairment Form upon joining OIG and annually as performance agreements are established.
- If required, annually complete OGE Form 450, *Confidential Financial Disclosure Report*, or SF 278, *Public Financial Disclosure Report* (Senior Executive Service members).
- Request permission to engage in outside employment.
- Obtain approval to publish articles and give speeches.

- Inform his/her supervisor and the Office of Counsel prior to accepting employment at an entity they are auditing or may expect to be auditing.
- Submit updated forms to alert their supervisor of any changes relating to the Personal Impairment Forms as they occur.

OIG supervisors and managers must consider each threat to independence on its own and in light of other previous or current services. When considered in isolation, each threat may not be deemed significant or material, but when considered cumulatively could impair organizational and/or individual independence. Supervisors and managers will also consider potential or actual impairments as staffing decisions are made.

Several of the questions in your letter specifically address the relationship between Patrick Sullivan, the OIG Assistant Inspector General for Investigations, and Pasquale Perrotta, the acting Special Agent in Charge of the EPA Protective Service Detail. On February 23, 2018, upon receipt of an anonymous complaint from the EPA Office of Criminal Enforcement, Forensics and Training alleging misconduct on the part of Mr. Perrotta, Mr. Sullivan determined that certain of the other allegations were administrative in nature and not criminal. He returned the alleged administrative violations to the EPA Office of Criminal Enforcement, Forensics and Training for a management inquiry, which is the OIG's standard practice. Mr. Sullivan assigned the remaining portion of the complaint to the Washington Field Office within the OIG Office of Investigations, and informed the head of that unit that he was recusing himself from any involvement with the subsequent investigation. Mr. Sullivan has had no involvement with any subsequent OIG investigation of Mr. Perrotta.

Although he does not believe any conflict of interest exists, or that his impartiality is impaired, Mr. Sullivan recused himself from involvement with any investigation of Mr. Perrotta out of the abundance of caution because of his professional relationship with Mr. Perrotta. Mr. Sullivan considers Mr. Perrotta a professional friend and colleague, not a personal friend. The recusal is in place to preclude even a potential appearance of a conflict of interest or impairment to impartiality allowing anyone to question the results of the OIG Office of Investigations investigation. This recusal extended to any case in which Mr. Perrotta is, or may become, the subject.

On May 3, Mr. Sullivan decided to recuse himself from any future OIG Office of Investigations cases in which Mr. Perrotta is even interviewed as a witness. Again, this extension of the scope of the recusal is not because Mr. Sullivan believes that he has a real conflict of interest or impairment to impartiality, but rather out of an abundance of caution to preclude questioning the results of any OIG investigation.

- 10. In our prior conversations with your office, OIG staff have differentiated between investigations, audits, and assessments when describing the work your office does and the output it delivers to the public. Please explain the differences between these types of projects, including the standards used in conducting such projects, the types of conclusions the IG is permitted to draw from this work, and how those different OIG public products may be relevant here.**

The OIG's Office of Audit and Evaluation (OA&E) does not perform investigations (or threat assessments). OA&E is the only office in the OIG to perform audits. OA&E plans and conducts complex audits of EPA programs, systems and operations using the generally accepted

government auditing standards promulgated by the U.S. Government Accountability Office. OA&E serves as OIG national technical experts for assigned areas of responsibility, advising OIG personnel and others concerning program operations and audit approaches. OA&E prepares publicly available reports of audit with findings and recommendations to improve EPA operations and help EPA look after the environment and improve public health. OA&E conducts research on, and stays abreast of, methods that can be used for audit, both within and outside the OIG. OA&E's directorates are responsible for independent oversight of EPA programs—as well as programs of the U.S. Chemical Safety and Hazard Investigation Board (CSB), for which Congress designated the EPA OIG to also serve as its OIG—and recommending improvements to programs and operations. Following is listed each OIG directorate and its role.

- ***Air.*** Conducts performance audits to assess the EPA's programs and activities to protect human health and the environment through progress toward air quality and climate change goals.
- ***Contract and Assistance Agreement.*** Conducts performance audits of the EPA's management of contracts, grants, cooperative agreements and interagency agreements.
- ***Efficiency.*** Through performance audits, identifies ways for EPA and CSB programs and operations to improve processes and realize cost savings, thus freeing resources for high-priority environmental projects.
- ***Environmental Research Programs.*** Conducts performance audits of the EPA's research and development programs; particular focus is given to areas that support human health and environmental protection.
- ***Financial.*** Conducts financial audits to render opinions on financial statements produced by the EPA and CSB, and supports financial and performance audits in the Forensic Directorate.
- ***Forensic.*** Conducts financial and performance audits of EPA assistance agreements and contracts to identify potentially fraudulent actions, and also determine the acceptability of costs claimed under specific financial instruments.
- ***Information Resources Management.*** Conducts performance audits to determine the economy, efficiency and effectiveness of the agency's investments in information technology for achieving environmental goals and integrity of data used for decision-making.
- ***Land Cleanup and Waste Management.*** Conducts performance audits to assess EPA programs, activities and initiatives to protect human health and the environment through cleanup and waste management, accident prevention and emergency response.
- ***Toxics, Chemical Management and Pollution Prevention.*** Conducts performance audits to assess the EPA's management of chemical risks and programs to prevent pollution.
- ***Water.*** Conducts performance audits to assess the EPA's protection and restoration of healthy aquatic communities and waters that sustain human health.

As explained in answer to question 1, the term "threat investigation" is a generic term the OIG uses to classify the type of investigation in the OIG's case management system. It does not necessarily mean that every case opened as "threat investigation" reveals evidence of an actual threat. A "threat assessment" is a guide usually used by decision makers in determining the type and amount of security needed to address the protection of a person, event or facility. It includes all available information, including the results of threat investigations, but also other factors, such as notoriety, history of threats or violence directed against the person or event, other

dangers or potential dangers that may be associated with the person or event, and location, to name a few.

The OIG has never conducted a "threat assessment" for the Administrator. The OIG investigates threats, or potential threats, directed against EPA employees, including the Administrator. An OIG investigative report is a factual account of a given investigation. These reports are not threat assessments.

We appreciate your interest in the work of the OIG. A similar letter is being sent to Ranking Member Carper. If you have any questions about this or any other matter, please contact Alan Larsen, Counsel to the Inspector General, at (202) 566-2391.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur A. Elkins Jr.", with a stylized flourish at the end.

Arthur A. Elkins Jr.