



DEPARTMENT OF VETERANS AFFAIRS
INSPECTOR GENERAL
WASHINGTON DC 20420

JUN 18 2018

By Hand Delivery

Mr. Peter O'Rourke
Acting Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Re: *Access to OAWP Complaint Database*

Dear Acting Secretary O'Rourke:

I am responding to your June 11, 2018, letter that reflects the Department's continued failure to provide our office with access to the complaint database maintained by the Office of Accountability and Whistleblower Protection (OAWP). Your response to my June 5 letter compels me to formally notify Congress of the Department's position of nondisclosure of information we have requested in order to oversee VA operations related to referrals received by OAWP. The letter does not provide any factual or legal basis for the failure to allow my office the access to the OAWP records to which the OIG is entitled, and it is not clear why the Department is resisting our access to these records. The Department's withholding access to OAWP records raises serious concerns, and your unsupported and false accusations of the OIG's lack of cooperation and substandard investigations is equally concerning.

Your letter stated that OAWP has "found no specific requests for information from OIG that have been denied." As you are aware, OIG employees have been in regular contact with OAWP staff since the fall of 2017 in an effort to obtain access to OAWP's database of complaints. To date, we have not received that access despite repeated assurances that we would. I can provide the necessary documentation that verifies our repeated attempts to meet with OAWP staff regarding this issue, including when you were the Executive Director.

OAWP and the OIG have a shared interest and mission in protecting veterans by ensuring that the people tasked with serving them are held accountable and that whistleblowers are treated fairly. Because both OAWP and the OIG have mechanisms for individuals to report misconduct, we must effectively coordinate those efforts and ensure that the OIG is aware of allegations that should be investigated by our office. As my previous letter stated, my office needs to know whether the OAWP is working on a complaint that has been separately received by the OIG,

particularly if it is a potential criminal matter. Federal regulations governing VA require the Department to immediately refer criminal matters involving felonies to the OIG.¹ The statute creating OAWP also mandates that OAWP refer disclosures for investigation by other entities, including the OIG in some instances.² OAWP has informed the OIG that since its inception, they have received on average 150–170 complaints per month. Based on that reported number, it does not appear that an appropriate number have been referred to the OIG.

Although no justification is required under the Inspector General's Act, we share this information with you to be clear that your refusal hampers our statutory obligation to provide adequate oversight of VA operations. Nothing exempts OAWP from the requirement to disclose records of all inquiries it has received (including its complaint database) in order to conduct that oversight work.

Your letter states that OAWP is "unable to determine whether the information" concerning complaints to OAWP as requested in my letter "relates to the programs and operations" within the scope of the IG's responsibilities under the Inspector General Act of 1978 (the IG Act). The scope of our authority is not a subjective determination to be made by VA or OAWP in an attempt to deny access; the IG Act vests this determination squarely with the Office of Inspector General as part of its oversight responsibilities.

It is the Inspector General's responsibility to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of its establishment and to "promot[e] economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations."³ The Inspector General's responsibilities thus extend to all programs and operations of the establishment. In carrying out these responsibilities, the Inspector General should be given "timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the applicable establishment which relate to the programs and operations with respect to which that Inspector General has responsibilities under this Act."⁴ This broad authority to access records of the Department applies "notwithstanding any other provision of law," except where Congress has expressly limited the Inspector General's access.⁵ Congress has not done so with respect to OAWP materials. The Department has no basis to withhold the OAWP materials requested by the OIG and its continued refusal to provide this information is contrary to law.

Denying the OIG access, or selectively providing access to certain records, is also antithetical to the fundamental purpose of OAWP and its stated commitment to transparency. It deprives veterans and the public of the ability to ensure that OAWP is in fact holding Department officials

¹ See 38 C.F.R. § 1.204.

² Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, P.L. 115–41, § 323(c)(1)(D).

³ IG Act § 4(a).

⁴ *Id.* § 6(a).

⁵ *Id.*

accountable consistent with its mandate. We have tried on many occasions since November to address our access to the OAWP dataset with you and your staff and, in fact, believe you had agreed, at minimum, to share the information.⁶ We are disappointed to find that is not the case.

Your letter raises a number of unrelated issues, which I will briefly address to clear up what appear to be misunderstandings about the legal mandates governing the OIG and concerns with our work. I think it would be appropriate to meet to discuss the following in more depth to clarify these matters further, and am disappointed that your office did not respond with available dates to my requests on June 13 and 14 to meet and discuss the issues you raised in your June 11 letter:

First, you assert that OIG is not providing required data to OAWP and that OIG is obligated under the Accountability Act to provide OAWP with “timely” data from hotlines, other disclosures OIG receives, and our audits and investigations in order to permit OAWP to meet its mandatory requirements. In fact, the Act charges OAWP, not the OIG, with an obligation to prepare reports based on certain information, including OIG information.⁷ To our knowledge, no OAWP request for information from the OIG Hotline for use in such reporting has been denied. Moreover, with the exception of information concerning criminal investigations, OAWP can perform its duties without additional input from the OIG. All of our audit, inspection, and administrative investigation reports are published and available to OAWP and the public on our website. Our hotline and other relevant data are reported in the Semiannual Report to Congress, which VA also receives prior to publication and is readily accessible on our website.

My staff's most recent records review supports that the OIG has appropriately referred cases to OAWP, though little information has been transmitted from OAWP to the OIG. I note that during the almost one-year history of OAWP, the OIG staff has referred approximately 40 cases to OAWP. By contrast, despite the 150–170 whistleblower referrals we have been told OAWP receives per month, OAWP has only referred approximately 14 cases to the OIG Hotline.

Second, you allege that the OIG abused its authority with respect to OIG personnel having had access to VA's Office of General Counsel's GCLaws database and imply that our access was obtained improperly. You have apparently been misinformed about the circumstances relating to that access: On each of the three occasions in which the OIG accessed the database, that access was initiated and/or authorized by an attorney in your OGC—not abused by the single OIG investigator who was accessing the records. When General Counsel James Byrne raised concerns with me about this access in January 2018, we provided him with this information and resolved the issue.

⁶ See, e.g., email from Peter O'Rourke to Jeffrey G. Hughes (OIG) on November 14, 2017 at 9:03 a.m. in which you directed Travis Young in OAWP to, “Please work with Mr. Hughes or his designee to develop a secure method/Sharepoint that we can use to share information.”

⁷ See 38 USC § 323(c)(1)(G).

Third, your letter accuses the OIG of failing to meet applicable standards of the Council of the Inspectors General for Integrity and Efficiency (CIGIE) and alleges that our reports have “improperly and recklessly cast the VA and its employees in an unfavorable light and demonstrate clear investigative misconduct and neglectful senior executive oversight.” However, no specific reports or actions are cited in support and you have not previously brought any such concerns to my attention.⁸ In fact, the VA has lauded our investigative efforts on a number of our recent reports, including our report on the deficiencies at the Washington, DC VA Medical Center. We conduct our work pursuant to CIGIE standards and meet all peer review and other quality standards. The IG community recognizes that strong, effective, and appropriate oversight can create discomfort on the part of the agency and personnel being overseen. If you have specific examples, please bring them to my attention and we will address them as appropriate.

Finally, and perhaps most significantly, I must address your views included in your June 11 letter about my independence and your ability to control the work of the OIG. You wrote, “You [the Inspector General] are reminded that OIG is loosely tethered to VA and in your specific case as the VA Inspector General, I am your immediate supervisor. You are directed to act accordingly.” Such language conflicts with the clear intent of the IG Act to ensure that the work of Inspectors General is independent from an agency head.

It is beyond dispute that Congress acted to bestow a high level of independence upon Inspectors General, to enable the performance of oversight responsibilities free from inappropriate pressure or interference from agency personnel. Your letter purports to impose a level of control over the investigative work of the Office of Inspector General by apparently referencing the statutory language placing the Inspector General under the “general supervision” of the Agency head. Federal case law and the legislative history of the IG Act clearly demonstrate that the scope of such supervision is extremely limited and does not permit any interference in OIG investigations. The phrase “general supervision” is not defined, but the IG Act is clear that any supervision is limited and may not be exercised to constrain an Inspector General’s discretion to undertake an audit or investigation, issue subpoenas, and see such matters through to their conclusion.⁹ Indeed, the legislative history of the IG Act notes that “[e]ven the agency head would have no authority to prevent the [Inspector General] from initiating and completing audits and investigations he believes necessary.”¹⁰

As one federal appellate court explained, “we cannot conclude that Congress intended for the ‘general supervision’ granted to agency heads to include any authority to compromise the

⁸ We are aware that the Department has informed Congress that it disputes the findings of our recent administrative investigation of a senior VA employee that involves allegations of nepotism and improper disclosure of information. We disagree with the Department’s position and have responded to Congress on that matter directly.

⁹ See *The Inspectors General*, Council of the Inspectors General for Integrity and Efficiency (July 14, 2014), available at https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

¹⁰ *Id.*

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investigatory rights conferred on Inspectors General.”¹¹ The court further stated, “Congress did not intend that the power of ‘general supervision’ given to [the agency head] could be used to limit or restrict the investigatory power of the Inspector General.”¹² Rather, the Inspector General is “shielded with independence from agency interference,” and such authority may be “exercised in the judgment of the Inspector General as each deems ‘necessary or desirable.’”¹³ “To facilitate that function, the Act gives to each Inspector General access to the agency’s documents and agency personnel.”¹⁴

I will continue to exercise my independent judgment in conducting oversight of the Department in a thorough and objective manner consistent with the law and guidelines imposed by CIGIE. My June 13 and 14 requests to meet with you remain open. I hope that you will reconsider your position and grant my office the requested access to the OAWP complaint database. If not, then we will have no choice but to pursue other available remedies.

Sincerely,



MICHAEL J. MISSAL

Enclosures

Copy to: Chairman and Ranking Member, Committee on Veterans’ Affairs, U.S. House of Representatives
Chairman and Ranking Member, Committee on Oversight and Government Reform, U.S. House of Representatives
Chairman and Ranking Member, Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, Committee on Appropriations, U.S. House of Representatives
Chairman and Ranking Member, Committee on Veterans’ Affairs, U.S. Senate
Chairman and Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate
Chairman and Ranking Member, Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, Committee on Appropriations, U.S. Senate

¹¹ *U.S. Nuclear Reg. Comm’n v. Fed. Labor Relations Auth.*, 25 F.3d 229, 235 (1994).

¹² *Id.* at 234.

¹³ *Id.* (internal citation omitted).

¹⁴ *Id.*