

Agency Response to Draft Report

MEMORANDUM

SUBJECT: Agency Response on the OIG Draft Report, “*Despite Requirements of Inspector General Act, Chief of Staff Refuses to Provide Agency Information for OIG Evaluations; EPA Whistleblower Training Does Not Address Interference with or Intimidation of Congressional Witnesses,*” Project No. OA&E-FY19-0313, dated November 21, 2019

FROM: Doug Benevento, Associate Deputy Administrator Donna Vizian, Principal Deputy Assistant Administrator, Office of Mission Support

TO: Charles J. Sheehan, Acting Inspector General

This responds to your November 21, 2019 draft memorandum (“memo”). We appreciate the opportunity to review the memo to ensure the record on this matter is complete and accurately reflects the Agency’s position. We request that you review the information below and make the suggested corrections.

The memo makes two assertions with which we disagree, and we believe need to be corrected. First, it claims that Chief of Staff Ryan Jackson “Is not Complying with [the] Inspector General Act and [the] Administrator’s Memorandum on Cooperating with the IG,” by not disclosing the identity of the person(s) that provided him with testimony of an EPA advisory board member prior to that testimony being publicly released. In doing so, the memo makes no reference to the November 8, 2019 legal opinion from the EPA General Counsel to the Administrator (attached) addressing the Agency’s obligations in this regard. Second, the memo asserts that the Agency whistleblower training is deficient because it does not “specifically address interfering with or intimidating individuals who seek to communicate with or testify before Congress.” The memo’s finding ignores the fact that EPA provides its employees training approved by the Office of Special Counsel (“OSC”) that is in fact the same training used by the Inspector General’s Office at EPA. The Administrator has also communicated directly with Agency employees their rights and responsibilities regarding prohibited personnel activities and whistleblower protections, see the attached Message from the Administrator. Accordingly, the Agency disputes the memo’s findings and submits the following information to supplement the memo. If OIG chooses to not to incorporate this information, the factual assertions in the memo would be inaccurate and potentially misleading.

With respect to the assertion that Mr. Jackson is violating the IG Act and the Administrator’s guidance to employees, the memo should refer to the legal advice provided to the Administrator in the November 8, 2019 legal opinion from the EPA General Counsel.

To the extent OIG is acting on behalf of Congress to obtain information that is the subject of a Congressional inquiry, separation of powers between the executive and legislative branches support the Agency, not OIG, as having ultimate control of how to accommodate information requests by Congress.

OIG's domain is objective inquiry into waste, fraud, abuse, and mismanagement at the Agency, but it is not authorized, for example, to investigate the Congress itself. This testimony pertains to a hearing being conducted by the legislative branch, and additional Constitutional concerns are implicated given the broad protections for legislative activities defined in the Speech or Debate Clause (Article I, Section 6, Clause 1). How Congress takes testimony or from whom it receives final testimony is not a proper area of inquiry for OIG. Moreover, while I do not purport to create a new legal test here for relevance of the information to OIG in order for it to be obtained, this piece of information does not appear to be even necessary to conduct an "audit" to improve EPA operations. The OIG can only operate within its statutory limits and not occupy the policy role given to the Administrator in EPA's statutes or upend EPA's right to manage its communications to Congress.

While OIG may not concur with this legal opinion, failing to refer to it leaves the impression that the Agency has no basis for this position, which could mislead the public and Congress when the memo becomes public. As you know, we have previously pointed OIG to the process that EPA established for reviewing and approving testimony of its employees, including for special governmental employees that serve on federal advisory committees. My understanding is that the review of this testimony was consistent with that process. In fact, my understanding is that Mr. Jackson conveyed to OIG during an interview that he undertook review of the testimony to ensure that it described accurately the reappointments process to the Agency's Board of Scientific Counselors. These facts should be included in the memo.

Finally, the memo notes that the Agency's whistleblower training does not include training or material related to intimidation or threats to witnesses providing congressional testimony. While this is accurate, it is not complete and therefore may be misleading. The EPA currently utilizes the OSC's 2302(c) Certification Program, the same certification relied upon by OIG. As you know, a 2302(c) Certification Program allows federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act (WPA), the Whistleblower Protection and Enhancement Act (WPEA), and related civil service laws. 5 U.S.C. § 2302(c). Under the 2302(c) Certification Program, OSC certifies an agency's compliance if the agency meets the following five requirements:

1. Placing informational posters at agency facilities;
2. Providing information to new employees about the WPA/WPEA as part of the orientation process;
3. Providing information to current employees on an annual basis about the WPA/WPEA;
4. Training supervisors every three years on the WPA/WPEA; and
5. Training supervisors annually on how to respond to complaints involving whistleblower protections.

EPA has previously met these requirements and has been received certification from the OSC. Further, because the report properly notes that the whistleblower training provided by the OSC cannot be deviated from a more appropriate finding is: "The Agency complies with the OSC's whistleblower training requirements." However, the Agency would agree to support the OIG in communicating to OSC that certain additional information should be added to future OSC- approved training.