



Testimony of

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U.S. Department of Commerce
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before a hearing of the

Committee on the Judiciary
United States Senate

***“All” Means “All”: The Justice Department’s Failure to Comply
with Its Legal Obligation to Ensure Inspector General Access
to All Records Needed for Independent Oversight***

August 5, 2015

Chairman Grassley, Ranking Member Leahy, and Members of the Committee:

I appreciate the opportunity to appear before you today regarding the recent opinion issued by the Office of Legal Counsel and its impact on the ability of Offices of Inspectors General (OIGs) to carry out our mission.

In addition to the description Inspector General Horowitz provided you of the chilling effects this opinion will have on the work of IGs, I want to provide you a specific example of how the opinion impacted my office even before it was released.

Earlier this year, we began an audit of the International Trade Administration's (ITA's) Enforcement and Compliance business unit's efforts to ensure it was conducting quality and timely trade remedy determinations. In April 2015, the audit team determined that OIG needed access to business proprietary information (BPI) submitted during ITA proceedings and requested the data from ITA.

Both ITA and the Department of Commerce Office of General Counsel (OGC) raised concerns that providing BPI for an audit would be a violation of the Tariff Act of 1930, as amended, and, in conjunction with 18 U.S.C. Section 1905 (Federal Trade Secrets Act), could expose the Department to potential criminal litigation and penalties. OGC reached out to the Department of Justice Office of Legal Counsel (OLC) for guidance on the matter.

According to the Department's Office of General Counsel, OLC said they were coming out with an opinion, expected imminently, that would provide a framework to advise on this subject. In light of the potential criminal penalties, OGC concluded it was advisable to wait until the opinion was released. Subsequently, OGC stated that—while ITA may be able to release data to our office for an investigation particular to a specific proceeding—there is no exception in the Tariff Act applicable to an audit.

In trying to work collaboratively with ITA to obtain access to this information, we proposed that ITA anonymize the data by removing company names. However, according to ITA, all of the requested data fields are BPI. Additionally, we suggested that we could provide an assurance statement indicating that we understand the importance of safeguarding BPI from unauthorized disclosure. However, OGC stated that, given the fact OLC said it would release an opinion with a framework to use in resolving statutory conflicts with the IG Act, OGC felt it was still advisable to wait until the OLC opinion was released.

OGC asserted that Tariff Act amendments that came into effect after 1978, when the IG Act was passed, did not reflect an OIG's authority to access the information. After 2 months of trying to get access to the information, we had no choice but to terminate the stalled audit because of the Department's refusal to provide the requested information, based on advice from OLC.

Conflicting laws hamper OIGs' ability to fulfill their mission under the IG Act "(A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations." As discussed above, the Tariff Act and the Trade Secrets Act were cited as the reason for denying OIG access to records. However, the

IG Act authorizes OIGs “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to” their Departments; this access should pertain to all government records.

I join with the Inspector General community in urging the Committee and Congress to address these issues in light of the OLC opinion—and its impact on our ability to provide oversight of our departments and agencies.

I will be pleased to take your questions.