



May 27, 2021

The Honorable Roger F. Wicker
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

Dear Ranking Member Wicker:

I received your letter of May 17, 2021 that expresses concern about my office's inability to share with you the report of investigation for Office of Inspector General (OIG) case No. 19-0714. Subsequent correspondence from your staff on May 21, 2021 further inquired as to whether our inability to release that record is due to a legal constraint, internal policy, or agency preference, and as to whether the Department of Commerce is separately permitted to provide the report to you. This letter responds to both the May 17 and May 21 correspondence.

I want to begin by assuring you that the OIG takes seriously its duty to keep Congress informed about the programs and administration of the Department of Commerce, in accordance with the Inspector General Act of 1978, as amended, 5 U.S.C. App. § 2(3). The OIG strives to cooperate with members of Congress and to provide as much information about our work as possible. To that end, this office has been as responsive as we are able regarding your March 15, 2021 request for records related to the Investigations and Threat Management Service, and the OIG is committed to continued cooperation. In addition to the documents we have provided through the Freedom of Information Act (FOIA) process, the OIG has also separately communicated with you and your staff on many occasions regarding your request. This includes a March 17th meeting with committee staff, a March 19th letter acknowledging your request for records and explaining that we would have to process it under FOIA, an April 7th meeting with committee staff, an April 15th meeting with committee staff, and a May 3rd meeting with committee staff.

However, particularly with our investigative matters, we face certain limits on what we can share. Where an OIG investigation remains open, premature disclosure of our findings could threaten not only the objectivity of our work but also the Department's ability to take appropriate administrative action. For this reason, our office, like other investigative agencies, typically cannot provide information about a pending investigation until the matter is completely closed. This is the case for requests through FOIA or from a Committee Chairperson or Ranking Member. Here, the Department has requested an extension in responding to report No. 19-0714 and as a result of that requested extension the matter is still open.

Moreover, regardless of whether a case is open or closed, OIG investigative records such as this report are subject to the Privacy Act of 1974, 5 U.S.C. § 552a. The Privacy Act prohibits us from releasing investigative records absent the consent of the persons to whom they relate

or unless the disclosure falls into one of twelve statutory exceptions. 5 U.S.C. § 552a(b). Violations can lead to civil liability for the agency and potential criminal liability for the disclosing agency official. *Id.* § 552a(g), (i).

One of the Privacy Act's exceptions does allow an agency to release a covered record "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." *Id.* § 552a(b)(9). The Department of Justice's Office of Legal Counsel (OLC) has long taken the position that this exception only authorizes disclosures at the request of an entire House of Congress, an entire congressional committee or subcommittee, or the chairperson of such committees. See *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001); see also *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. (2017) (affirming the 2001 opinion as to the Privacy Act, at issue here, while also providing an opinion more broadly regarding oversight authority). According to OLC's 2001 opinion, agencies are prohibited from using this exception to provide Privacy Act information to the Ranking Member of a congressional committee. 25 Op. O.L.C. 289. OLC does acknowledge that this exception would permit release to a Ranking Member where the Ranking Member had received a delegation of authority from an Entire House of Congress or the applicable committee. *Id.*

As part of the Executive Branch, my office is bound by OLC's interpretation of the Privacy Act. Given your request, my office has reached out to OLC to confirm our understanding of its 2001 opinion. We are awaiting a response, and will be in touch if OLC sheds a different light on their opinion.

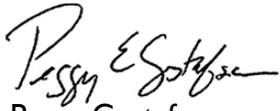
These same Privacy Act restrictions also apply to other parts of the Department of Commerce when they are in receipt of an OIG investigative report, such as the one you request. Because the Department of Commerce is an Executive Branch agency, all components of it are subject to the Privacy Act. See 5 U.S.C. 552a(a)(1); 5 U.S.C. 552(f) (defining "agency" for purposes of the Privacy Act and FOIA). Moreover, per Department of Commerce Administrative Order 207-10, OIG reports of investigation remain OIG records after transmittal to the Department and the Department may not disclose them without the written permission of the OIG.¹

Given these legal constraints, my office expeditiously processed your request for investigative records under FOIA. See 5 U.S.C. 552a(b)(2) (Privacy Act exception for mandatory disclosures under FOIA). In so doing, we released as much information to you under that law as permitted. However, because these are Privacy Act records, we were required to apply all applicable FOIA exemptions – including those that pertain to open investigations (FOIA Exemption 7a) and personal privacy (FOIA Exemptions 6 and 7c).

Although the OIG cannot provide you with the report for case No. 19-0714 at this time, we remain committed to working with you as much as we are able. Once the case closes, my office will re-process your request with legally-required redactions, as appropriate.

¹ DAO 207-10, Sec. 7, https://www.osec.doc.gov/opog/dmp/daos/dao207_10.html.

Sincerely,

A handwritten signature in black ink, appearing to read "Peggy Gustafson". The signature is written in a cursive style with a large initial "P" and a long horizontal flourish at the end.

Peggy Gustafson
Inspector General