



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

SEP 05 2013

THE INSPECTOR GENERAL

Via U.S. Mail and Email

The Honorable Rafael Moure-Eraso
Chairman
Chemical Safety and Hazard Investigation Board
2175 K Street NW
Washington, DC 20037

Re: Seven Day Letter for Refusal to Produce Records

Dear Chairman Moure-Eraso:

I am writing pursuant to Section 5(d) of the Inspector General Act of 1978, as amended, which requires each Inspector General (IG) to report to the head of that IG's agency "whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such [agency]." 5 U.S.C. App. 3, § 5(d). This is commonly referred to as a "Seven Day Letter" under the IG Act.

The particularly serious problem that I am reporting is the U.S. Chemical Safety and Hazard Investigation Board's (CSB) refusal to provide records to the Office of Inspector General (OIG). The OIG has requested records in furtherance of an OIG law enforcement investigation. CSB's refusal to produce such records interferes with the ability of the OIG to carry out its statutory responsibilities.

As you know, on July 22, 2013, the OIG requested records of email communications between and among certain high level CSB officials and CSB outside counsel, all pertaining to certain official CSB matters. *See Enclosure 1 (without attachments)*. These email records are required as part of an OIG investigation pertaining to CSB operations. On August 7, 2013, CSB responded that it did not intend to comply with the request. *See Enclosure 2*. On August 8, 2013, I informed CSB that OIG would proceed with a Seven Day Letter pursuant to section 5(d) if the records were not provided by August 23, 2013. *See Enclosure 3*. At CSB's request, OIG granted an extension of time to August 29, 2013.

On August 23, my staff wrote to ask CSB to confirm that it has documents within the scope of the OIG request and that they be provided to OIG no later than August 29. On August 27, CSB confirmed that it does have such documents. On August 29, CSB declined to provide the documents, and instead asserted in pertinent part:

The vast majority of the documents you have requested are communications between CSB personnel and the agency's outside legal counsel. A small number of communications are between me and CSB attorneys. I am concerned that the release of these documents to the OIG will waive the agency's attorney-client privilege vis-à-vis third parties adverse to the agency and the executive branch.

See Enclosure 4 at 2. Further, CSB maintains that "there were no other documents" meeting our request. In short, CSB has provided no records, but rather asserts that an attorney-client privilege that it may have with respect to third parties excuses production to the OIG. In support of its contention, CSB attached the analysis of a law professor concluding that CSB would waive privilege if it turned over the documents to the OIG.

I disagree that production of documents to the OIG would waive privilege. The IG Act is clear in section 6(a)(1) that OIGs have "access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act ..." 5 U.S.C. App. 3, § 6(a)(1). As a matter of statutory interpretation, the IG Act is unambiguous that OIGs have access to all agency records without qualification. There is no basis to read into the statute an implied right to withhold privilege information. The legislative history to the IG Act of 1978 makes it clear the congressional intent in creating the authority provided to IGs in Section 6: "The committee intends this subsection to be a broad mandate The Inspector or Auditor General would also have access to confidential agency memoranda." Senate Report No. 95-1071, at 34 (1978)(*emphasis added*). It is an implausible interpretation of the IG Act that Congress intended for agencies to be able to withhold information from OIGs based upon a claim of privilege. Such a right could effectively preclude OIGs from fulfilling the very watchdog mission that Congress provided for with this authority.

Any assertion of privilege would go to the issue of whether the OIG could subsequently release the document in question to a third party, not whether the OIG is entitled to access in the first place. CSB has cited no legal authority for the proposition that an agency can withhold documents from its OIG based on privilege. Indeed, we have not found any such authority. The cases cited in CSB's legal opinion are inapposite. All involve production of records by a third party to the Federal government, not production by a federal agency to its OIG. Even if a privilege arguably could be asserted, a section 6(a)(1) disclosure would constitute an "involuntary" disclosure, in which case there would be no waiver of CSB's privilege.¹ See Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 334 (D.D.C. 2008); Cobell v. Norton, 213 F.R.D. 69, 75-76 (D.D.C. 2003); SEC v. Lavin, 111 F.3d 921, 930 (D.C. Cir. 1997).

¹ In this regard, CSB's legal opinion correctly acknowledges that there is no waiver of privilege where there are "specific statutory provisions to the contrary." See *Enclosure 2, Memorandum at 1*.

In sum, the OIG has a legitimate law enforcement reason for requesting the records at issue. The IG Act provides the statutory basis for OIG access to all records without qualification. CSB has a duty to provide the records fully, completely, and without delay. Refusal is a particularly serious and flagrant problem requiring the issuance of this Seven Day Letter.

Section 5(d) of the IG Act requires you to transmit this letter to appropriate committees or subcommittees of Congress within seven calendar days – by September 12, 2013, together with your report containing any comments you deem appropriate. As the issues I have raised arise under the IG Act, the appropriate Congressional committees to whom you should transmit this report are the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Government Affairs, as well as the committees with primary oversight responsibilities for the CSB, the Senate Environment and Public Works Committee and the House Science, Space and Technology Committee. Please inform me simultaneously with your notification to Congress that you have provided my report to those committees.

Sincerely,

A handwritten signature in cursive script, appearing to read "Arthur A. Elkins Jr.", written in dark ink.

Arthur A. Elkins Jr.
Inspector General

Enclosures: