[OUTREACH]

Three Ideas to Improve Effective Inspector General Access to Both Information and Individuals

It has been said that knowledge is power; today, access is power

By Inspector General Brian D. Miller

Renewed interest in oversight and accountability, highlighted by implementation of the *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, has focused sharply on the need for transparency, effective oversight, and the roles of Inspectors General across the federal government. Transparency compels IGs to conduct robust oversight and thus commands federal officials to give IGs access to documents, individuals, and information systems. It has been said that knowledge is power. Today, access is power. IGs without access are powerless and cannot ensure transparency. The ideas presented below would help to improve oversight and transparency by improving IG access.

Congressional interest in the role of IGs was shown in the ARRA provisions giving IGs, among other things, additional authorities and responsibilities, in matters involving ARRA funds, to interview contractor employees and conduct whistleblower investigations. Congressional support for the IG function was demonstrated through enactment of the *Inspector General Reform Act of 2008*, which implemented several proposals suggested by the Legislation Committee of the National Procurement Fraud Task Force, such as expanding (1) coverage of the *Program Fraud Civil Remedies Act* and law enforcement authority to all IGs; and (2) IG subpoena authority to include electronically stored information and tangible things. In addition, discussions are ongoing regarding other proposals put forth by the Task Force, such as additional amendments to the PFCRA and enhancement of Office of Inspector General authority to conduct computer matches.

With respect to effective access to information and individuals, however, some hurdles still remain that are not being addressed. Those hurdles are impeding the ability of the IG community to ensure that oversight is as fully transparent and efficient as possible. Access to both information and individuals is essential for effective oversight. When access is delayed or denied, auditors and investigators may not find important material and results may be attenuated and incomplete. Denial of access to employees of contractors, for example, can pose unnecessary challenges as IGs attempt to understand what really happened with a contractor's billing practices. On the other hand, having to notify the target of the existence of an investigation in order to get his/her financial records can impede the conduct of that investigation.

In this article, I advance two new ideas not previously offered by the Task Force, and a third new idea to modify the Task Force's suggestion on IG subpoena authority. These ideas, individually or collectively, would help to ensure IGs and their staff have access to the data and individuals necessary to

perform their work. The first idea concerns timely access to financial records, an issue that arises frequently in investigations, without having to tell the target about the investigation. The second idea involves removing procedural roadblocks to OIG access to electronic information systems, which can create needless delays. The third idea focuses on ensuring proper access to individuals who work for federal contractors, by giving IGs additional authority, without raising the concerns that testimonial subpoena authority seems to raise. Taken together, these ideas would be valuable aids to improving the work of IGs as they strive to protect the American public from fraud, waste, and abuse.

1.) "Don't Tip Off the Target" amendment to the Right to Financial Privacy Act

Basic investigative techniques include not "tipping off" a subject about an investigation. Premature disclosure can lead to destruction of evidence, intimidation of witnesses, or flight. It can also preclude undercover work and provide an opportunity for the subject to manipulate his finances to frustrate the government's interests. As an illustration, telling someone like Bernie Madoff that he was under investigation would only give him an opportunity to hide or transfer ill-gotten gains before the government had an opportunity to understand the full extent of his crimes or freeze his assets.

Current RFPA Requirements Pose a Problem

The RFPA currently requires IGs to provide notice to the subject of an investigation when issuing a subpoena for that person's financial records, absent a court order delaying such notice for 90 days, before the IG can obtain those records. This notice requirement could harm the investigation and cause unnecessary and undue delay. Inspector General subpoenas should be treated the same as grand jury subpoenas, which are exempt from the requirement to give the subject notice.

The RFPA, which does not apply to state or local governments, was adopted to create a statutory Fourth Amendment protection for bank records primarily in response to *United States v. Miller,* 425 U.S. 435 (1976), where the Court held there was no such protection. Grand jury subpoenas were excepted from the customer notice and challenge provisions in the RFPA because of the secrecy surrounding grand juries and a concern that notice and challenge rights might in fact harm the privacy of those under investigation. As stated by the Supreme Court, the purposes served by grand jury secrecy include preventing escape, preventing tampering with witnesses, encouraging free disclosures by witnesses, and protecting the innocent. *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958).

These factors apply equally well to IG investigations, which also can be harmed by premature disclosure. Investigation records are covered by the *Privacy Act*, which protects the confidentiality of those records. In addition, timing suggests that when Congress adopted the RFPA, they did not consider the effect on IG investigations. The IG Act was enacted on October 12, 1978 (P.L. 95-452), while the RFPA was enacted on November 10, 1978 (P.L. 95-630). With the passage of the IG Act and the more recent Reform Act, perhaps it is time to correct that apparent oversight.

The requirement for notice to the subject prior to obtaining his financial records can be detrimental to an investigation in several ways:

- Providing notice to a target can provide him an opportunity to destroy or tamper with evidence, flee, or intimidate witnesses.
- Such premature disclosure can also prevent legitimate undercover work and make recovery of misspent funds more problematic. These financial transactions can be extremely complicated to trace and unravel, and advance notice can impede the government's forfeiture and other civil remedies that are designed to ensure the minimization of unlawful losses of federal dollars.
- The notice requirements can also cause undue delay. As an initial matter, if the government does not know all the names on the account, the government must issue a subpoena to the bank to identify the account holders. Then, after obtaining the identities of the account holders, the government must issue another subpoena and comply with the notice provisions for each account holder. There is an additional minimum 15-day delay between sending the notice to the customer and obtaining the records, or a potentially longer delay if the Department of Justice decides to seek a court order, which delays notice for 90 days. If the Department of Justice seeks a delay or the customer files a challenge in court, the law enforcement agency cannot obtain the records until the court issues a decision, a process that could take a significant amount of time during which the subject would be free to move assets and otherwise hamper the investigation.

The RFPA also requires notification to the subject within 14 days when records obtained under the RFPA are transferred to another agency, which would apparently include records transferred from an IG to the Department of Justice in furtherance of a criminal investigation. I know of no other law that requires notifying the subject when records are transferred to a prosecuting authority.

Because of the similarity in the interests served by grand jury and IG investigations, and the protections afforded the records, I suggest that Congress consider giving IGs the same exemption from the RFPA notice requirement that grand jury subpoenas currently have, such that an IG does not have to notify a target when a subpoena for his financial records is issued.

Proposed Language for "Don't Tip Off the Target"
Amend 12 U.S.C. 3413(i) and 3420 to read as follows:

Title 12. Banks and Banking

§ 3413(i) Disclosure pursuant to issuance of subpoena or court order respecting grand jury proceeding or law enforcement investigation
Nothing in this chapter (except sections 3415 and 3420 of this title) shall apply to any subpoena or court order issued in connection with (1) proceedings before a grand jury or (2) a law enforcement investigation by an Inspector General pursuant to the Inspector General Act of 1978, as amended; except that a court shall have authority to order a financial institution, on which a grand jury or Inspector General subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury or in response to the IG Subpoena, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

§ 3420. Grand jury information; notification of certain persons prohibited
(a) Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury or by an Inspector General as part of a law enforcement investigation—

1. ***in the case of a grand jury subpoena, shall be returned and actually presented to the grand jury unless the volume of such records makes such return and actual presentation impractical in which case the grand jury shall be provided with a description of the contents of the records;***
2. ***in the case of a grand jury subpoena, shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure, or for a purpose authorized by section 3412 (a) of this title;***
3. ***in the case of an Inspector General subpoena, shall be used only for a legitimate law enforcement purpose, and any subsequent disclosure or transfer of records obtained pursuant to that subpoena to the Department of Justice shall be exempt from the provisions of section 3412(a) and (b) of this title;***
4. ***shall be destroyed or returned to the financial institution if not used for one of the purposes specified in paragraphs (2) or (3); and***
5. ***shall not be maintained, or a description of the contents of such records shall not be maintained by any government authority other than in the sealed records of the grand jury or by an Inspector General, unless such record has been used in the prosecution of a crime or to further a legitimate agency administrative purpose consistent with the Privacy Act.***

(b)(1) No officer, director, partner, employee, or shareholder of, or agent or attorney for, a financial institution shall, directly or indirectly, notify any person named in a grand jury or Inspector General subpoena served on such institution in connection with an investigation relating to a possible—
(A) crime against any financial institution or supervisory agency or crime involving a violation of the Controlled Substance Act [21 U.S.C. 801 et seq.], the Controlled Substances Import and Export Act [21 U.S.C. 951 et seq.], section 1956 or 1957 of title 18, sections 5313, 5316 and 5324 of title 31, or section 6050I of title 26; or
(B) conspiracy to commit such a crime, about the existence or contents of such subpoena, or information that has been furnished to the grand jury or Inspector General in response to such subpoena.
(2)Section 1818 of this title and section 1786 (k)(2) of this title shall apply to any violation of this subsection.

2.) Explicit access to agency information systems by oversight authorities

Providing IGs with explicit, unrestricted read-only access to agency information systems would remove a current roadblock to effective oversight of agency programs. The *Federal Information Security Management Act* and implementing procedures, such as the controls prescribed in *National Institute of Standards and Technology Special Publication 800-53A,* require federal agencies to control access to their information systems. The IG Act, in turn, provides that IGs are to have access to all agency "records, reports, audits, reviews, documents, papers, recommendations, or other material" related to the programs and operations of the agency. Systems owners' understanding of the types of access controls required can result in limiting or delay-

ing IGs' access to material, impeding the unrestricted access contemplated by the IG Act. The lack of an explicit provision for access by IGs as oversight bodies has caused confusion and inconsistency in information security management and can result in unnecessary delays to IG reviews and oversight.

The required systems controls include "least privilege" and "need to know," which allow authorized accesses only for users who are necessary to accomplish assigned tasks in accordance with organizational missions and business functions. To implement this requirement, system owners have implemented protocols that require the requesting organization to provide information such as a limited timeframe for access, the security clearance level of each person requesting access, and the justification for access, which can be interpreted to require a statement as to the specific project purpose. Because the system owner controls access, moreover, that owner can require the IG to provide specific details as to the purpose of access before granting that access, and the system owner can, in fact, deny access.

In my view, these controls, as implemented, may place too many restrictions on the IG access contemplated in the IG Act. Frequently, the IG may want to conduct various reviews on information in agency IT systems simply to look for potential weaknesses or problems. To have to explain to the agency in each case why the IG wants access, and obtain the agency's permission, seems to contradict the intent of the IG Act. I believe the interests of IG oversight and IT security can be better balanced by providing explicit guidance on IG access to IT systems, and providing that IGs themselves must ensure that any access by their employees complies with applicable requirements, rather than leaving that determination to the system owners.

I suggest an amendment to the *Federal Information Security Management Act of 2002*, as follows:

Section 3544 of title 44, United States Code, is amended—

by striking "and" at the end of paragraph (a)(4);

by striking a period and inserting a semicolon at the end of paragraph (a)(5); and

by adding at the end of subsection (a) the following:

"(6) if the agency has an Inspector General appointed under the Inspector General Act of 1978 or any other law, ensure that the Office of Inspector General has unrestricted "read-only" access for review and analysis to all agency information systems from the Inspector General's accredited system. The Director of the Office of Management and Budget and the National Institute of Standards and Technology shall promulgate guidance to implement this paragraph."

3.) Access to Contractor Employees

Often issues that may arise in the course of an audit or investigation can be resolved or disposed of simply by talking to the people who were involved. When those people are federal employees, there is ample precedent for the expectation that they will be available to talk with IGs and their staffs as needed subject to the usual constitutional and *Privacy Act* protections. There is no similar expectation, however, with regard to people who work for federal contractors. Since so much of the government's work is currently accomplished with contractors, it stands to reason that contractor employees have a wide range of knowledge of and experience with activities that likely will become the subjects of audits or investigations. Not being able to talk to them presents a significant problem for ensuring effective oversight.

There has been discussion between the IG community and Congress regarding expanding IG subpoena authority to include testimonial subpoena authority, as suggested by the Task Force. However, Congress has not introduced legislation to accomplish this purpose, and concerns about that recommendation include implications for the Fifth Amendment, and questions regarding whether the DOJ should be involved in the decision to issue the subpoena, since DOJ would have to seek a court order to enforce the subpoena in the case of a refusal to comply. In light of those concerns, I am proposing an alternative, based on language in the ARRA and in the recent amendment to the Federal Acquisition Regulation requiring contractors to self-report certain crimes and violations, to give IGs statutory authority to interview contractor employees without the procedural hurdles of issuing a subpoena.

Section 1515 of ARRA provides that OIGs, with respect to each contract or grant awarded using ARRA funds, are authorized to examine any records that pertain to and involve transactions relating to the contract, subcontract, grant, or subgrant, and "to interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions." This provision as applicable to contractors has been implemented via an interim rule published at *74_Fed. Reg. 14646* (March 31, 2009), which amended FAR section 52.212-5, Contract Terms and Conditions Required to implement Statutes or Executive Orders – Commercial Items, to provide that Inspectors General shall have access to and the right to (1) examine a contractor's or subcontractor's records that pertain

to, and involve transactions relating to, contracts using Recovery Act funds, and (2) "[i]nterview any officer or employee regarding such transactions."

Similarly, the FAR now requires, in all contracts with a value expected to exceed $5 million and a performance period of at least 120 days, a clause that defines "full cooperation" as providing "government auditors and investigators" with "access to employees with information." 48 CFR 52.203-13(a). These provisions illustrate the movement toward requiring those who obtain federal money to cooperate with oversight bodies. I believe that same logic should be applied to all those who receive federal funds.

Because the ARRA provision authorizing IGs to interview contractor employees is more definitive than the FAR provision – although their intent appears to be the same – I would suggest that extending this ARRA provision to apply to all contracts, not just contracts using Recovery Act funds, would as a practical matter, provide IGs with a statutory basis to interview contractor employees. I believe that most contractors would not act in direct contravention of a statutory requirement; therefore this approach should make it simpler for IGs to interview those contractor employees they need to talk to. This approach would move the issue of interviewing contractor employees out of the subpoena arena to contract enforcement, which presumably would limit or eliminate the concerns about testimonial subpoena authority. Moreover, the logic of granting this authority to IGs for contracts using ARRA funds would apply equally well to all other contracts.

While there are many arguments for extending this approach to subcontractor employees as well, Congress chose, in the ARRA, to give the Government Accountability Office, but not IGs, the authority also to interview any officer or employee of a subcontractor receiving Recovery Act funds. Based on ARRA, I am not proposing extending this authority to subcontractor employees at this time.

I suggest an amendment to the IG Act as follows:

Section 6 of the Inspector General Act, 5 U.S.C. App. 3, is amended—

By adding at the end of subsection (a) the following:

"(10) Whenever in the judgment of the Inspector General it is necessary in the performance of the functions assigned by this Act, (a) to examine any records of any contractor or grantee, and of its subcontractors or subgrantees, or any State or local agency administering a contract, that pertain to, and involve transactions relating to, the contract, subcontract, grant, or subgrant; and (b) to interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions."

Conclusion

For IGs, access is power. In general, it remains true that knowledge also is power. In our technological age, however, access is necessary for knowledge. Obtaining access to records without delay and not having to "tip off the target," clearly providing for unrestricted read-only access for IGs to all agency information systems, and clarifying the expectation that IGs will have access to contractor employees will go a long way to improving the effectiveness of oversight and protecting the interests of the American taxpayers.

Brian D. Miller

Brian D. Miller was confirmed by the U.S. Senate as the Inspector General of the General Services Administration on July 22, 2005.

As Inspector General, Mr. Miller directs nationwide audits and investigations of federal procurement involving GSA. Mr. Miller is also a member of the Council of the Inspectors General on Integrity and Efficiency and participated in the Department of Justice Hurricane Katrina Task Force. On October 10, 2006, Mr. Miller was named Vice-Chair of the National Procurement Fraud Task Force. Mr. Miller played a leading role in developing a new requirement for contractors to report overpayments and crimes, included in the *Close the Contractor Fraud Loophole Act of 2008*.

In 2007, Mr. Miller was recognized by Ethisphere magazine as the 12th "most influential person in business ethics" by a worldwide panel of experts. In July 2008, Mr. Miller was named among "Those Who Dared: 30 Officials Who Stood Up for Our Country," a special report of Citizens for Responsibility and Ethics in Washington, D.C. a national advocacy organization. In October 2008, Mr. Miller received the Attorney General's Distinguished Service Award.

Mr. Miller earned his law degree from the University of Texas.