

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



September 18, 2013

The Honorable Vincent C. Gray
Mayor
District of Columbia
Mayor's Correspondence Unit, Suite 316
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Re: **The "Universal Code of Conduct and BEGA Amendment Act of 2013" (D.C. Bill 20-0412) and its Impact on D.C. Office of the Inspector General Operations**

Dear Mayor Gray and Chairman Mendelson:

Due to recent events concerning the sharing of and access to D.C. Office of the Inspector General (OIG) investigative records, inclusive of currently proposed legislation, the "Universal Code of Conduct and BEGA Amendment Act of 2013" (D.C. Bill 20-0412) (BEGA Amendment Act), I believe that it is important that I convey concerns that I have with respect to the legislation.

Background

First and foremost, I would like to take this opportunity to clear up the media accounts and accompanying misconceptions, misinformation, and erroneous assertions about the OIG's lack of cooperation with the Board of Ethics and Government Accountability (BEGA); that is, the OIG has failed to provide/share documents with BEGA to enable it to conduct its enforcement action. That information is in error and false, and, regrettably, BEGA officials have chosen not to correct the record.

Each time BEGA has requested that the OIG provide records relating to a matter, which either BEGA has requested or the OIG has referred to it because the OIG has substantiated a code of conduct violation, the OIG has provided documentation supporting its findings to allow BEGA to proceed with enforcement. In this regard, the OIG has provided BEGA with copies of witness

and target statements, case inserts, photographs, charts, and anything else that supported the OIG Report of Investigation.

At one point this summer, BEGA officials informed the OIG that it had not provided all the documentation for one particular case. The OIG believed that it had provided all the documents and repeatedly asked BEGA officials to identify the document(s) they felt the OIG had not provided/shared with the agency. After initially not responding to the OIG's requests, BEGA responded by stating that it sought, "the entire investigative file ... without limit"

Quite naturally, the use of such language reasonably leads one to believe that BEGA wanted to review and examine all information collected in our case file. As Inspector General, I could not allow unfettered and unbridled access to any OIG file that could, among other things, result in premature exposure or release of information of a criminal nature, or that is part of a grand jury inquiry. This type of access would clearly undermine the independence of the OIG by creating a chilling effect not only on OIG agents in conducting investigations but on the willingness of law enforcement partners, such as the Federal Bureau of Investigation (FBI) and the United States Attorney's Office (USAO), to work or share information with the OIG. Accordingly, I informed BEGA officials that the OIG would provide BEGA only with OIG information that is "*appropriate and relevant*," but would not permit unfettered/unbridled access to OIG records.

Thereafter, in early August 2013, the OIG learned that BEGA had authorized the issuance of a subpoena because the OIG supposedly would not provide documents for a particular case. It was only *after* the August 1, 2013, hearing and during a telephone conference call, that BEGA officials finally responded to OIG requests for specifics about the documentation sought by stating that they did not seek unfettered access to entire OIG investigative files (a position that is at odds with the proposed legislation and will be addressed below). Rather, BEGA officials indicated that they were merely seeking the "handwritten notes" that the agent took during an interview, which formed the basis for a Memorandum of Interview (MOI). It should be noted, the OIG had previously provided the witness MOI for which BEGA now sought the handwritten notes. In essence, BEGA had in its possession the substantive information for which the subpoena would have been issued; that is, the statement of the witness. Consequently, going forth, the OIG has agreed to provide any handwritten notes that serve as a basis of any MOIs. A resolution of the supposed or perceived impasse, that easily could have been achieved, without the public hearing or authorization for the issuance of a subpoena, had BEGA simply responded to OIG requests to specify and/or clarify the information being sought, instead of requesting unfettered access to OIG records or files.

Effect of BEGA Amendment Act on OIG Operations

While we were able to resolve the perceived impasse with BEGA by clarifying the information that BEGA sought as well as the extent of the access that BEGA sought, including that it was not seeking unfettered access to files (again, a position that is at odds with the proposed legislation), I believe that the currently proposed BEGA Amendment Act poses a serious threat to OIG independence because, as a law enforcement agency, the OIG conducts criminal investigations, which permits withholding documents compiled within the scope of an ongoing criminal matter.

Otherwise, the OIG's mandate, independence, which is the essence of this agency's existence, is undermined and/or severely compromised.

The legislation's current language allows BEGA to "[e]xamine or copy any document or record prepared, maintained, or held by any agency, in any form, except those documents or records that may not be disclosed according to law". Consequently, BEGA, an administrative agency, would be given the authority to obtain OIG documents and/or records pertaining to criminal investigations or administrative cases, which often times become criminal cases, unless the OIG can demonstrate that the documents and/or records were withheld "according to law."

Granting BEGA unfettered access to OIG investigative case files (especially Investigations Division (ID) cases files) infringes on the independence of the OIG in the following ways:

- BEGA employees, who are neither law enforcement personnel nor prosecutors, would be allowed to review information which is restricted, in form and/or in substance, to law enforcement personnel and/or prosecutors.
- BEGA employees will be given access to documents and/or evidence the OIG obtains from other law enforcement entities.
- Outside entities, especially federal law enforcement agencies would be reluctant to share information and evidence with the OIG knowing that an outside, non-law enforcement entity, BEGA, has access to OIG records without limitation for all practicable purposes.

I will address each area separately.

Non-law enforcement personnel would have access to restricted information.

The OIG's ID is authorized to conduct both criminal and administrative investigations. BEGA's authority extends only to administrative investigations. The current legislation would allow BEGA personnel to obtain records received pursuant to a criminal investigation or even OIG administrative cases that may potentially become criminal matters. BEGA's staff is not authorized access to law enforcement sensitive information or information obtained from sources restricted to law enforcement officials. Unlike BEGA, the OIG's ID is staffed with criminal investigators who have access to law enforcement sensitive and restricted information and resources (e.g., National Crime Information Center (NCIC) records collected by the FBI). ID also conducts joint investigations, often partnering with outside law enforcement entities (federal, state, and local). As such, these entities often share with ID information, documents, and evidence (as necessary) that are incorporated into ID case files.

Further, ID administrative cases often start out as criminal investigations. The case files usually contain information derived from sources and databases that are restricted to law enforcement personnel or prosecutors (i.e., NCIC, Metropolitan Police Department's (MPD) Washington Area Law Enforcement System (WALES), Fusion Centers, etc.). Even the files for these cases contain information from sources restricted to law enforcement personnel (i.e., parts of Thomas Reuters CLEAR reports). Therefore, to grant BEGA unfettered access to OIG ID investigative case files, including administrative case files, will provide BEGA employees access to information restricted to ID personnel. Furthermore, it should be noted that no other OIG divisions (Audit, I&E, or MFCU) have access to ID case files without prior approval and, even then, only to the degree that it is warranted. In addition, our outside government and commercial partners (e.g., FBI Criminal Justice Information Services, CLEAR, and Fusion Centers) probably would require that we sanitize our case files prior to providing information in such circumstances.

BEGA employees will be given access to documents and/or evidence the OIG obtains from other law enforcement entities.

OIG investigators routinely engage in highly sensitive matters as well as undercover operations involving multiple law enforcement entities (e.g., USAO, FBI, federal inspector general offices, and the MPD). Allowing access to records in these cases would compromise the integrity of an ongoing investigation and prospective enforcement proceedings. Furthermore, revealing such documents would disclose information regarding case planning and strategy. Premature release of this type of information from an ongoing investigation would reveal the investigation's nature, scope, and direction, and would allow the subject(s) to view the evidence obtained and fabricate defenses. Under the proposed legislation, the OIG cannot provide assurances to other law enforcement agencies that BEGA will not "[e]xamine or copy any document or record prepared, maintained, or held by any agency, in any form, except those documents or records that may not be disclosed according to law," which may have criminal consequences.

Outside entities, especially federal law enforcement agencies would be reluctant to share information and evidence with the OIG knowing that an outside, non-law enforcement entity, BEGA, has access to OIG records without limitation for all practicable purposes.

The nature of law enforcement work is to share with other law enforcement. Our records contain the identity of sources and other witnesses and any disclosure could well lead to witness tampering and intimidation. The type of unfettered or unbridled disclosure that the legislation proscribes cannot help but have a negative impact on our criminal investigators and the thoroughness of their investigations by, among other things, making them reticent to elicit and report acquired evidence or information because of possible premature disclosure. Additionally, the legislation's exception for documents that may not be disclosed "according to law" does not address my concerns because there are times when the OIG has a criminal matter before it contacts the USAO, and the release of information in such an instance could severely impair an

ongoing matter, create a chilling effect on the OIG's ability to conduct future investigations, and discourage other law enforcement entities from wanting to work with the OIG. In fact, the OIG has already encountered that very reaction from other law enforcement entities/organizations. In sum, the proposed legislation negates the law enforcement protections against disclosure that the OIG ensures because BEGA is already authorized to make public information that the OIG does not.

Conclusion

Those who seem to assert that the issue of my concern is the independence of the OIG as it relates to second-guessing or protecting ones' turf, are missing the point. My concern is the chilling effect that unfettered access to OIG records would create on OIG agents in conducting their investigations and law enforcement entities such as the USAO and FBI with whom the office works closely.

It is not a question of simply second-guessing. Anyone has the right to second-guess, just as the OIG has that same right, and I cannot control that, nor would I or could I. Examples of this can be found in such matters as the donation of the fire truck wherein the Council conducted two investigations and the OIG conducted its investigation, and the summer youth program where the OIG and the D.C. Auditor both conducted reviews. Another example is BEGA's review of the Councilmember Graham/lottery matter. In that matter, while I may not agree with BEGA's findings, BEGA was certainly in its right to have handled the Graham/lottery matter as it saw fit. So too, the OIG had the right to conduct its own independent investigation in a manner that I saw fit, which resulted in different findings, which I continue to stand by.

Similarly, it is not a question of protecting one's turf but rather maintaining the integrity of OIG operations. To emphasize, the problem arises when BEGA seeks or is provided unfettered access to OIG records, which it then can publicize per its regulations, in its own discretion. This in effect undermines the OIG's independence and OIG investigations by creating a chilling effect on the OIG conducting its investigations and OIG law enforcement partners' willingness to share information with the OIG. This chilling effect is all the more potentially egregious in matters in which the OIG does not substantiate misconduct. Accordingly, in light of the inherent and statutory independence of the OIG as a watchdog entity, any assertions of second-guessing, turf protecting and/or comparison of the sizes of the two offices to support the need for unfettered or unbridled access to OIG records are without merit and irrelevant.

As I indicated in my April 30, 2013, correspondence (which is on our website) to Councilmember McDuffie when I denied his request for unfettered access to an OIG file, this Office is mandated by statute to execute its duties independently. D.C. Code Section 1-301.115a (a)(3)(D) states, "The Inspector General shall [*i*]ndependently [emphasis added] audits, inspections, assignments, and investigations as the Mayor shall request, and any other audits, inspections and investigations that are necessary or desirable in the Inspector General's judgment" Accordingly, the OIG is charged with telling its stakeholders and others what

Mayor Gray and Chairman Mendelson
September 18, 2013
Page 6 of 6

they need to know rather than what they would like to hear. To do otherwise, I believe would be a dereliction of my responsibilities as Inspector General. I believe that it is more important to do what one believes is right as opposed to doing what one thinks and/or believes others want one to do or which may be popular.

In light of the current climate, not just locally but nationally, where inference, innuendo, and a tendency to callously rush to judgment have become all too prevalent substitutes for facts and due process, it is ever more important that watchdog entities like offices of inspectors general be able to carry on their work/mission without being susceptible or vulnerable to political, media driven, and otherwise inappropriate pressures or influences. The better course, with respect to BEGA and OIG operations, in my estimation, is to require coordination and sharing of information where doing so does not impinge upon the integrity and ability of both to conduct truly independent investigations. This is where the discretion of the respective agency heads or agencies must be applied.

In closing, I hope the foregoing is helpful and useful to the Council and the executive branch in their deliberations as they seriously and thoughtfully consider the BEGA Amendment Act; legislation that, while well-intentioned, I respectfully cannot help but conclude is ill-conceived and ill-advised, particularly with respect to the access to records as it relates to the OIG. Accordingly, I believe that it should not be approved in its current state, if at all.

I look forward to continuing work with both branches and their components in this regard.

Sincerely,


Charles J. Willoughby
Inspector General

CJW/zgh

cc: Councilmember Kenyan McDuffie, Chairperson, Committee on Government
Operations, Council of the District of Columbia
Council of the District of Columbia