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March 19, 2013

### VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz  
Inspector General  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

Dear Inspector General Horowitz:

Nearly two months ago, on January 17, 2013, I wrote to you seeking documents from your office in connection with the nomination of Valerie E. Caproni for United States District Judge for the Southern District of New York. You have provided neither the documents nor a reply to my letter explaining why you are withholding the documents.

Your staff at the Office of the Inspector General (OIG) did provide a briefing on the findings outlined in several previously public OIG reports surrounding National Security Letters at the Federal Bureau of Investigation (FBI) during Ms. Caproni's tenure as FBI General Counsel. However, the information offered in that briefing was limited to summaries and restatements of the public reports. Thus, it became clear during the briefing that key questions left unanswered by the public reports could be addressed only by reviewing underlying evidence on which the report's conclusions were based. For example, the briefers could not recall the questions propounded and answers provided during interviews with Ms. Caproni and others that formed the basis of the reports. That information of course is recorded in transcripts that the OIG possesses.

My January 11, 2013, letter requested "all working papers, draft reports, and correspondence . . . between the OIG and Ms. Caproni (or her counsel)." The transcripts of the OIG interviews with Ms. Caproni and her deputy would be responsive to my request for "all working papers," because those transcripts are part of the evidence upon which the OIG relied in reaching its conclusions. Based upon my understanding of the

limited and incomplete information provided by OIG staff, those transcripts are absolutely necessary to understand Ms. Caproni's involvement.

### **A Lack of Clarity**

The OIG's January 2010 report entitled "A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records" contains confusing and inconsistent language about Ms. Caproni's knowledge of the problems at the FBI that led its Communications Analysis Unit (CAU) to collect telephone records without legal process and without a truly exigent circumstance. As discussed in the staff briefing, page 237 of the report initially indicates Ms. Caproni "first learned about the CAU's use of exigent letters *or other improper requests for telephone records* in late 2006, during the OIG's first NSL investigation."<sup>1</sup>

However, the very next paragraph describes a conversation between Caproni and her deputy in April 2005, before the OIG investigation began, in which her deputy told Ms. Caproni "[CAU personnel] were requesting NSLs for records they had already received."<sup>2</sup> Her deputy even raised with Ms. Caproni the issue of "whether these after-the-fact NSLs should be reported as possible intelligence violations to the President's Intelligence Oversight Board."<sup>3</sup> However, Ms. Caproni and her deputy reportedly agreed that "these were *likely* all emergency circumstances anyway and a follow-on NSL would not be required."<sup>4</sup> Yet, as the report notes, Ms. Caproni also told the OIG "we had no discussions that [exigent letter requests] would qualify under" the emergency voluntary disclosure statute.<sup>5</sup>

It is difficult to square the OIG's conclusory assertion that Ms. Caproni was unaware of improper requests for telephone records with the evidence presented in the report that she actually discussed those problems with her subordinates.

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<sup>1</sup> U.S. Department of Justice, Office of the Inspector General, "A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records" (Jan. 2010), at 237 (emphasis added).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, (emphasis added).

<sup>5</sup> *Id.* at FN. 262. From April 2003 to March 2006, the Electronic Communications Privacy Act (ECPA) allowed a provider to voluntarily release toll records information to a government entity if the provider "reasonably believe[d] that an emergency involving immediate danger of death or serious physical injury to any person justify[d] disclosure of the information." 18 U.S.C. § 2702(c)(4) (Supp. 2002). In March 2006, the provision was amended by the *USA PATRIOT Improvement and Reauthorization Act of 2005* to allow voluntary disclosure "if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." *USA PATRIOT Improvement and Reauthorization Act of 2005*, Pub. L. No. 109-177, § 119(a), 120 Stat. 192 (2006).

In telephone calls and meetings following my request, your staff offered a series of evolving objections to cooperating voluntarily to assist the Committee with its nominations review process. Your staff initially claimed that the request was unprecedented and that the OIG has not provided these types of documents to Congress in the past. However, that is proven inaccurate by past practice of the OIG.

### **An Example of Past OIG Practice**

For example, on March 24, 2006, your predecessor, Glenn Fine, responded favorably to a similar request by producing a set of documents regarding its review of the allegations raised by FBI whistleblower and former Special Agent Michael German. The cover letter signed by then-Inspector General Glenn Fine describes the documents provided to the Senate Committee on the Judiciary as “consisting largely of OIG Memoranda of Interviews, affidavits, and an interview transcript.” More specifically, the documents that the OIG provided to the Committee also included: (1) Michael German’s 26-page written comments to the draft OIG report, and (2) polygraph examination reports of multiple FBI personnel, with their names unredacted. Notably, the staff contact on the OIG’s cover letter was Senior Counsel, Scott Dahl, who is now the Inspector General at the Smithsonian and who left the Justice Department OIG in 2007.<sup>6</sup>

Your current staff was unaware of this precedent and asked for a copy of the OIG’s own correspondence with my office.

After being made aware of the depth of cooperation and openness the OIG provided to the Committee in this previous matter, your staff shifted ground and began to try to distinguish the German matter from the National Security Letter and Exigent letter reviews on the basis that one was an “investigation” and the other was a “programmatically review.” This is a distinction without a difference.

### **Withholding Documents Regarding Ms. Caproni is Unjustified**

The policy reason cited for withholding the Caproni documents from the Committee was the need to ensure candor and encourage a dialogue between the OIG and those given an opportunity to comment on its draft reports. Your staff argued that the possibility of disclosure to the Committee would somehow “chill” that dialogue in the future. If that were true, it would be no less true in an investigative context than in a programmatic review. And, it is arguably untrue, since the OIG sometimes prints

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<sup>6</sup> Dahl joined the Commerce OIG in October 2010. He was deputy IG for the Office of the Director of National Intelligence from 2007–2010. He was senior counsel to the IG at the Department of Justice from 2003–2007. He was also a corruption prosecutor in the Public Integrity Section, Criminal Division of Justice from 1997–2003 and a trial attorney in the Civil Fraud Section, Civil Division at Justice from 1992 to 1997.

agency comments along with its reports when it chooses not to make edits based on those comments.

The OIG clearly did not believe it would chill future commenters on its draft reports to provide the Committee a copy of Michael German's comments. The question, therefore, is whether there is some fundamental difference between Mr. German's comments on a draft report and Ms. Caproni's comments on a draft report that justifies disclosing the former and withholding the latter. Unfortunately, the only meaningful distinction between the two scenarios is that Mr. German was a former Special Agent at the time he submitted his comments while Ms. Caproni was the FBI's General Counsel at the time she submitted hers. Stated differently, Mr. German was "external to DOJ," but Ms. Caproni was "internal to DOJ." That distinction raises serious questions about how your office views its independence from the Department of Justice and its component agencies.

### **An Independence Problem**

Your staff specifically referred to the OIG's communications with Ms. Caproni over the draft OIG report as "internal DOJ communications." Communications between the agency's counsel and the OIG are emphatically not "internal." If an OIG were to negotiate the wording of its reports with the agency in secret deliberations, without the possibility of Congressional oversight, there could be no public confidence that the work of the OIG was actually independent as required by the Inspector General Act.<sup>7</sup> To be clear, the Committee does not need to see internal deliberations among OIG staff about how a particular finding or conclusion ought to be worded. However, communications with the agency's general counsel are in a completely different category, especially when that general counsel is a nominee before the Committee for an appointment with lifetime tenure.

Moreover, the OIG's objection to providing Ms. Caproni's comments on the draft report do not apply in the context of interview transcripts. Specifically, the OIG has based its reluctance to provide the exchange of draft reports and comments on the supposed "chilling effect" disclosure of those documents would have on the process. However, given that interviewees are under an obligation to provide truthful testimony (and in fact are subject to 18 U.S.C. § 1001) regardless of whether those transcripts are later provided to Congress, disclosing them would have no "chilling effect" on future investigations or reviews.

Accordingly, my request for copies of draft reports reviewed by Ms. Caproni and records of communications between the OIG and Ms. Caproni about her role in the

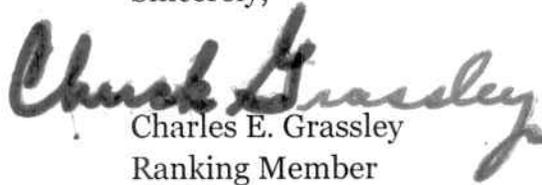
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<sup>7</sup> Inspector General Act of 1978, as amended, 5 U.S.C. app. 3 (West 2013).

National Security Letter reports remains pending. If you do not intend to provide those documents, please provide a written explanation, including citations to relevant authority and precedent, of the reasons why you believe this request diverges from past OIG precedent.

While my request for the documents outlined above remains outstanding, in an effort to move forward with Ms. Caproni's nomination and considering that the interview transcripts do not pose the same supposed "chilling effect" as the other categories of documents, I ask that you provide copies of the transcripts of OIG interviews with Ms. Caproni and her deputy, Julie Thomas, no later than March 22, 2013.

Sincerely,

  
Charles E. Grassley  
Ranking Member

Cc: The Honorable Patrick Leahy  
Chairman