

**THE OFFICE OF INSPECTOR
GENERAL AND ITS ONGOING
FAILURE TO COMPLY WITH A
SUBPOENA FOR DOCUMENTS
ABOUT A RECENT INVESTIGA-
TION**

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

Thursday, September 11, 2014

Serial No. 113-89

Printed for the use of the Committee on Natural Resources



Available via the World Wide Web: <http://www.fdsys.gov>
or
Committee address: <http://naturalresources.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

89-835 PDF

WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

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**OVERSIGHT HEARING ON THE OFFICE OF
INSPECTOR GENERAL AND ITS ONGOING
FAILURE TO COMPLY WITH A SUBPOENA
FOR DOCUMENTS ABOUT A RECENT
INVESTIGATION**

**Thursday, September 11, 2014
U.S. House of Representatives
Committee on Natural Resources
Washington, DC**

The committee met, pursuant to call, at 9:45 a.m., in room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Lamborn, Huffman and Sablan.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

The CHAIRMAN. The committee will come to order and the Chairman notes a presence of a quorum, which under Rule 3(e) is two members, and we have maxed that here today.

The Committee on Natural Resources is meeting today to hear testimony on an oversight hearing titled "Oversight of the Office of Inspector General and its Ongoing Failure to Comply With a Subpoena for Documents About a Recent Investigation."

Under Committee Rule 4(f), opening statements are limited to the Chairman and the Ranking Member. However, I ask unanimous consent to include any Members' opening statements in the hearing record if submitted to the clerk by the close of business today, and without objection, so ordered.

I will now recognize myself for 5 minutes. There are long-held concerns about the integrity and independence of the Department of Interior's Office of Inspector General under the leadership of the Deputy Inspector General, Mary Kendall. A committee report released last year highlighted several examples of mismanagement and their ongoing issues that continue to undermine the credibility of the OIG's work.

The OIG is supposed to serve as an independent watchdog over the Department and report findings to Congress. Instead, Ms. Kendall has established an accommodating and deferential relationship between the OIG and the Department, hindering the OIG's ability to conduct impartial, independent work. The OIG is currently in violation of a congressional subpoena for an unredacted copy of their report and documents on the Department's rewrite of the 2008 Stream Buffer Zone Rule.

Their report exposed mismanagement of the rulemaking process and significant ongoing problems. However, key parts of the report had been redacted including one section entitled "Issues With the

New Contract.” The committee has made multiple requests for this unredacted report and documents including the issuance of a subpoena, but the OIG refused to comply and says that the report is being withheld at the request of the Interior Department.

Specifically, the Department’s Office of the Solicitor reviewed the OIG’s report and documents and identified what parts were to be redacted. Rather than serve as an independent watchdog of the Department, in this example, the OIG is now letting the Department call the shots. The OIG conducted a 2-year investigation, then handed all of the documents of the investigation to the very Department that was the subject of the investigation and then allowed the Department to go line by line through the documents and decide what would be provided to Congress. That is astounding. The OIG has given control over to the Department and is allowing it to dictate what should be provided to Congress pursuant to a subpoena.

The OIG claims that the redacted material consists of an ongoing deliberative process related to rulemaking, but the OIG report is not created as part of the rulemaking and is not used in the furtherance of rulemaking. The report and documents were created solely by the OIG and remain in the possession and the control of the OIG. That is why it was absurd when Ms. Kendall said that we should seek these documents from the Department. They are OIG documents.

Further, the OIG has failed to provide any reason for such redaction. Though we have been informed that Ms. Kendall has asked the Solicitor’s Office to prepare this, once again yielding her statutory power to the Department, she is supposed to be investigating. Finally, I am alarmed that the OIG appears to feel that it has to enter into a deferential relationship with the Department in order to have access to information. In a letter to the committee, Ms. Kendall wrote that in order to secure that level of access from the Department, the OIG, and I quote, “has agreed to protect privileged information,” end quote.

Assistant Inspector General for Investigations, Robert Knox, testified before us in January saying, and I quote again, “The fear we have is if we don’t show that respect, we may lose that access that we need for investigations and audits in the future,” end quote. The IG Act provides unfettered access to documents and information in order for all Inspector Generals to have the necessary tools to maintain their independence and do their job as watchdogs. They shouldn’t have to fear about not having access if they don’t show them respect.

Recently, 47 separate Inspector Generals wrote a letter to Congress reaffirming their authority under the IG Act to have access to all those agency records. Interestingly, Ms. Kendall did not sign this letter that defends the importance of the independent IGs.

For over a year-and-a-half, I have been calling on President Obama to appoint a permanent IG for the Interior Department. It is ridiculous that the OIG has been without a permanent head for 5 years. The credibility of the OIG has been tarnished under the leadership of Ms. Kendall and immediate steps should be taken to restore the independence and the trust in the office.

[The prepared statement of Mr. Hastings follows:]

PREPARED STATEMENT OF THE HON. DOC HASTINGS, CHAIRMAN, COMMITTEE ON
NATURAL RESOURCES

There are long-held concerns about the integrity and independence of the Department of the Interior's Office of Inspector General under the leadership of Deputy Inspector General Mary Kendall. A committee report released last year highlighted several examples of mismanagement and there are ongoing issues that continue to undermine the credibility of the OIG's work.

The OIG is supposed to serve as an independent watchdog over the Department and report findings to Congress. Instead, Ms. Kendall has established an accommodating and deferential relationship between the OIG and the Department, hindering the OIG's ability to conduct impartial, independent work.

The OIG is currently in violation of a congressional subpoena for an unredacted copy of their report and documents on the Department's rewrite of the 2008 Stream Buffer Zone Rule. Their report exposed mismanagement of the rulemaking process and significant ongoing problems.

However, key parts of the report have been redacted, including one section entitled "Issues with the New Contract." The committee has made multiple requests for this unredacted report and documents, including the issuance of a subpoena, but the OIG refuses to comply and says that the report is being withheld at the request of the Interior Department. Specifically, the Department's Office of the Solicitor reviewed the OIG's report and documents and identified what parts were to be redacted.

Rather than serve as an independent watchdog of the Department, the OIG is now letting the Department call the shots.

The OIG conducted a 2-year investigation, then handed all of the documents of the investigation to the very Department that was the subject of the investigation, and then allowed the Department to go line-by-line through the documents and decide what would be provided to Congress.

It's astounding. The OIG has given control over to the Department and is allowing it to dictate what should be provided to Congress pursuant to a subpoena.

The OIG claims that the redacted material consists of an ongoing deliberative process related to the rulemaking. But the IG report was not created as part of the rulemaking and was not used in the furtherance of the rulemaking. The report and documents were created solely by the OIG and remain in the possession and control of the OIG. That's why it was absurd when Ms. Kendall said we should seek these documents from the Department instead. They are OIG documents.

Furthermore, the OIG has failed to provide any reason for each redaction. Though we've been informed that Ms. Kendall has asked the Solicitor's Office to prepare this—once again yielding her statutory power to the Department she is supposed to be investigating.

Finally I'm alarmed that the OIG appears to feel that it has to enter into a deferential relationship with the Department in order to have access to information. In a letter to the committee, Ms. Kendall wrote that in order to secure that level of access from the Department, the OIG "has agreed to protect privileged information." Assistant Inspector General for Investigations, Robert Knox, testified before us in January saying, "The fear we have is if we don't show that respect, we may lose that access that we need for our investigations and audits in the future."

The IG Act provides unfettered access to documents and information in order for Inspector Generals to have the necessary tools to main their independence and do their jobs as watchdogs. They shouldn't have to "fear" about not having access if they don't show them respect.

Recently, 47 separate Inspector Generals wrote a letter to Congress reaffirming their authority under the IG Act to have access to all agency records. Interestingly, Ms. Kendall did not sign this letter that defends the importance of independent IGs.

For over a year-and-a-half I've been calling on President Obama to appoint a permanent IG for the Interior Department. It's ridiculous that the OIG has been without a permanent head for 5 years. The credibility of the OIG has been tarnished under the leadership of Ms. Kendall and immediate steps should be taken to restore the independence and trust of the office.

The CHAIRMAN. With that, I will recognize, sitting in for the Ranking Member, Mr. Huffman from California.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chairman and welcome back, Ms. Kendall.

The Interior Department's Office of Inspector General found no evidence of misconduct or political interference in the ongoing Stream Protection rulemaking. Now, that should have been the end of it. It should have been case closed, but my Republican colleagues seem to have trouble accepting facts that contradict their conspiracy theories, so now we are badgering the investigator once again for not confirming what Republicans want to be true, but just isn't.

The OIG's report and supporting documents provided to this committee, contain some redactions requested by the Department of Interior and according to the OIG, these redactions concern the substance of the ongoing Stream Protection rulemaking which the Department identified as predecisional and privileged. They are irrelevant, however, to the central question of whether the Interior Department officials acted improperly in this rulemaking and on that question, we have all the information we need.

The Interior Department has produced roughly 14,000 pages of documents to this committee on the rulemaking. Contractors who worked on the rulemaking also provided the committee with 25 hours of audio recordings, meetings with Federal regulators, and now we have the Office of Inspector General's findings, including supporting documents and interview transcripts with key players that are mostly unredacted.

The OIG has told the Chairman that the still redacted information is irrelevant to the Majority's oversight interest. Ms. Kendall explained in a letter this past May that, quote, "When we become aware of fraud and other serious problems, abuses and deficiencies relating to the administration of programs and operations . . . we ensure such information is presented in a timely manner to the relevant congressional committees. . . As we have repeatedly advised, however, we did not find fraud or other serious problems with respect to the ongoing rulemaking process."

The OIG report confirmed the findings of a Democratic staff report issued more than 2 years ago. We have learned nothing new this entire Congress. So let me be clear: The Minority believes that congressional oversight is essential for a well-functioning government, and where there is a legitimate well-founded interest in executive branch documents, we would and will support and work with the Majority to obtain those documents.

The problem here is this investigation has no purpose. The Majority has just demanded documents for the sake of demanding documents. It is another example where they seem to prefer to have the issue so we can fight about it instead of having the information. This is clearly wasteful. The Interior Department has spent more than \$2 million and diverted roughly 34,000 hours of staff time dealing with the Chairman's document demands, but it also threatens to erode our system of executive branch oversight, so there are much more serious implications to what we are doing here.

The Inspector General's Office often sometimes faces difficulty obtaining access to records, especially privileged records, but this OIG has obtained memorandum from every Interior Secretary since Gale Norton directing Department employees to provide all requested information to the OIG, including privileged information.

Now, if the OIG were to do as the Majority demands and release all information identified as privileged by the Department, it could comprise the ability of this Inspector General and future Inspector Generals to obtain sensitive information and conduct effective investigations in the future.

The Chairman also has issued a whopping 11 subpoenas over the last two Congresses. Subpoenas are sometimes necessary, but when they are handed out like Halloween candy, their force is diminished and we in Congress become easier to ignore. That is especially true when the subpoenas are frivolous, like the one we are talking about here today.

Indeed, it is telling that, at the end of this Congress, we are having a hearing about documents and nothing that actually matters to the American people. The sad truth is that the Majority's investigations have taught us nothing important; they have caused nothing to improve. We leave this Congress as we started, demanding documents without purpose and wasting everyone's time.

I yield the balance of my time.

The CHAIRMAN. I thank the gentleman for his statement.

[The prepared statement of Mr. Huffman follows:]

PREPARED STATEMENT OF HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman.

The Interior Department's Office of Inspector General found no evidence of misconduct or political interference in the ongoing Stream Protection rulemaking.

That should have been case closed, but Republicans seem to have trouble accepting facts that contradict their conspiracy theories. So now we're here badgering the investigator for not confirming what Republicans know must be true—but isn't true.

The OIG's report and supporting documents provided to this committee contain some redactions requested by the Interior Department. According to the OIG, these redactions concern the substance of the ongoing Stream Protection rulemaking, which the Department identified as pre-decisional and privileged.

They are irrelevant, however, to the central question of whether Interior Department officials acted improperly in the Stream Protection rulemaking.

On that question, we have all the information we need. The Interior Department has produced roughly 14,000 pages of documents to the committee on the Stream Protection rulemaking. Contractors who worked on the rulemaking also provided the committee with 25 hours of audio recordings of meetings with Federal regulators. And now we have the Office of Inspector General's findings, including supporting documents and interview transcripts with key players that are mostly unredacted.

The OIG has told the Chairman that the still redacted information is irrelevant to the Majority's oversight interests. Ms. Kendall explained in a letter this past May that, quote, "When we become aware of fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations . . . we ensure such information is presented in a timely manner to the relevant congressional committees. . . As we have repeatedly advised, however, we did not find fraud or other serious problems with respect to the ongoing rulemaking process."

The OIG report confirmed the findings of a Democratic staff report issued more than 2 years ago. We have learned nothing new in this entire Congress!

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This is clearly wasteful—the Interior Department has spent more than \$2 million and diverted roughly 34,000 hours of staff time dealing with the Chairman’s document demands. But it also threatens to erode our system of executive branch oversight.

Inspectors General often face difficulty obtaining access to records, especially privileged records. But this OIG has obtained memorandum from every Interior Secretary since Gale Norton directing Department employees to provide all requested information to the OIG, including privileged information.

If the OIG did as the Majority demands and released all information identified as privileged by the Department, it could compromise the ability of the OIG to obtain sensitive information and conduct effective investigations in the future.

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The CHAIRMAN. Ms. Kendall, you have been here before. You know how this process works. Your full statement will appear in the record, but we would like you to keep your oral remarks within the 5 minutes. The green light means that you are doing well. When the yellow light comes on, it means you have a minute and when the red light comes on we would ask you to summarize your final point and then we can get to the question period.

And with that, Ms. Kendall, you are recognized for 5 minutes.

**STATEMENT OF THE HON. MARY KENDALL, DEPUTY
INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR**

Ms. KENDALL. Thank you, Mr. Chairman, and good morning. Good morning, Congressman Huffman, and, I guess, that is it for the committee. I would say good morning to other Members.

This committee has subpoenaed information from the Office of Inspector General regarding its Stream Protection Rule report that the Department of the Interior has claimed is privileged and should not be disclosed. My office has stated repeatedly that this dispute is between the committee and DOI, not the OIG, and we have urged the committee to engage with DOI to resolve this issue.

Instead, the committee has continued to pressure the OIG to release privileged documents and information that, if released, would not only jeopardize the OIG’s ability to obtain privileged information from DOI in the future but would also exacerbate an existing problem in the IG community regarding timely access to information and documents from their agencies and departments.

We have explained repeatedly that the claim of privilege is DOI’s to assert, not the OIG’s. We have also made this position clear to DOI which concurs that it alone has the responsibility and authority to resolve the issues in dispute. We also explained that we have a longstanding understanding with DOI that it would not decline to provide privileged information to the OIG, so long as we give DOI an opportunity to identify cognizable privileges, as it has here.

We have also expressed our concern that release of privileged information, in this instance by the OIG, would seriously impair our access to the same in the future. Of even greater concern is that to release information against the assertion of privilege by DOI would add to the argument that other Federal agencies and departments would use to withhold information from their respective OIGs. This is not simply my assessment. It is a conviction shared by my colleagues in other IG offices.

I find it curious that this committee is pressuring my office to do something that would jeopardize access in the future for itself and other OIGs, while your colleagues in both the House and Senate, in a bipartisan letter to OMB, have expressed their concern about the difficulties that Inspectors General have encountered in trying to obtain documents from their respective agencies.

In fact, the Senate Judiciary Committee held a bipartisan hearing on Tuesday and the House Oversight and Government Reform Committee held its second bipartisan hearing just yesterday on this very issue. Like the witnesses at these hearings, we acknowledge that the IG Act is very clear, that IGs are to have access to all documents and information applicable to the department or agency they oversee.

As a practical matter, however, other OIGs have had significant difficulty in gaining access to documents and employee interviews regardless of this statutory provision. Whether privilege is properly asserted by DOI in this matter involving ongoing rulemaking, can only be resolved between this committee and the Department or through litigation in Federal Court. The OIG has not taken a position in this dispute but has been placed squarely in the middle of it by this committee.

Our position that the information at issue is the Department's to claim and defend privilege for is also consistent with the position of other IG offices. We are not aware of any other congressional committee issuing subpoenas to an Inspector General to obtain departmental or agency documents or information. I again urge this committee to use the procedural tools available to it to pursue access to documents and information from the Department of the Interior rather than pressure the OIG to take action that would jeopardize our ability to do our job in the future as well as the abilities of our OIG colleagues to do their jobs.

The information that remains at issue is the Department's, not the OIG's; the assertion of privilege is the Department's, not the OIG's; and the waiver of the privilege is the Department's, not the OIG's. I will do my best to answer questions that Members may have.

[The prepared statement of Ms. Kendall follows:]

PREPARED STATEMENT OF MARY L. KENDALL, DEPUTY INSPECTOR GENERAL,
DEPARTMENT OF THE INTERIOR

This hearing arises out of a series of letters dated December 23, 2013, March 13, 2014, April 16, 2014, and July 18, 2014, and a subpoena dated March 25, 2014, issued by this committee to the Office of Inspector General (OIG) for the Department of the Interior (DOI) seeking documents and information concerning an OIG investigation regarding the Stream Protection Rule that is being promulgated by DOI. The OIG has responded in detail to each of these letters and to the subpoena in letters of our own.

To summarize the position of my office, this committee has subpoenaed information from our Stream Protection Rule report that DOI has claimed is privileged and should not be disclosed. This dispute is between the committee and DOI, not the OIG, and we have urged the committee to engage with DOI to resolve this issue. Instead, the committee has continued to pressure the OIG to release privileged documents and information that, if released, would not only jeopardize the OIG's ability to obtain privileged information from DOI in the future, but would also exacerbate a problem in the IG community regarding timely access to information from their agencies and departments.

We have explained repeatedly that the claim of privilege is DOI's to assert—not the OIG's—and we have repeatedly asked that the committee attempt to resolve the issue with DOI. We also explained that we have a long-standing understanding with DOI that it would not decline to provide privileged documents to the OIG so long as we gave DOI an opportunity to identify cognizable privileges, as it has here. We have also repeatedly expressed our concern that release of privileged information in this instance by the OIG will seriously impair our access to the same in the future.

Of even greater concern is that to release information against the assertion of privilege by DOI would add to the argument that other Federal agencies and departments would use to withhold information from their respective OIGs. This is not simply my assessment; it is a conviction shared by my colleagues in other IG offices.

It is curious that this committee is pressuring the OIG to do something that would jeopardize access in the future for itself and other OIGs while your colleagues in both the House and Senate, in a bipartisan letter to OMB, have expressed their concern about the difficulties that Inspectors General have encountered in trying to obtain documents from their respective agencies.

The Chairman's letters have contended that a claim of executive privilege has not been asserted as a basis for the continued withholding of the subject information. This contention fails to recognize how the executive branch asserts a claim of executive privilege. We have noted that every President since Lyndon Johnson has asserted executive privilege in shielding documents from Congress. The practice of recent administrations is that only the President can assert executive privilege and will only do so after receiving a recommendation from the Attorney General. The current practice also involves efforts to resolve disputes through a judicially recognized process of accommodation. This process has been described by one Attorney General as: "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch" (*Assertion of Executive Privilege*, 5 Op. O.L.C. 27, 31 (1981)).

Whether privilege is properly asserted by DOI in this matter involving ongoing rulemaking can only be resolved by the parties to the dispute—this committee and the Department—or through litigation in Federal Court. The OIG does not take a position in such a dispute; we note, however, that other administrations have claimed the privilege in the context of ongoing rulemaking. In 1981, Attorney General William French Smith recommended and President Reagan asserted executive privilege to subpoenas from a congressional committee for documents concerning ongoing deliberations regarding regulatory action by the Interior Secretary. (See *Assertion of Executive Privilege*, 5 Op. O.L.C. 27.) As we have explained to the committee and committee staff multiple times, the OIG cannot usurp the President's power to assert executive privilege if other efforts to resolve the dispute fail.

One of the Chairman's letters asserted that our actions to avoid getting pulled into an ongoing dispute between this committee and the Department is indicative of our lack of independence. We feel certain that the opposite is true—that our independence and neutrality in a dispute between the committee and the Department that has constitutional implications can only be advanced by the position we have repeatedly expressed: the information the committee seeks belongs to the Department, and the committee should be seeking that information from the Department, not from the OIG. We have also made this position clear to DOI, which concurs that it alone has the responsibility and authority to resolve the issues in dispute.

Our position is also consistent with the position of other IG offices—if documents or information in the possession of the OIG that the agency claims as privileged is sought by a congressional committee, the OIG would refer the committee to the agency. We are not aware of any other congressional committee issuing subpoenas to an Inspector General to obtain departmental or agency documents or information.

We recognize that the IG Act provides "that each Inspector General, in carrying out the provisions of this Act, is authorized—to 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.”

As a practical matter, however, other OIGs have had significant difficulty in gaining access to documents and employee interviews regardless of this statutory provision, as was addressed in the January 15, 2014 hearing before the House Committee on Oversight and Government Reform, *Strengthening Agency Oversight: Empowering the Inspectors General*. The testimony from this hearing makes clear that the language of the IG Act alone does not assure OIGs access to agency documents and information.

The OIG for DOI is somewhat unique in that we secured a memorandum from every one of the Secretaries of the Interior since Gale Norton directing DOI employees to provide all requested information to the OIG, including privileged information. The OIG, in order to facilitate such access, has agreed to review such privilege assertions and determine whether such claims have a constitutional basis and are consistent with prior assertions by the executive branch.

The OIG’s unique situation was even noted in the Staff Report for Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Lamar Smith, House Committee on Science, Space and Technology, entitled *Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board*, dated June 19, 2014. The report notes that the disclosure of privileged information to an OIG would not waive privilege because the OIG is technically part of its department or agency. The issue of providing privileged information to the OIG was also recently cited in an August 5, 2014 letter to Congress, signed by 47 IGs, which said: “While valid privilege claims might in certain circumstances appropriately limit the . . . OIG’s **subsequent and further release** of documents, a claim of privilege provides no basis to withhold documents from the . . . OIG in the first instance” (emphasis added).

I again urge this committee to use the procedural tools available to it to pursue access to documents and information from the Department of the Interior, rather than pressure the OIG to take action that would jeopardize our ability to do our job in the future, as well as the abilities of our OIG colleagues to do their jobs. The information that remains at issue is the Department’s, not the OIG’s; the assertion of privilege is the Department’s, not the OIG’s; and the waiver of privilege is the Department’s, not the OIG’s.

The CHAIRMAN. I will recognize myself for the purpose of questioning now.

In my opening statement, I made an observation of my understanding. In your opening statements you made an observation of your understanding. In several letters, Ms. Kendall, to this committee and again in your written testimony today, you articulate several conflicting viewpoints about the position you are taking on behalf of the Department.

On the one hand, you state that you are, and I quote, “not taking a position,” end quote, of whether these documents are, in fact, privileged. Yet, you also claim that the committee continues to, and I quote, “pressure the OIG to release privileged documents,” end quote, and spend several paragraphs explaining your understanding that these documents are, in fact, privileged.

Now, let me be clear. Your office conducted an investigation and created a report of your findings. You have withheld these findings from the Congress in violation of the IG Act and in violation of this subpoena. Under the spurious claim that the information contained in the report that you drafted is privileged. You then claim that your office is not taking a position. However, the Department has not asserted a claim of privilege, and you have not asked this committee to hold the subpoena in abeyance while the claim of executive privilege is asserted by the Department.

Your claims that you are being put in the middle of a disagreement between this committee and the Department, in my view, is disingenuous. The committee has subpoenaed a report that your office, your office, OIG, within the Department of Interior drafted, not documents that were used in the ongoing rulemaking. If the Department had sought a claim of executive privilege of these documents and then the committee subpoenaed you for them, that would be a different situation. Here, the Department simply told you what they wanted withheld, and you obliged. You even had the Department make the redactions for you.

So let me ask you this, these are very simple questions: Has the Department sought a claim of executive privilege from the White House regarding these documents?

Ms. KENDALL. Mr. Chairman, not that I know of, but that would be a question that would need to be asked of the Department.

The CHAIRMAN. So as far as you know, that has not been done?

Ms. KENDALL. As far as I know.

The CHAIRMAN. Is anything preventing the Department from seeking a claim of privilege from the White House?

Ms. KENDALL. Not that I know of, Mr. Chairman.

The CHAIRMAN. Have you asked the Department to assert a claim of privilege on these documents?

Ms. KENDALL. Mr. Chairman, I have asked the Department to provide me a document that expresses their position on this information.

The CHAIRMAN. I didn't ask you that. Have you asked the Department to assert a claim of privilege on these documents that we are asking, that we subpoenaed?

Ms. KENDALL. It is not my position to do so, sir.

The CHAIRMAN. So you haven't asked, then, obviously.

Ms. KENDALL. No I have not.

The CHAIRMAN. Have you told the Department that absent a valid claim of privilege that you are compelled to comply with the congressional subpoena?

Ms. KENDALL. Mr. Chairman, there is a process by which privilege is asserted—

The CHAIRMAN. I didn't ask you that. What I asked you is, have you told the Department that absent a valid claim of privilege under the IG Act, you are compelled to comply with a congressional subpoena?

Ms. KENDALL. I believe it would be the committee's position to tell the Department that, not mine.

The CHAIRMAN. I just find that answer—all right. I just don't know, let me ask one final question. I think I know what the answer is going to be, not satisfactory to me. Absent a valid assertion of executive privilege, are you not compelled to comply with the validly issued congressional subpoena?

Ms. KENDALL. Absent a valid assertion, I would say yes, but in this case, the Department has provided information to us that—

The CHAIRMAN. But it is not an assertion of executive privilege. Is that correct?

Ms. KENDALL. Mr. Chairman, I would be glad to provide you the documents that the Department has provided us and you can make your own decision on whether it is valid or not.

The CHAIRMAN. I am not—all right.

Ms. Kendall, you can tell that I am a bit frustrated because what we are asking is, again, just for the record, something that your office created.

Ms. KENDALL. I understand that.

The CHAIRMAN. And the Office of the Inspector General was created long before I came to Congress to have, quote, “independent oversight and access to all documents so that Congress in their responsibility to review issues would have that information.” You have done that in your IG investigation of the previous rulemaking. And that is what we are asking about. That is all we are asking about.

My time has expired. I recognize the gentleman from California.

Mr. HUFFMAN. Thank you, Mr. Chairman.

I think we need to be very precise with some of these words that really have legal significance, so I want to follow up on the Chairman’s point about whether findings that you made in your investigation were actually withheld or redacted, as opposed to information that may have been the subject of a claim of privilege by the Department.

So Ms. Kendall, let me ask you just very directly, did you make any findings that were withheld or redacted from this committee?

Ms. KENDALL. No, sir.

Mr. HUFFMAN. I thought so.

Ms. Kendall, the Inspector General Act requires you to keep the Secretary of Interior and Congress fully informed concerning fraud and other serious problems, abuses, deficiencies relating to the administration, programs and operations. However, the information the Majority is demanding from you does not concern anything close to that standard of seriousness; is that correct?

Ms. KENDALL. That is correct.

Mr. HUFFMAN. And so had you found misconduct, deficiencies, et cetera, as specified in the Act, would you have reported that information to this committee?

Ms. KENDALL. In the ongoing rulemaking, yes, I would have.

Mr. HUFFMAN. But you made no such findings?

Ms. KENDALL. No, we did not.

Mr. HUFFMAN. I think it is important to remember, as we have this disagreement about documents and assertions of privilege by the Department, that the underlying rulemaking that has been targeted by the Majority is a Stream Protection Rule involving the practice of mountaintop removal mining.

It is a practice that is destroying Appalachian communities, threatening public health, devastating the environment and there is no doubt that the rulemaking would probably require the coal industry to do some additional things to protect the environment and public health in Appalachian communities. Yet we have so changed the subject and gotten so wrapped around the axle that that fundamental point has been lost.

I want to thank you for your patience and for your appearance before this committee, and I would yield the balance of my time.

The CHAIRMAN. The Chair recognizes the gentleman from Colorado, Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman. Thank you for having this important hearing.

Ms. Kendall, the investigation your office conducted shows that contractors were asked to change numbers, that this occurred after the job loss numbers were leaked, and that OSM spent millions of dollars and several years to have nothing to show for it. The report also discussed other, quote, "issues with the new contract," unquote, issues that you have determined Congress has no right to know about.

We have repeatedly asked you to provide the report your office prepared in accordance with the requirements of the Inspector General Act; you have repeatedly refused to do so. A subpoena was issued on March 25 of this year for the unredacted version of the report your office created. Although you have written letters back, on Tuesday you provided a few more sentences, but most of what we are seeking is still missing.

Now, apparently, you concede that these documents that we are subpoenaing were created by your office. Is that true?

Ms. KENDALL. That is true.

Mr. LAMBORN. That they were created during the course of your duties under the Inspector General's Act. Is that true?

Ms. KENDALL. Yes, sir.

Mr. LAMBORN. And that they remain in your possession, custody or control?

Ms. KENDALL. Yes, sir.

Mr. LAMBORN. OK. So here is what we have. You created a report using the authority under the IG Act and that same Act requires you to keep Congress fully and currently informed. By providing a different report to Congress, one that is heavily redacted, you have failed to keep Congress fully and currently informed.

You are withholding documents at the request of the Department in violation of a subpoena. You and your general counsel have confirmed that the documents are in your possession, custody and control; and you have just reconfirmed that.

To your knowledge, has the President exerted executive privilege over these documents?

Ms. KENDALL. To my knowledge, no.

Mr. LAMBORN. OK. And have you asked the Department to seek a claim of privilege?

Ms. KENDALL. I answered the Chairman about that; no, I have not.

Mr. LAMBORN. OK. Do you intend to comply with the subpoena that our committee has properly given to you?

Ms. KENDALL. Mr. Lamborn, I have asked the committee multiple times to seek this information from the Department. The information is contained in the OIG report, but the information is the Department's, not the OIG's.

The Department has expressly said it would work with this committee to accommodate, and that is the process by which this kind of information is supposed to go through, but the committee has not engaged the Department in this particular instance since April of 2013.

Mr. LAMBORN. So we have no right to subpoena you?

Ms. KENDALL. You have subpoenaed me.

Mr. LAMBORN. Well, we have every right to do so. It was properly done. You have been under subpoena for 6 months now. You have failed to comply. You have not provided this committee with the documents we have properly sought for. I believe you should be held in contempt.

Do you have any reason to say why you should not be held in contempt?

Ms. KENDALL. I certainly do, sir, because this information is the Department's. If I can go back to Mr. Issa's hearing yesterday, he said that the reason IG should get privileged information is because they are a part of the executive branch. I do not feel that I can, as a part of the executive branch, usurp the Department's claim of privilege or usurp the President's claim of privilege.

Mr. LAMBORN. Ms. Kendall, let me interrupt. We are asking for your report. Why can't you give us your report?

Ms. KENDALL. You are asking for the Department's information.

Mr. LAMBORN. No, we are asking for your report.

Mr. Chairman, I yield back.

The CHAIRMAN. Let me correct for the record that you just stated in response to a question from Mr. Lamborn that this committee has not interacted with the Department since April of 2013.

Ms. KENDALL. On this issue.

The CHAIRMAN. No, that is not correct. There has been—I don't know where you got that information. Where did you get that information?

Ms. KENDALL. Well, that was the last letter that I understood you sent to the Department.

The CHAIRMAN. No, there have been discussions on the staff level with the Department on this. So—

Ms. KENDALL. I stand corrected.

The CHAIRMAN. You stand corrected, all right.

Now, you said that the Department gave you a reasoning of privilege, I think I heard you say that, of why you should not give your report to us. Would you clarify what I thought I heard you say in my initial line of questioning?

Ms. KENDALL. Yes, sir. The Associate Solicitor for General Law, Ed Keable, has provided us with two memoranda that express their position on these documents and expressly ask that we ask the committee to engage with them, not with the OIG, to resolve this issue. I would be happy to provide those documents to you.

The CHAIRMAN. You have not provided them. When will you provide those to us, then?

Ms. KENDALL. I can provide them to you this afternoon, sir.

The CHAIRMAN. All right. I wish you would do so.

Ms. KENDALL. I will do that.

[The information follows:]



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

MAR 27 2014

Memorandum

To: Mary Kendall, Deputy Inspector General

From: Edward T. Keable, Deputy Solicitor—General Law

Subject: Response to House Natural Resources Committee Subpoena Dated
March 25, 2014

The Department understands that the Office of the Inspector General (OIG) has received a subpoena dated March 25, 2014 from the House Natural Resources Committee (HNRC) demanding production of the unredacted version of the Report of Investigation (ROI) into the efforts of the Office of Surface Mining (OSM) to revise its Stream Protection Rule (SPR) and which the OIG provided to the Committee in redacted form on March 18, 2014; transcripts of interviews with OSM and other DOI employees and employees of contractors engaged by the OSM to assist in the drafting of the SPR; and investigating agents' notes concerning these interviews and other aspects of the ROI.

In response to earlier oversight requests, the Department previously reviewed the redacted information the Committee now demands through its subpoena and concluded that the information relates to the ongoing rulemaking process for the SPR. The information demanded relates to important Executive Branch confidentiality interests and is deliberative and pre-decisional information that, if provided to the Committee, could compromise the independence and integrity of the still on-going rulemaking process.

The Secretary of the Interior and the HNRC Chairman have also discussed the sensitivity of information related to the on-going rulemaking process. In a January 15, 2014, letter to the Chairman, the Secretary summarized that exchange: "During our conversation, you acknowledged the Department's interest in protecting this information and I hope that our mutual understanding can form the foundation for us to work together in a way that respects our mutual Constitutional interests."

The information now demanded of the OIG by the Committee in its March 25 subpoena is the very same information the Committee Chairman has already agreed the Department has a cognizable interest in protecting from disclosure.

We therefore continue to respectfully request that you decline to produce to the Committee any information that relates to the ongoing rulemaking process for the SPR. We also request that you direct the Committee to Ms. Sarah Neimeyer, Director, DOI Office of Congressional and Legislative Affairs, regarding the Committee's interest in this information and to reach a mutually agreeable accommodation on this matter.

cc: Sarah Neimeyer, Director, DOI OCL



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

SEP - 5 2014

IN REPLY REFER TO

Memorandum

To: Mary Kendall, Deputy Inspector General

From: Edward T. Keable, Deputy Solicitor—General Law

Subject: Response to House Natural Resources Committee Subpoena Dated March 25, 2014

The Department understands that you have been invited to testify before the House Natural Resources Committee (Committee) on September 11, 2014, regarding your response to the Committee's March 25, 2014, subpoena seeking production of the unredacted Report of Investigation (ROI) into the efforts of the Office of Surface Mining (OSM) to revise its Stream Protection Rule (SPR) and related documents.

In a March 27, 2014, memo, I informed you that the Department reviewed the redacted information sought in the subpoena and concluded that certain information relates to important Executive Branch confidentiality interests and is deliberative and pre-decisional information that, if provided to the Committee, could compromise the independence and integrity of the still ongoing SPR rulemaking process. I respectfully requested that you decline to produce to the Committee any such information that relates to the ongoing SPR rulemaking and asked that you refer the Committee to the Department to afford us the opportunity to reach an accommodation.

In response to what the Department understands to be the Committee's specific concerns about the appropriateness of some of the Department's requested redactions in the IG's initial response to the Committee, the Department has again reviewed the ROI and supporting documents and has agreed, as a part of the accommodation process between the Legislative and Executive branches, that factual assertions and some deliberative information that do not harm important Executive Branch interests may be revealed to the Committee. We have provided your staff with that information. However, the Department finds no reason to alter its conclusion about the release of the remaining deliberative, pre-decisional information contained in those documents.

The Department has not yet announced the availability of a proposed rule, and internal, deliberative discussions among employees of the Department and its contractors about the SPR are ongoing. These discussions, which will determine the scope and content of the rule to be proposed, the alternatives to be considered, and appropriate environmental and economic analytical models to be employed, are the heart of the deliberative and pre-decisional information surrounding the SPR rulemaking that the Department seeks to protect.

The Department stands on solid legal ground in its efforts to protect its pre-decisional deliberations regarding the SPR. Courts have recognized that aspects of the deliberative process privilege have roots in the constitutional separation of powers. It has also been long-standing Executive Branch policy recognized by both political parties that protecting internal Executive Branch deliberations is one of the significant interests encompassed by the doctrine of executive privilege, and this confidentiality interest is heightened when the deliberations are ongoing. Thus, draft rulemaking documents prepared during the course of ongoing deliberations clearly fall within the scope of executive interests. The release of such information could severely compromise the independence and integrity of the Executive Branch's rulemaking process.

The Department therefore continues to respectfully request that you decline to produce to the Committee any information we have identified to you that relates to our executive interests in the ongoing rulemaking process for the SPR. I also again ask that you direct the Committee to Ms. Sarah Neimeyer, Director, DOI Office of Congressional and Legislative Affairs, regarding the Committee's interest in this information to afford the Department the opportunity to work with the Committee to attempt to accommodate their interests.

cc: Sarah Neimeyer, Director, OCL

The CHAIRMAN. OK. That is all I have.
Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chair.
I would just note that if the Majority was interested in asking the Solicitor this question directly, she was sitting in the chair right next to you yesterday in a hearing.

Ms. KENDALL. I was hoping she would be here today, sir.

Mr. HUFFMAN. Yes, and that question was not posed. So I think we are left with a situation where the Majority has, for some reason, preferred to bring the Inspector General's Office before this committee to answer questions about assertions of privilege that were made by the Department, not by you, to disregard the fact that you have made finding after finding that there was nothing wrong found in your investigation with this rulemaking. You have shared those findings completely without redaction with the committee, and yet questions about the Department's assertions of privilege continue to be asked as if there is an issue or controversy here.

So there is still no there there to this whole process, and I am sort of left with the statement I concluded with in my opening, that we have learned nothing, but we have sure spent a lot of time and money chasing documents.

The CHAIRMAN. Gentleman yield back?

Mr. HUFFMAN. Yes.

The CHAIRMAN. Chair recognizes the gentleman from Colorado, Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

And before we go on, could the staff please put up on the screen Slide 1. OK.

And that is what we were referring to earlier, Ms. Kendall. This is all that we have received from your report. Maybe there are a few words that were given on Tuesday, but basically that is what we are faced with, unfortunately.

Now, we have discussed the IG Act a little bit already, but I have a question about a different section. Section 5 of the Act requires that you, quote, "keep the head of the Department and the Congress fully and currently informed." You provided one version of a report to the Department and a different, less detailed version of that report to Congress, withholding vital information at their request. How does this decision comport with the requirement to keep Congress and the head of the Department fully and currently informed?

And if the staff could put up Slide 6, please, with that specific language so we can all see it.

Ms. KENDALL. Congressman Lamborn, first, I would note that the previous exhibit was 2 pages out of a 30-page report and only one of them was heavily redacted. That pertains to the ongoing rulemaking which is an executive branch responsibility, and the Department has claimed that they have an interest in maintaining the privilege of deliberative process.

And that is the only information relative to this entire report that we have been willing to accept as a claim of privilege.

Mr. LAMBORN. Now, how often does it happen that you provide separate reports, one to the Department and one to Congress?

Ms. KENDALL. Rarely.

Mr. LAMBORN. Rarely. In fact, this is probably a unique situation?

Ms. KENDALL. It is.

Mr. LAMBORN. OK. So we have one report provided to the Department and one to Congress. I don't see how you are in compliance with that requirement, that Congress be fully and currently informed.

How do you determine what reports are included in the semiannual report to Congress that your office provides?

Ms. KENDALL. We include what we determine internally as significant reports. I understand this one was left out of our semiannual report inadvertently. I have been told by staff that it was not input into the system until October, which would have made it—it should have gone into the March semiannual report, but I have made sure that it will be in the semiannual report that we issue at the end of October, or at the beginning of October.

Mr. LAMBORN. OK. So you admit that that mistake was also made?

Ms. KENDALL. That mistake was made, yes.

Mr. LAMBORN. And will that report be in its full form that the Department received, or are you going to redact it again?

Ms. KENDALL. The semiannual report is a summary of reports, and it will contain the bulk of the information in summary form of this report.

Mr. LAMBORN. So we won't have the full and currently informed type of document that we are hoping to get?

Ms. KENDALL. Mr. Lamborn, we have a very significant differing opinion on that.

Mr. LAMBORN. We sure do.

Let's see, one of the redacted versions of the report shows that the date is February 28, 2013. The report was not released until December 20, 2013, 10 months later. Why was that report so long in being released?

Ms. KENDALL. I don't personally know where the February date comes from, but our reports take a very long time to get released, going through a process of review and editing and then issuance.

Mr. LAMBORN. Was the Department providing input to you? Did they express concerns about the content that they wanted to suppress?

Ms. KENDALL. No, sir. When we issue a report to the Department, we issue it. They have, in the case of an investigative report, 90 days to respond to us.

Mr. LAMBORN. But this was 10 months. So their 90 days came and went and 10 months went by, 7 more months.

Ms. KENDALL. I don't know when the report was actually issued to the Department.

Mr. LAMBORN. Does every department that the Inspector General's Office deals with get that kind of opportunity to dictate what is released to Congress?

Ms. KENDALL. I don't know what other departments do or don't do, but in this case, there is, in my view, a valid assertion of deliberative process privilege that we needed to respect in order to prevent the problems that other IGs have about gaining access. I

think it would significantly impair our ability if we released this information over the Department's assertion of privilege.

Mr. LAMBORN. So they are acting wrongfully, and you are taking it out on us?

Ms. KENDALL. I don't believe they are acting wrongfully, sir. I have asked the committee over and over to engage them on this very issue. It is their privilege to defend and to waive.

Mr. LAMBORN. Mr. Chairman, I yield back.

The CHAIRMAN. Time of the gentleman has expired.

The chair recognizes the gentleman from the Northern Marianas, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman. And I yield my time to Mr. Huffman from California. Thank you.

Mr. HUFFMAN. I thank the gentleman.

Could we put Exhibit 6 back up on the screen, please.

The reason that we have a disagreement about this duty of the Inspector General to keep Congress fully and currently informed is because this exhibit is picking and choosing language from the statute.

There is no obligation to keep Congress fully and currently informed about what you had for breakfast or every conversation that you had with anybody in the Department of Interior. The Act actually, if it were properly and fully quoted on this section, is quite specific on what you are supposed to keep Congress fully and currently informed about, and it specifies fraud, serious problems, abuses and deficiencies relating to the administration of programs and operations.

So let's ask the question once again. I suspect the answer is still going to be the same. But Ms. Kendall, did you at any time find fraud, serious problems, abuses and deficiencies in your investigation?

Ms. KENDALL. No, sir.

Mr. HUFFMAN. Thank you.

The CHAIRMAN. Ms. Kendall, clearly, there are differences of opinion here on the IG and your responsibility as Acting Inspector General, and clearly this issue is maybe larger system-wide simply by the mere fact that 47 IGs, roughly half of them, have signed letters saying that they are not getting the cooperation from the agencies over which they have responsibility. Now, that larger issue is certainly above the pay scale of this committee.

But the question is, I guess, ultimately, is the Office of Inspector General, which was supposed to be independent, it was created again before I was here, any Member here was in the Congress, and it was designed as part of the oversight process, and when we feel as a committee, I mean, whatever information is given, the judgment of that information, whether it is valid or not, is really the committee.

We ask for the information, and depending on what the subject matter is, if it is satisfactory, OK, it is satisfactory. But it sounds to me that what you are attempting to do or what your actions are from my point of view is you are acting as a referee and not allowing us to make the determination if it is important. I think that is very serious. I don't know where this leads.

Mr. Huffman talked about the Stream Buffer Rule. I know that that was promulgated before he was elected. There is a lot of controversy about it, mainly because the Bush administration has spent 5 years dealing and coming up with a Stream Buffer Rule that was similarly thrown out, and a new one was put in place and then the contractors were fired. I mean, that is pretty serious business. And they were fired because information was leaked that it would cost jobs. Well, OK, boy, that has an affect on the economy. Shouldn't the people know why? And all we were asking about was your report of how that happened.

Ms. KENDALL. Mr. Chairman—

The CHAIRMAN. We weren't asking about the rulemaking. You keep confusing that.

Ms. KENDALL. Except that our report does talk about what happened with the contractor who was not fired but their contract was let to expire. Our concern in looking at this, and we reported it out in the first 29 pages of the report, what happened to the contractor and whether or not there was improper political influence exerted over the contractor and the numbers. And we determined—well, we didn't determine, we just presented the facts, quite frankly.

The CHAIRMAN. Well, there is a part there, however, I don't have it right in front of me, that says that trouble with the contractor, or something to the effect—yes, in fact, the part that is redacted is issues with the new contract.

So, this issue, absent executive privilege, we think that that report should come to us. You have a different view. Maybe what you are going to give us as to what the Department in the memorandum, maybe that will enlighten us. Hope springs eternal. But I am confident that that probably will not happen.

So if there is no further business to come before the committee, committee stands adjourned.

[Whereupon, at 10:26 a.m., the committee was adjourned.]