# INSPECTOR GENERAL DESKBOOK

## VOLUME 2

*Office of Inspector General*
*Department of The Treasury*

# Inspector General Deskbook
# Volume 2

## *TABLE OF CONTENTS*

***Section 2 - Subpoena Authority of Inspector Generals***

U.S. v. Legal Servs. for New York City, 249 F.3d 1077 (D.C. Cir. 2001).

Court enforced OIG subpoena requesting information that included identification of appellant's clients. The court held that compliance with the subpoena would not be unduly burdensome, as the remote possibility of a linkage between client identity and subject matter of cases would not unduly disrupt or seriously hinder appellant's provision of legal services.

U S. v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142 **(**D.C. Cir. 1987).

Use of IG subpoenas, versus grand jury subpoenas, authorized even if IG merely serving as conduit for DOJ investigation.

U.S. v. Iannone, 610 F.2d 943 (D.C. Cir. 1979).

IG's do not have testimonial subpoena authority.

University of Medicine and Dentistry of New Jersey v. Corrigan, 2003 U.S. App. LEXIS 21082 (3d. Cir. 2003).

Court enforced OIG subpoena, holding that the PATH audits were squarely within the broad authority of the inspector general to audit healthcare providers for the purpose of preventing fraud and abuse within the Medicare program. The audits do not represent a transfer of program operating responsibilities, but rather, a permissible duplication of functions or copying of techniques.

U.S. v. Chevron U.S.A., 186 F.3d 644 (5th Cir. 1999).

Court enforced OIG subpoena requesting confidential and proprietary information, holding that the subpoenas were neither outside OIG authority nor unduly burdensome. The protective order afforded adequate protection in light of the OIG's stipulation not to disclose protected competitive materials.

Winters Ranch Partnership v. Viadero, 123 F.3d 327 (5th Cir. 1998).

Court enforced OIG subpoena duces tecum, holding that they were issued for a purpose within GIG statutory authority, to test the efficiency of the federal program implementation. Court did not find that the GIG had usurped the program operating responsibilities.

Burlington N. R. R. Co. v. Office of Inspector Gen., 983 F.2d 631 (5th Cir. 1993).

Court denied enforcement of subpoena duces tecum, concluding that OIG exceeded its statutory oversight authority when it attempted to assume the regulatory compliance functions of the Railroad Retirement Board and IRS.

United States v. Guerrero, 4 F.3d 749 (9th Cir. 1993).

Court enforced OIG subpoena requiring the governor to provide access to the records needed to perform an audit of the Commonwealth of the Northern Mariana Islands. The court held that there was no intrusion on the right to self-governance.

LEXSEE 527 US 229

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ETC., ET AL., PETITIONERS v. FEDERAL LABOR RELATIONS AUTHORITY ET AL.**

**No. 98–369**

**SUPREME COURT OF THE UNITED STATES**

***527 U.S. 229; 119 S. Ct. 1979; 144 L. Ed. 2d 258; 1999 U.S. LEXIS 4190; 67 U.S.L.W. 4468; 161 L.R.R.M. 2513; 99 Cal. Daily Op. Service 5179; 99 Daily Journal DAR 6081; 1999 Colo. J. C.A.R. 3480; 12 Fla. L. Weekly Fed. S 371***

**March 23, 1999, Argued**
**June 17, 1999, Decided**

**PRIOR HISTORY:** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

**DISPOSITION:** *120 F.3d 1208*, affirmed.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**SYLLABUS:** The day after enacting the Inspector General Act (IGA), which created an Office of Inspector General (OIG) in the National Aeronautics and Space Administration (NASA) and other federal agencies, Congress enacted the Federal Service Labor–Management Relations Statute (FSLMRS), which, *inter alia*, permits union participation at an employee examination conducted "by a representative of the agency" if the employee believes that the examination will result in disciplinary action and requests such representation, *5 U.S.C. § 7114*(a)(2)(B). When NASA's OIG (NASA–OIG) began investigating a NASA employee's activities, a NASA–OIG investigator interviewed the employee and permitted, *inter alios*, the employee's union representative to attend. The union subsequently filed a charge with the Federal Labor Relations Authority (Authority), alleging that NASA and its OIG had committed an unfair labor practice when the investigator limited the union representative's participation in the interview. In ruling for the union, the Administrative Law Judge concluded that the OIG investigator was a "representative" of NASA within § 7114(a)(2)(B)'s meaning, and that the investigator's behavior had violated the employee's right to union representation. On review, the Authority agreed and granted relief against both NASA and NASA–OIG. The Eleventh Circuit granted the Authority's application for enforcement of its order.

*Held:* A NASA–OIG investigator is a "representative" of NASA when conducting an employee examination covered by § 7114(a)(2)(B). Pp. 3–17.

(a) Contrary to NASA's and NASA–OIG's argument, ordinary tools of statutory construction, combined with the Authority's position, lead to the conclusion that the term "representative" is not limited to a representative of the "entity" that collectively bargains with the employee's union. By its terms, § 7114(a)(2)(B) refers simply to representatives of "the agency," which, all agree, means NASA. The Authority's conclusion is consistent with the FSLMRS and, to the extent the statute and congressional intent are unclear, the Court may rely on the Authority's reasonable judgment. See, *e.g., Federal Employees* v. *Department of Interior*, 526 U.S. , . The Court rejects additional reasons that NASA and NASA–OIG advance for their narrow reading. Pp. 3–8.

(b) The IGA does not preclude, and in fact favors, treating OIG personnel as representatives of the agencies they are duty–bound to audit and investigate. The IGA created no central office or officer to supervise, direct, or coordinate the work of all OIGs and their respective staffs. Other than congressional committees and the President, each Inspector General has no supervisor other than the head of the agency of which the OIG is part. Congress certainly intended that the OIGs would enjoy a great deal of autonomy, but an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. See *5 U.S.C. App. §§ 2*, 4(a), 6(a)(2). Any potentially divergent interests of the OIGs and their parent agencies — *e.g.*, an OIG has authority to initiate and conduct investigations and audits without interference from the agency head, § 3(a) — do not make NASA–OIG any less a NASA representative when it investigates a NASA employee. Furthermore, not all OIG examinations subject to § 7114(a)(2)(B) will im-

plicate an actual or apparent conflict of interest with the rest of the agency; and in many cases honest cooperation can be expected between an OIG and agency management. Pp. 8–13.

(c) NASA's and NASA–OIG's additional policy arguments against applying § 7114(a)(2)(B) to OIG investigations — that enforcing § 7114(a)(2)(B) in situations similar to this case would undermine NASA–OIG's ability to maintain the confidentiality of investigations, and that the Authority has construed § 7114(a)(2)(B) so broadly in other instances that it will impair NASA–OIG's ability to perform its responsibilities — are ultimately unpersuasive. It is presumed that Congress took account of the relevant policy concerns when it decided to enact the IGA and, on that statute's heels, § 7114(a)(2)(B). Pp. 14–16.

(d) That the investigator in this case was acting as a NASA representative for § 7114(a)(2)(B) purposes makes it appropriate to charge NASA–OIG, as well as its parent agency, with responsibility for ensuring that investigations are conducted in compliance with the FSLMRS. P. 17.

*120 F.3d 1208*, affirmed.

**COUNSEL:**

David C. Frederick argued the cause for petitioners.

David M. Smith argued the cause for respondent Federal Labor Relations Authority.

Stuart Kirsch argued the cause for respondent American Federation of Government Employees.

**JUDGES:** STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined.

**OPINIONBY:** STEVENS

**OPINION:** [*231] [**1982] [***265]

JUSTICE STEVENS delivered the opinion of the Court.

[***HR1A] On October 12, 1978, Congress enacted the Inspector General Act (IGA), *5 U.S.C. App. § 1 et seq.*, p. 1381, which created an Office of Inspector General (OIG) in each of several federal agencies, including the National Aeronautics and Space Administration (NASA). The following day, Congress enacted the Federal Service Labor–Management Relations Statute (FSLMRS), *5 U.S.C. § 7101 et seq.*, which provides certain protections, including union representation, to a variety of federal employees. The question presented by this case is whether an investigator employed in NASA's Office of Inspector General (NASA–OIG) can be considered a "representative" of NASA when examining a NASA employee, such that the right to union representation in the FSLMRS may be invoked. § 7114(a)(2)(B). Although certain arguments of policy may support a negative answer to that question, the plain text of the two statutes, buttressed by administrative deference and Congress' countervailing policy concerns, dictates an affirmative answer.

I

In January 1993, in response to information supplied by the Federal Bureau of Investigation (FBI), NASA's OIG conducted [*232] an investigation of certain threatening activities of an employee of the George C. Marshall Space Flight Center in Huntsville, Alabama, which is also a component of NASA. A NASA–OIG investigator contacted the employee [***266] to arrange for an interview and, in response to the employee's request, agreed that both the employee's lawyer and union representative could attend. The conduct of the interview gave rise to a complaint by the union representative that the investigator had improperly limited his participation. The union filed a charge with the Federal Labor Relations Authority (Authority) alleging that NASA and its OIG had committed an unfair labor practice. See *5 U.S.C. §§ 7116*(a)(1), (8).

[***HR2A] The Administrative Law Judge (ALJ) ruled for the union with respect to its complaint against NASA–OIG. See App. to Pet. [**1983] for Cert. 71a. The ALJ concluded that the OIG investigator was a "representative" of NASA within the meaning of § 7114(a)(2)(B), and that certain aspects of the investigator's behavior had violated the right to union representation under that section. Id. at 64a–65a, 69a–70a. On review, the Authority agreed that the NASA–OIG investigator prevented the union representative from actively participating in the examination and (1) ordered both NASA and NASA–OIG to cease and desist (a) requiring bargaining unit employees to participate in OIG interviews under § 7114(a)(2)(B) without allowing active participation of a union representative, and (b) likewise interfering with, coercing, or restraining employees in exercising their rights under the statute; and (2) directed NASA to (a) order NASA–OIG to comply with § 7114(a)(2)(B), and (b) post appropriate notices at the Huntsville facility. *NASA, 50 F.L.R.A. 601, 602, 609, 622–623 (1995).*

NASA and NASA–OIG petitioned for review, ask-

ing whether the NASA–OIG investigator was a "representative" of NASA, and whether it was proper to grant relief against NASA as well as its OIG. The Court of Appeals upheld the Authority's rulings on both questions and granted the [*233] Authority's application for enforcement of its order. *120 F.3d 1208, 1215–1217 (CA11 1997)*. Because of disagreement among the Circuit Courts over the applicability of § 7114(a)(2)(B) in such circumstances, see *FLRA v. United States Dept. of Justice, 137 F.3d 683 (CA2 1997); United States Dept. of Justice v. FLRA, 309 U.S. App. D.C. 84, 39 F.3d 361 (CADC 1994); Defense Criminal Investigative Serv. v. FLRA, 855 F.2d 93 (CA3 1988)*, we granted certiorari. 525 U.S. (1998).

II

The FSLMRS provides, in relevant part,

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at —

. . . . .

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation." *5 U.S.C. § 7114*(a).

[***HR1B] [***HR2B] In this case it is undisputed that the employee reasonably believed the investigation could result in discipline against him, that he requested union representation, that NASA is the relevant "agency," and [***267] that, if the provision applies, a violation of § 7114(a)(2)(B) occurred. The contested issue is whether a NASA–OIG investigator can be considered a "representative" of NASA when conducting an employee examination covered by § 7114(a)(2)(B).

[***HR3A] NASA and its OIG argue that, when § 7114(a)(2)(B) is read in context and compared with the similar right to union representation protected in the private sector by the National Labor Relations Act, the term "representative" [*234] refers only to a representative of agency management — "*i.e.*, the entity that has a collective bargaining relationship with the employee's union." Brief for Petitioners 13. Neither NASA nor NASA–OIG has such a relationship with the employee's union at the Huntsville facility, see *5 U.S.C. § 7112*(b)(7) (excluding certain agency investigators and auditors from "appropriate" bargaining units), and so the investigator in this case could not have been a "representative" of the relevant "entity."

By its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain "entities" within the agency in question. It simply refers to representatives of "the agency," which, all agree, means NASA. Cf. § 7114(a)(2) (referring to employees "in the unit" and an exclusive representative "of an appropriate unit in an agency"). Thus, relying on prior rulings, the Authority found no basis in the FSLMRS or its legislative history to support the limited reading advocated by NASA and its OIG. The Authority reasoned that adopting their proposal might erode the right by encouraging the use of investigative conduits outside the employee's bargaining unit, and would otherwise frustrate Congress' apparent policy of protecting certain federal employees when they are examined [**1984] and justifiably fear disciplinary action. *50 F.L.R.A. at 615, and n. 12*. That is, the risk to the employee is not necessarily related to which component of an agency conducts the examination. See App. to Pet. for Cert. 65a (information obtained by NASA–OIG is referred to agency officials for administrative or disciplinary action).

In resolving this issue, the Authority was interpreting the statute Congress directed it to implement and administer. *5 U.S.C. § 7105*. The Authority's conclusion is certainly consistent with the FSLMRS and, to the extent the statute and congressional intent are unclear, we may rely on the Authority's reasonable judgment. See *Federal Employees* v. *Department of Interior*, 526 U.S. , (1999) (slip op., at 5); *Fort Stewart Schools v. FLRA, 495 U.S. 641, 644–645, 109 L. Ed. 2d 659, 110 S. Ct. 2043 (1990)*. [*235]

Despite the text of the statute and the Authority's views, NASA and NASA–OIG advance three reasons for their narrow reading. First, the language at issue is contained in a larger section addressing rights and duties related to collective bargaining; indeed, *5 U.S.C. § 7114* is entitled "Representation rights and duties." Thus, other subsections define the union's right to exclusive representation of employees in the bargaining unit, § 7114(a)(1); its right to participate in grievance proceedings, § 7114(a)(2)(A); and its right and duty to engage in good–faith collective bargaining with the agency, §§ 7114(a)(4), (b). That context helps explain why the right granted in § 7114(a)(2)(B) is limited to situations [***268] in which the employee "reasonably believes that the examination may result in disciplinary action" — a condition restricting the right to union presence or participation in investigatory examinations that do not threaten the witness' employment. We find nothing in this context, however, suggesting that an examination that obviously

presents the risk of employee discipline is nevertheless outside the coverage of the section because it is conducted by an investigator housed in one office of NASA rather than another. On this point, NASA's internal organization is irrelevant.

Second, the phrase "representative of the agency" is used in two other places in the FSLMRS where it may refer to representatives of agency management acting in their capacity as actual or prospective parties to a collective bargaining agreement. One reference pertains to grievances, § 7114(a)(2)(A), and the other to the bargaining process itself, § 7103(a)(12) (defining "collective bargaining"). NASA and NASA–OIG submit that the phrase at issue should ordinarily retain the same meaning wherever used in the same statute, and we agree. But even accepting NASA and NASA–OIG's characterization of §§ 7114(a)(2)(A) and 7103(a)(12), the fact that some "representatives of the agency" may perform functions relating to grievances and bargaining does not mean that other personnel who conduct [*236] examinations covered by § 7114(a)(2)(B) are not also fairly characterized as agency "representatives." As an organization, an agency must rely on a variety of representatives to carry out its functions and, though acting in different capacities, each may be acting for, and on behalf of, the agency.

Third, NASA and NASA–OIG assert that their narrow construction is supported by the history and purpose of § 7114(a)(2)(B). As is evident from statements by the author of the provision n1 as well as similar text in *NLRB v. J. Weingarten, Inc., 420 U.S. 251, 43 L. Ed. 2d 171, 95 S. Ct. 959 (1975),* this section of the FSLMRS was patterned after that decision. In *Weingarten*, we upheld the National Labor Relations Board's conclusion that an employer's denial of an employee's request to have a union representative present at an investigatory interview, which the employee [**1985] reasonably believed might result in disciplinary action, was an unfair labor practice. *Id. at 252–253, 256.* We reasoned that the Board's position was consistent with the employee's right under § 7 of the National Labor Relations Act (NLRA) to engage in concerted activities. *Id. at 260.* Given that history, NASA and its OIG contend that the comparable provision in the FSLMRS should be limited to investigations by representatives of that part of agency management with responsibility for collectively bargaining with the employee's union.

> n1 Congressman Udall, whose substitute contained the section at issue, explained that the "provisions concerning investigatory interviews reflect the . . . holding in" *Weingarten*. 124 Cong. Rec. 29184 (1978); Legislative History of the Federal Service Labor–Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (Committee Print compiled for the House Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service), Comm. Print No. 96–7, p. 926 (1979) (hereinafter FSLMRS Leg. Hist.); see *NASA, 50 F.L.R.A. 601, 606 (1995).*

This argument ignores the important [***269] difference between the text of the NLRA and the text of the FSLMRS. That the general protection afforded to employees by § 7 of the NLRA provided a sufficient basis for the Board's recognition of a novel right in the private sector, see id. at 260–262, [*237] 266–267, does not justify the conclusion that the text of the FSLMRS — which expressly grants a comparable right to employees in the public sector — should be narrowly construed to cover some, but not all, interviews conducted by agency representatives that have a disciplinary potential. Congress' specific endorsement of a government employee's right to union representation by incorporating it in the text of the FSLMRS gives that right a different foundation than if it were merely the product of an agency's attempt to elaborate on a more general provision in light of broad statutory purposes. n2 The basis for the right to union representation in this context cannot compel the uncodified limitation proposed by NASA and its OIG.

> n2 See id. at 608, n. 5 (Congress recognized that the right to union representation might evolve differently in the federal and private sectors); H. R. Conf. Rep. No. 95–1717, p. 156 (1978), FSLMRS Leg. Hist. 824; cf. *Karahalios v. Federal Employees, 489 U.S. 527, 534, 103 L. Ed. 2d 539, 109 S. Ct. 1282 (1989)* (the FSLMRS "is not a carbon copy of the NLRA").

[***HR1C] [***HR3B] Employing ordinary tools of statutory construction, in combination with the Authority's position on the matter, we have no difficulty concluding that § 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union.

III

[***HR1D] [***HR4A] Much of the disagreement in this case involves the interplay between the FSLMRS and the Inspector General Act. On NASA's and NASA–OIG's view, a proper understanding of the IGA precludes treating OIG personnel as "representatives" of the agen-

cies they are duty-bound to audit and investigate. They add that the Authority has no congressional mandate or expertise with respect to the IGA, and thus we owe the Authority no deference on this score. It is unnecessary for us to defer, however, because a careful review of the relevant IGA provisions plainly favors the Authority's position. [*238]

Section 2 of the IGA explains the purpose of the Act and establishes "an office of Inspector General" in each of a list of identified federal agencies, thereby consolidating audit and investigation responsibilities into one agency component. It provides:

"In order to create independent and objective units —

"(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

"(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

"(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs [***270] and operations and the necessity for and progress of corrective action;

"there is hereby established in each of such establishments an office of Inspector General." *5 U.S.C. App. § 2*.

NASA is one of more than 20 "establishments" now listed in § 11(2). n3

> n3 Such establishments are described as "agencies" in other federal legislation, such as the FSLMRS. See *5 U.S.C. §§ 101*-105, 7103(a)(3). Note also that other OIGs were created by subsequent amendments to the IGA and may be structured differently than those OIGs, such as NASA's, discussed in the text. See, *e.g., 5 U.S.C. App. §§ 8*, 8E, 8G.

[**1986]

Section 3 of the IGA provides that each of the offices created by § 2 shall be headed by an Inspector General appointed by the President, and confirmed by the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, [*239] or investigations." § 3(a). Each of these Inspectors General "shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head," but shall not be subject to supervision by any lesser officer. *Ibid.* Moreover, an Inspector General's seniors within the agency may not "prevent or prohibit" the Inspector General from initiating or conducting any audit or investigation. *Ibid.*; see also § 6(a)(2). The President retains the power to remove an Inspector General from office. § 3(b).

Section 4 contains a detailed description of the duties of each Inspector General with respect to the agency "within which his Office is established." § 4(a). Those duties include conducting audits and investigations, recommending new policies, reviewing legislation, and keeping the head of the agency and the Congress "fully and currently informed" through such means as detailed, semiannual reports. §§ 4(a)(1)-(5). Pursuant to § 5, those reports must be furnished to the head of the agency, who, in turn, must forward them to the appropriate committee or subcommittee of Congress with such comment as the agency head deems appropriate. § 5(b)(1); see also § 5(d). Section 6 grants the Inspectors General specific authority in a variety of areas to facilitate the mission of their offices. Accordingly, Inspectors General possess discretion to conduct investigations "relating to the administration of the programs and operations of the applicable" agency, § 6(a)(2); the ability to request information and assistance from government agencies, § 6(a)(3); access to the head of the agency, § 6(a)(6); and the power to hire employees, enter into contracts, and spend congressionally appropriated funds, §§ 6(a)(7), (9); see also § 3(d). Finally, § 9(a)(1)(P) provides for the transfer of the functions previously performed by NASA's "'Management Audit Office' and the 'Office of Inspections and Security'" to NASA-OIG. [*240]

[***HR4B] The IGA created no central office or officer to supervise, direct, or coordinate the work of all OIGs and their respective staffs. Other than congressional committees (which are the recipients of the reports prepared by each Inspector General) and the President (who has the power to [***271] remove an Inspector General), each Inspector General has no supervising authority — except the head of the agency of which the OIG is a part. There is no "OIG-OIG." Thus, for example, NASA-OIG maintains an office at NASA's Huntsville facility, which reports to NASA-OIG in Washington, and then to the NASA Administrator, who is the head of the agency. § 11(1); *50 F.L.R.A. at 602*. n4 In conducting their work, Congress certainly intended that the various OIGs would

enjoy a great deal of autonomy. But unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. See *5 U.S.C. App. §§ 2,* 4(a), 6(a)(2). In common parlance, the investigators employed in NASA's OIG are unquestionably "representatives" of NASA when acting within the scope of their employment.

n4 At oral argument, NASA and NASA–OIG indicated that the Administrator's general supervision authority includes the ability to require its Inspector General to comply with, *inter alia*, equal employment opportunity regulations. Tr. of Oral Arg. 5.

Minimizing the significance of this statutory plan, NASA and NASA–OIG emphasize the potentially divergent interests of the OIGs and their parent agencies. To be sure, OIGs maintain authority to initiate and conduct investigations and audits without interference from the head of the agency. § 3(a). And the ability to proceed without consent from agency higher–ups is vital to [**1987] effectuating Congress' intent and maintaining an opportunity for objective inquiries into bureaucratic waste, fraud, abuse, and mismanagement. n5 [*241] But those characteristics do not make NASA–OIG any less a representative of NASA when it investigates a NASA employee. That certain officials within an agency, based on their views of the agency's best interests or their own, might oppose an OIG investigation does not tell us whether the investigators are "representatives" of the agency during the course of their duties. As far as the IGA is concerned, NASA–OIG's investigators are employed by, act on behalf of, and operate for the benefit of NASA.

n5 See § 2; S. Rep. No. 95–1071, pp. 1, 5–7, 9 (1978); H. R. Rep. No. 95–584, pp. 2, 5–6 (1977).

Furthermore, NASA and NASA–OIG overstate the inherent conflict between an OIG and its agency. The investigation in this case was initiated by NASA's OIG on the basis of information provided by the FBI, but nothing in the IGA indicates that, if the information had been supplied by the Administrator of NASA rather than the FBI, NASA–OIG would have had any lesser obligation to pursue an investigation. See §§ 4(a)(1), (d), 7; S. Rep. No. 95–1071, p. 26 (1978). The statute does not suggest that one can determine whether the OIG personnel engaged in such an investigation are "representatives" of NASA based on the source of the information prompting an investigation. Therefore, it must be NASA and NASA–OIG's position that even when an OIG conducts an investigation in response to a specific request from the head of an agency, an employee engaged in that assignment is not a "representative" of the agency within the meaning of § 7114(a)(2)(B) of the FSLMRS. Such management–prompted [***272] investigations are not rare. n6

n6 See, *e.g., United States INS, 46 F.L.R.A. 1210, 1226–1231 (1993),* review denied sub nom. *American Federation of Govt. Employees v. FLRA, 306 U.S. App. D.C. 102, 22 F.3d 1184 (CADC 1994); United States Dept. of Justice, INS, 46 F.L.R.A. 1526, 1549 (1993),* review granted sub nom. *United States Dept. of Justice v. FLRA, 309 U.S. App. D.C. 84, 39 F.3d 361 (CADC 1994); Department of Defense, Defense Criminal Investigative Serv., 28 F.L.R.A. 1145, 1157–1159 (1987),* enf'd sub nom. *Defense Criminal Investigative Serv. v. FLRA, 855 F.2d 93 (CA3 1988);* see also *Martin v. United States, 20 Cl. Ct. 738, 740–741 (1990).*

[*242]

[***HR4C] [***HR5A] Thus, not all OIG examinations subject to § 7114(a)(2)(B) will implicate an actual or apparent conflict of interest with the rest of the agency; and in many cases we can expect honest cooperation between an OIG and management–level agency personnel. That conclusion becomes more obvious when the practical operation of OIG interviews and § 7114(a)(2)(B) rights are considered. The IGA grants Inspectors General the authority to subpoena documents and information, but not witnesses. *5 U.S.C. App. § 6*(a)(4). Nor does the IGA allow an OIG to discipline an agency employee, as all parties to this case agree. There may be other incentives for employee cooperation with OIG investigations, but formal sanctions for refusing to submit to an OIG interview cannot be pursued by the OIG alone. Such limitations on OIG authority enhance the likelihood and importance of cooperation between the agency and its OIG. See generally §§ 6(a)(3), (b)(1)–(2) (addressing an Inspector General's authority to request assistance from others in the agency, and their duty to respond); §§ 4(a)(5), (d); *50 F.L.R.A. at 616;* App. to Pet. for Cert. 65a (noting information sharing between NASA–OIG and other agency officials). Thus, if the NASA–OIG investigator in this case told the employee that he would face dismissal if he refused to answer questions, *120 F.3d at 1210, n. 2,* the investigator invoked NASA's authority, not his own. n7

n7 In fact, a violation of § 7114(a)(2)(B) seems less likely to occur when the agency and its OIG are not acting in concert. Under the Authority's

construction of the FSLMRS, when an employee within the unit makes a valid request for union representation, an OIG investigator does *not* commit an unfair labor practice by (1) halting the examination, or (2) offering the employee a choice between proceeding without representation and discontinuing the examination altogether. *United States Dept. of Justice, Bureau of Prisons, 27 F.L.R.A. 874, 879–880 (1987);* see also *NLRB v. J. Weingarten, Inc., 420 U.S. 251, 258–260, 43 L. Ed. 2d 171, 95 S. Ct. 959 (1975).* Disciplining an employee for his or her choice to demand union participation or to discontinue an examination would presumably violate the statute, but such responses require more authority than Congress granted the OIGs in the IGA.

[*243] [**1988]

[***HR1E] [***HR4D] Considering NASA–OIG's statutorily defined role within the agency, we cannot conclude that the proper operation of the IGA requires nullification of § 7114(a)(2)(B) in all OIG examinations.

IV

[***HR1F] Although NASA's and NASA–OIG's narrow reading of the phrase "representative of the agency" is supported by the text of neither the FSLMRS nor the IGA, they also present broader — but ultimately unpersuasive — arguments of policy to defeat the application of § 7114(a)(2)(B) to OIG investigations.

First, NASA and NASA–OIG contend that enforcing § 7114(a)(2)(B) in situations similar to this case would undermine NASA–OIG's ability to maintain the confidentiality of [***273] investigations, particularly those investigations conducted jointly with law enforcement agencies. Cf. *5 U.S.C. App. §§ 5*(e)(1)(C), (2) (restricting OIG disclosure of information that is part of an ongoing criminal investigation). NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties. That possibility is, however, always present: NASA and NASA–OIG identify no legal authority restricting an employee's ability to discuss the matter with others. Furthermore, an employee cannot demand the attendance of a union representative when an OIG examination does not involve reasonably apparent potential discipline for that employee. Interviewing an employee who may have information relating to agency maladministration, but who is not himself under suspicion, ordinarily will not trigger the right to union representation. Thus, a variety of OIG investigations and interviews — and many in which confidentiality concerns are heightened — will not implicate § 7114(a)(2)(B) at all. Though legitimate, NASA's and NASA–OIG's confidentiality concerns are not weighty enough to justify a [*244] non–textual construction of § 7114(a)(2)(B) rejected by the Authority.

[***HR1G] [***HR6A] Second, NASA and its OIG submit that, in other instances, the Authority has construed § 7114(a)(2)(B) so broadly that it will impair NASA–OIG's ability to perform its investigatory responsibilities. The Authority responds that it has been sensitive to agencies' investigative needs in other cases, and that union representation is unrelated to OIG independence from agency interference. Whatever the propriety of the Authority's rulings in other cases, NASA and NASA–OIG elected not to challenge the Authority's conclusion that the NASA–OIG examiner's attempt to limit union representative participation constituted an unfair labor practice. To resolve the question presented in this case, we need not agree or disagree with the Authority's various rulings regarding the scope of § 7114(a)(2)(B), nor must we consider whether the outer limits of the Authority's interpretation so obstruct the performance of an OIG's statutory responsibilities that the right must be more confined in this context. n8

n8 The same can be said of NASA and NASA–OIG's concerns that the reach of § 7114(a)(2)(B) will become the subject of collective bargaining between agencies and unions, or hinder joint or independent FBI investigations of federal employees. See *United States Nuclear Regulatory Comm'n v. FLRA, 25 F.3d 229 (CA4 1994)* (adopting the agency's position that it could not bargain over certain procedures by which its OIG conducts investigatory interviews); *NASA, 50 F.L.R.A. at 616, n. 13* (distinguishing FBI investigations). The process by which the scope of § 7114(a)(2)(B) may properly be determined, and the application of that section to law enforcement officials with a broader charge, present distinct questions not now before us.

[***HR1H] In any event, the right Congress created in § 7114(a)(2)(B) vindicates obvious countervailing federal policies. It provides a procedural safeguard for employees who are under investigation by their agency, and the mere existence of the right can only strengthen the morale of the federal workforce. The interest in fair treatment for employees under [*245] investigation is equally strong whether they are being questioned by employees in NASA's OIG or by other representatives of the agency.

[***274] And, as we indicated in *Weingarten*, representation is not the equivalent of obstruction. See *420 U.S. at 262–264*. In many cases the participation of a union representative will facilitate the factfinding process and a fair resolution of an [**1989] agency investigation — or at least Congress must have thought so.

[***HR1I] [***HR7A] Whenever a procedural protection plays a meaningful role in an investigation, it may impose some burden on the investigators or agency managers in pursuing their mission. We must presume, however, that Congress took account of the policy concerns on both sides of the balance when it decided to enact the IGA and, on the heels of that statute, § 7114(a)(2)(B) of the FSLMRS. n9

n9 The dissent does not dispute much of our analysis; it indicates that NASA–OIG is an "arm" of NASA "working to promote overall agency concerns." *Post*, at 15. The dissent's premise is that the Authority determined that the phrase "representative of the agency" means "representative of . . . agency [management]," and that this issue is now uncontested. See *Post*, at 1, 3–14, 17. But see *Post*, at 6, n. 3. Putting aside the fact that NASA and NASA–OIG's construction of the statute — however one interprets their argument — is very much in dispute, see Brief for Respondent American Federation of Government Employees, AFL–CIO, 26–32; Brief for Respondent FLRA 23–25, 31, and the rule that litigants cannot bind us to an erroneous interpretation of federal legislation, see *Roberts v. Galen of Va., Inc., 525 U.S. 249, 253, 142 L. Ed. 2d 648, 119 S. Ct. 685 (1999)*, we have ignored neither the actual rationale of the Authority's decision in this case nor NASA's and NASA–OIG's arguments before this Court. Focusing on its plain reasoning, we cannot fairly read the Authority's decision as turning on whether NASA "management" was involved. The Authority emphasized that FSLMRS rights do not depend on "the organizational entity within the agency to whom the person conducting the examination reports"; and in discussing NASA–OIG's role within the agency, the Authority's decision repeatedly refers to NASA headquarters together with its components — that is, to the agency as a whole. *50 F.L.R.A. at 615–616; id. at 621* (noting "the investigative role that OIGs perform for the agency" and concluding that NASA–OIG "represents" not only its own interests, "but ultimately NASA [headquarters] and its subcomponent offices"). Nowhere did the Authority rely on the assertion that OIGs act as "agency management's agent," a term coined by the dissent. *Post*, at 8.

[*246]

V

[***HR2C] Finally, NASA argues that it was error for the Authority to make NASA itself, as well as NASA's OIG, a party to the enforcement order because NASA has no authority over the manner in which NASA–OIG conducts its investigations. However, our conclusion that the investigator in this case was acting as a "representative" of NASA for purposes of § 7114(a)(2)(B) makes it appropriate to charge NASA–OIG, as well as the parent agency to which it reports and for which it acts, with responsibility for ensuring that such investigations are conducted in compliance with the FSLMRS. NASA's Administrator retains general supervisory authority over NASA's OIG, *5 U.S.C. App. § 3*(a), and the remedy imposed by the Authority does not require NASA to interfere unduly with OIG prerogatives. NASA and NASA–OIG offer no convincing reason to believe that the Authority's remedy is inappropriate in view of the IGA, or that it will be ineffective in protecting the limited right of union representation secured by § 7114(a)(2)(B). See generally *5 U.S.C. §§ 706*, 7123(c).

The judgment of the Court of Appeals is

Affirmed.

**DISSENTBY:** THOMAS

**DISSENT:** [***275]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

In light of the independence guaranteed Inspectors General by the Inspector General Act of 1978, *5 U.S.C. App. § 1 et seq.*, p. 1381, investigators employed in the Office of Inspector General (OIG) will not represent agency management in the typical case. There is no basis for concluding, as the Federal Labor Relations Authority [*247] did, that in this case the investigator from OIG for the National Aeronautics and Space Administration *was* a "representative of the agency" within the meaning of *5 U.S.C. § 7114*(a)(2)(B). I respectfully dissent.

I

The National Aeronautics and Space Administration is headquartered in Washington, D. C. Among other agency subcomponents are the George C. Marshall Space Flight Center (MSFC), located in Huntsville, Alabama, and the Office of Inspector General, which is headquartered in Washington, D. C., but maintains offices in

all of the agency's other subcomponents, including the [**1990] Marshall Center. In January 1993, the Federal Bureau of Investigation received information that an employee of the Marshall Center, who is referred to in the record only as "P," was suspected of spying upon and threatening various coworkers. The FBI referred the matter directly to NASA's OIG, and an investigator for that Office who was stationed at the Marshall Center was assigned the case. He contacted P, who agreed to be interviewed so long as his attorney and a union representative were present; the investigator accepted P's conditions. App. to Pet. for Cert. 61a. At the interview, OIG's investigator read certain ground rules, which provided, *inter alia*, that the union representative was "'not to interrupt the question and answer process.'" *Ibid*. n1 The union filed an unfair labor practice charge, claiming that the interview was not conducted in accordance with the requirements of *5 U.S.C. § 7114*(a)(2)(B), as the Authority has interpreted that provision. The Authority's General Counsel issued a complaint to that effect, and the Authority found that [*248] NASA headquarters and NASA's OIG had committed unfair labor practices. On review, the Court of Appeals for the Eleventh Circuit granted the Authority's application for enforcement of its order. *120 F.3d 1208 (1997).*

> n1 It appears that OIG's inspector informed P that he would face dismissal if he did not answer the questions put to him. See *120 F.3d 1208, 1210, n. 2 (CA11 1997).*

As the Court correctly recognizes, *ante*, at 3–4, several points are not in dispute at this stage of the litigation. The fact that P requested union representation and reasonably believed that disciplinary action might be taken against him on the basis of information developed during the examination has never been in dispute in this case. See *NASA, 50 F.L.R.A. 601, 606, n. 4 (1995).* Although petitioners contested the matter before the Authority, on review in the Eleventh Circuit, they conceded that OIG's investigator conducted the interview of P in a way that did not [***276] comport with what § 7114(a)(2)(B) requires. See *120 F.3d at 1211.* And all parties agree that the relevant "agency" for purposes of § 7114(a)(2)(B) is NASA. One other point is not disputed — the "representative" to which § 7114(a)(2)(B) refers must represent agency management, not just the agency in some general sense as the Court suggests, *ante*, at 4, 11. See *50 F.L.R.A. at 614* ("'Representative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency"); *id. at 615* ("'We doubt that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit'") (quoting *Defense Criminal Investigative Serv. v. FLRA, 855 F.2d 93, 99 (CA3 1988));* Brief for Respondent FLRA 16 ("The Authority has determined that the phrase 'representative of the agency' should not be so narrowly construed as to exclude management personnel, such as OIG, who are located in other components of the agency"); id. at 21; Reply Brief for Petitioners 1 ("[A] 'representative of the agency' in Section 7114(a)(2)(B) must be a representative of agency *management*"). [*249]

Since an agency's stated reasons for decision are important in any case reviewing agency action, I summarize in some detail what the Authority actually said in this case. It began by stating its conclusion:

"We reach this conclusion based upon our determination that: (1) the term 'representative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the IG Act are not irreconcilable." *50 F.L.R.A. at 614.*

The Authority headed its discussion of its first determination "Section 7114(a)(2)(B) Covers the Actions of Management Personnel Employed in Other Subcomponents of the Agency." *Id. at 615.* This statement appears to suggest OIG itself is part of agency management. But the remainder of the Authority's discussion appears to advance a different theory — one that OIG serves as agency management's *agent* because OIG inspectors [**1991] ultimately report to NASA's Administrator, see *ibid.* (OIG's investigator, "although employed in a separate component from the MSFC, is an employee of and ultimately reports to the head of NASA"), and because OIG provides information to management that sometimes results in discipline to union employees, *ibid*. ("OIG not only provides investigatory information to NASA [headquarters] but also to other NASA subcomponent offices"); see also *id. at 616* (Congress would regard an OIG investigator as a representative of the agency because "the information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disciplinary [*250] actions taken against [***277] unit employees"). n2 The Authority recognized that the Inspector General Act grants an Inspector General, or IG, "a degree of freedom and independence from the parent agency." *Id. at 615.* It thought, however, that the Inspector General's autonomy "becomes nonexistent" when the IG's investigation concerns allegations of misconduct by agency

employees in connection with their work and the information obtained during the investigation possibly would be shared with agency management. *Ibid*. As it further explained: "in some circumstances, NASA, OIG *performs an investigatory role* for NASA [headquarters] and its subcomponents, specifically [the Marshall Center]." *Id. at 616* (emphasis added). Moreover, the Authority reasoned, the Inspector General "plays an integral role in assisting the agency and its subcomponent offices in meeting the agency's objectives." *Id. at 617.* In light of all this, the Authority concluded:

> n2 The Authority also relied on a policy ground here. It asserted that there was "no basis in the Statute or its legislative history to make the existence of [the representational rights provided by § 7114] dependent upon the organizational entity within the agency to whom the person conducting the examination reports." *50 F.L.R.A. at 615.* It elaborated, in a footnote, that "if such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees." *Id. at 615, n. 12.*

"Plainly, the IG represents and safeguards the entire agency's interests when it investigates the actions of the agency's employees. Such activities support, rather than threaten, broader agency interests and make the IG a participant, with other agency components, in meeting various statutory obligations, including the agency's labor relations obligations under the Statute." *Ibid*. [*251]

II

The Authority's recognition that § 7114(a)(2)(B) protections are only triggered when an investigation is conducted by, or on behalf of, agency management, is important and hardly surprising. See, *e.g., 50 F.L.R.A. at 614* ("section 7114(a)(2)(B) should not be so narrowly construed as to exclude *management personnel* employed in other subcomponents of the agency") (emphasis added); Brief for Respondent FLRA 21 ("The Authority's conclusion that the word 'representative,' or phrase 'representative of the agency,' includes *management personnel* in other subcomponents of the 'agency' is entirely consistent with the language of the [Federal Service Labor–Management Relations Statute]" (emphasis added)). It is important because the Court seems to think it enough that NASA's OIG represent NASA in some broad and general sense. But as the Authority's own opinion makes clear, that is not enough — NASA's OIG must represent NASA's management to qualify as a "representative of the agency" within the meaning of § 7114(a)(2)(B). The Authority's position is hardly surprising in that the Federal Service Labor–Management Relations Statute plainly means just that. n3 The [***278] FSLMRS governs labor–management relations [**1992] in the federal sector. Section 7114(a)(2)(B) is captioned "representation rights and duties," and every employee right contained therein flows from the collective–bargaining relationship. n4 As petitioners note, [*252] in each of the three instances where the FSLMRS refers to an agency representative, it does so in the context of the collective–bargaining relationship between management and labor. See §§ 7103(a)(12), 7114(a)(2)(A), 7114(a)(2)(B). n5

> n3 Although it is significant that the Authority recognized below and recognizes here that the statutory phrase "representative of the agency" refers to a representative of agency management, I do not, as the Court asserts, *ante*, at 16, n. 9, rest the argument on the premise that the point is conceded. Rather, in light of the context in which the phrase appears, and in light of the very subject matter of the Statute, the phrase plainly has that meaning.

> n4 Section 7114(a)(1) details what "[a] labor organization which has been accorded exclusive recognition" is entitled to and must do; § 7114(a)(2) indicates when an exclusive representative may be present at discussions or examinations conducted by agency management; § 7114(a)(3) requires agency management annually to inform its employees of their rights under § 7114(a)(2)(B); § 7114(a)(4) obligates management and the exclusive representative to bargain in good faith for purposes of arriving at a collective–bargaining agreement; § 7114(a)(5) provides that the rights of an exclusive representative do not limit an employee's right to seek other representation, for example, legal counsel; § 7114(b) speaks to the duty of good faith imposed on management and the exclusive representative under § 7114(a)(4); and § 7114(c) requires the head of the agency to approve all collective–bargaining agreements.

> n5 I disagree with the Court as to the proper reading of petitioners' argument that the phrase "representative of the agency" refers only to the entity that has a collective–bargaining relationship with a union. I do not take petitioners to mean that OIG's representative did not represent the "agency,"

NASA, for the simple reason that only Space Center management had a collective–bargaining relationship with P's union. If that were truly petitioners' view, its later argument that OIG cannot represent NASA because the IG is substantially independent from the agency head would not make sense — it would be enough for petitioners to argue that OIG is not under the control of the Space Center's management. Rather, as petitioners make clear in their reply brief, they are simply arguing that "a 'representative of the agency' must be a representative of agency management, as opposed to just another employee." Reply Brief for Petitioners 2, and n. 4. It appears that they would agree, in accordance with the Authority's precedent, see, *e.g., Air Force Logistics Command, 46 F.L.R.A. 1184, 1186 (1993); Department of Health and Human Services, 39 F.L.R.A. 298, 311–312 (1991),* that NASA headquarters also qualifies as agency management under the FSLMRS, even though it lacks a direct collective bargaining relationship with a union, because it directs its subordinate managers who have such a collective–bargaining relationship.

Investigators within NASA's OIG might be "representatives of the agency" in two ways. First, if NASA's Inspector General and NASA's OIG itself were part of agency management, I suppose that employees of the Office necessarily would be representatives of agency management. But, to the extent that the Authority meant to hold that, there is no [*253] basis for its conclusion. OIG has no authority over persons employed within the agency outside of its Office and similarly has no authority to direct agency personnel outside of the Office. Inspectors General, moreover, have no authority under the Inspector General Act to punish agency employees, to take corrective action with respect to agency programs, or to implement any reforms in agency programs that they might recommend on their own. See generally *Inspector General Authority to Conduct Regulatory Investigations,* 13 Op. Off. Legal Counsel 54, 55 (1989); Congressional Research Service, Report for Congress, Statutory Offices of Inspector General: A 20th Anniversary Review 7 (Nov. 1998). The Inspector General is charged with, [***279] *inter alia*, investigating suspected waste, fraud, and abuse, see *5 U.S.C. App. §§ 2,* 4, 6, and making policy recommendations (which the agency head is not obliged to accept), see § 4(a)(3), (4), but the Inspector General Act bars the Inspector General from participating in the performance of agency management functions, see § 9(a). Moreover, OIG is not permitted to be party to a collective–bargaining relationship. See *5 U.S.C. § 7112*(b)(7) (prohibiting "any employee primarily engaged in investigation or audit functions" from participating in a bargaining unit).

Investigators within NASA's OIG might "represent" the agency if they acted as agency management's representative — essentially, if OIG was agency management's agent or somehow derived its authority from agency management when investigating union employees. And something akin to an agency theory appears to be the primary basis for the Authority's decision. The agency theory does have a textual basis — § 7114(a)(2)(B)'s term "representative," as is relevant in this context, can mean "standing for or in the [**1993] place of another: acting for another or others: constituting the agent for another especially through delegated authority," or "one that represents another as agent, deputy, substitute, or delegate usually being invested with the authority of the principal." [*254] Webster's Third New International Dictionary 1926–1927 (1976); see also Webster's New International Dictionary 2114 (2d ed. 1957) ("being, or acting as, the agent for another, esp. through delegated authority"). The agency notion, though, is counterintuitive, given that, as the majority acknowledges, *ante*, at 8–9, the stated purpose of the Inspector General Act was to establish "*independent* and objective units" within agencies to conduct audits and investigations, see *5 U.S.C. App. § 2* (emphasis added).

To be sure, NASA's OIG is a subcomponent of NASA and the Inspector General is subject to the "general supervision," § 3(a), of NASA's administrator (or of the "officer next in rank below" the Administrator, *ibid.*). n6 But, as the Fourth Circuit has observed, it is hard to see how this "general supervision" amounts to much more than "nominal" supervision. See *NRC v. FLRA, 25 F.3d 229, 235 (1994).* NASA's Inspector General does not depend upon the Administrator's approval to obtain or to keep her job. NASA's Inspector General must be appointed by the President and confirmed by the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." *5 U.S.C. App. § 3*(a). Only the President, and not NASA's Administrator, may remove the Inspector General, and even then the President must provide Congress with his reasons for doing so. § 3(b). n7 [***280] In addition, the Administrator has no [*255] control over who works for the Inspector General. Inspectors General have the authority to appoint an Assistant Inspector General for Auditing and another Assistant Inspector General for Investigations, §§ 3(d)(1), (2), may "select, appoint, and employ such officers and employees as may be necessary," § 6(a)(7), and also are authorized to employ experts and consultants and enter into contracts for audits, studies and other necessary services, see §§ 6(a)(8), (9); see generally P.

Light, Monitoring Government: Inspectors General and the Search for Accountability 175–185 (1993) (describing the "unprecedented freedom" that IG's have under the Inspector General Act in organizing their offices and how IGs have enhanced their independence by exercising their statutory authority in this regard to the fullest).

n6 The Act provides that the Inspector General "shall not report to, or be subject to supervision by," any other agency officer. *5 U.S.C. App. § 3*(a).

n7 The Court, *ante*, at 10, does not report the full story with respect to Inspector General supervision. We were told at oral argument that Executive Order 12993, 3 CFR 171 (1996), governs the procedures to be followed in those instances where the Inspector General and NASA's Administrator are in conflict. Tr. of Oral Arg. 51–52. Complaints against an Inspector General are referred to a body known as the "Integrity Committee," which is composed "of at least the following members": an official of the FBI, who serves as Chair of the Integrity Committee; the Special Counsel of the Office of Special Counsel; the Director of the Office of Government Ethics; and three or more Inspectors General, representing both the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency. The Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, or his designee, serves as an advisor to the Integrity Committee with respect to its responsibilities and functions under the Executive Order.

Inspectors General do not derive their authority to conduct audits and investigate agency affairs from agency management. They are authorized to do so directly under the Inspector General Act. *5 U.S.C. App. § 2*(1). Neither NASA's Administrator, nor any other agency official, may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." § 3(a). The Administrator also may not direct the Inspector General to undertake a particular investigation; the Inspector General Act commits to the IG's discretion the decision whether to investigate or report upon the agency's programs and operations. [**1994] § 6(a)(2). The Authority's counsel argued to the contrary, but could not provide a single example of an instance where an agency head [*256] has directed an Inspector General to conduct an investigation in a particular manner. Tr. of Oral Arg. 40, see also id. at 46–48 (counsel for respondent American Federation of Government Employees (AFGE) also unable to provide an example of agency head direction of OIG investigation). The Authority's counsel also could not support his assertion that agency heads have the power to direct the Inspector General to comply with laws such as the FSLMRS. Id. at 41–43.

Inspectors General, furthermore, are provided a broad range of investigatory powers under the Act. They are given access to "all records, reports, audits, reviews, documents, papers, recommendations, or other material" of the agency. *5 U.S.C. App. § 6*(a)(1). They may issue subpoenas to obtain such information if necessary, and any such subpoena is enforceable by an appropriate United States district [***281] court. § 6(a)(4). n8 The Inspector General also may "administer to or take from any person an oath, affirmation, or affidavit, whenever necessary." § 6(a)(5). Inspectors General do not have the statutory authority to compel an employee's attendance at an interview. But if an employee refuses to attend an interview voluntarily, the Inspector General may request assistance, § 6(a)(3), and the agency head "shall . . . furnish . . . information or assistance," to OIG, § 6(b)(1).

n8 The Inspector General, however, does not have the authority to subpoena documents and information from other federal agencies. See *5 U.S.C. App. §§ 6*(a)(4), 6(b)(1).

NASA's Inspector General does, as the Authority claimed, provide information developed in the course of her audits and investigations to the Administrator. §§ 2(3), 4(a)(5). But she has outside reporting obligations as well. Inspectors General must prepare semiannual reports to Congress "summarizing the activities of the Office." § 5. Those reports first are delivered to the agency head, § 5(b), and the Administrator may add comments to the report, § 5(b)(1), but [*257] the Administrator may not prevent the report from going to Congress and may not change or order the Inspector General to change his report. Moreover, the Inspector General must notify the Attorney General directly, *without notice to other agency officials*, upon discovery of "reasonable grounds to believe there has been a violation of Federal criminal law." § 4(d).

As a practical matter, the Inspector General's independence from agency management is understood by Members of Congress and Executive Branch officials alike. This understanding was on display at the recent congressional hearing on the occasion of the Inspector General Act's 20th anniversary. For example, Senator Thompson, Chairman of the Senate Government Affairs Committee, stated that "the overarching question we need to explore is whether the Executive Branch is providing IGs with support and attention adequate to ensure

their independence and effectiveness." Hearings on "The Inspector General Act: 20 Years Later" before the Senate Committee on Governmental Affairs, 105th Cong., 2d Sess., 2 (1998). He further explained that "the IGs . . . are paid to give [Congress] an independent and objective version [of] events." *Ibid.* Senator Glenn, then the ranking minority member, opined that "the IG's first responsibility continues to be program and fiscal integrity; they are not 'tools' of management." Id. at 7.

At those hearings, testimony was received from several Inspectors General. June Gibbs Brown, the Inspector General for the United States Department of Health and Human Services, praised Secretary Shalala for "never, not even once, [seeking] to encroach on [her] independence." Id. at 4. In her written testimony, she offered: "A key component of OIG independence is our direct communication with the Members and staff of the Congress. Frankly, I suspect that no agency head relishes the fact that IGs have, by law, an independent relationship with oversight Committees. Information can and must go directly from the Inspectors General [*258] to the Hill, without prior agency and administration clearance." Id. at 45. The testimony of Susan Gaffney, the Inspector General for the United [***282] States Department of Housing and Urban Development, [**1995] revealed that agency managers know all too well that the Inspector General is independent of agency management:

"It is to me somewhat jolting, maybe shocking, that the current Secretary of HUD has exhibited an extremely hostile attitude toward the independence of the HUD OIG, and, as I have detailed in my written testimony, he has, in fact, let this hostility lead to a series of attacks and dirty tricks against the HUD OIG." Id. at 6.

In her written testimony, Ms. Gaffney further explained that, while "ideally, the relationship between an IG and the agency head is characterized by mutual respect, a common commitment to the agency mission, and a thorough understanding and acceptance of the vastly different roles of the IG and the agency head," the current Secretary, in her view, was "uncomfortable with the concept of an independent Inspector General who is not subject to his control and who has a dual reporting responsibility." Id. at 48–49.

The Authority essentially provided four reasons why OIG represented agency management in this case: because OIG is a subcomponent of NASA and subject to the "general supervision" of its Administrator; because it provides information obtained during the course of its investigations to NASA headquarters and its subcomponents; because that information is sometimes used for administrative and disciplinary purposes; and because OIG's functions support broader agency objectives. In my view, the fact that OIG is housed in the agency and subject to supervision (an example of which neither the Authority nor the Court can provide) is an insufficient basis upon which to rest the conclusion that OIG's employees are "representatives" of agency management. It is hard to see how OIG serves as agency management's agent [*259] or representative when the Inspector General is given the discretion to decide whether, when, and how to conduct investigations. See *5 U.S.C. App. §§ 3*(a), 6(a). n9

> n9 The Court posits, ante, at 12, that "nothing in the [Inspector General Act] indicates that, if the information had been supplied by the Administrator of NASA rather than the FBI, NASA–OIG would have had any lesser obligation to pursue an investigation." It appears shocked at the proposition that petitioners might think that "even when an OIG conducts an investigation in response to a specific request from the head of an agency, an employee engaged in that assignment is not a 'representative' of the agency within the meaning of *5 U.S.C. § 7114*(a)(2)(B)." *Ibid*. The answer to the Court is quite simple. So far as the Inspector General Act reveals, OIG has no obligation to pursue any particular investigation. And presumably the Court would agree that if NASA's administrator referred a matter to the FBI or the DEA (who also, we are told, rely on agency management to compel an employee's appearance at an interview, Reply Brief for Petitioners 5–6), those independent agencies would not "represent" the agency. I fail to see how it is different when the investigatory unit, although independent from agency management, is housed within the agency.

The fact that information obtained in the course of OIG interviews is shared with agency management and sometimes forms the basis for employee discipline is similarly unimpressive. The Court suggests that when this happens, OIG and agency management act in "concert." *Ante*, at 13, n. 7. The truth of the matter is that upon receipt of information from OIG, agency management has the *discretion* to impose discipline but it need [***283] not do so. And OIG has no determinative role in agency management's decision. See *5 U.S.C. App. § 9*(a) (Inspector General may not participate in the performance of agency management functions). Although OIG may provide information developed in the course of an investigation to agency management, so, apparently, does the FBI, Drug Enforcement Agency (DEA), and local police departments. See, *e.g., 63 Fed. Reg. 8682 (1998)* (FBI's disclosure policy); *62 Fed. Reg. 36572 (1997)* ((Immigration and Naturalization Service (INS) Alien File and Central

Index System); *62 Fed. Reg. 26555 (1997)* (INS Law Enforcement Support Center [*260] Database); *61 Fed. Reg. 54219 (1996)* (DEA); *60 Fed. Reg. 56648 (1995)* (Secret Service, Bureau of Alcohol, Tobacco, and Firearms, and other Treasury components); *60 Fed. Reg. 18853 (1995)* (United States Marshals Service (USMS)); *54 Fed. Reg. 42060 (1989)* (FBI, USMS, and various Department of Justice record systems); see also *31 CFR § 1.36* (1998) (listing routine uses and other exemptions in disclosure [**1996] of Treasury agencies' records). Surely it would not be reasonable to consider an FBI agent to be a "representative" of agency management just because information developed in the course of his investigation of a union employee may be provided to agency management. Merely providing information does not establish an agency relationship between management and the provider.

Similarly, the fact that OIG may promote broader agency objectives does not mean that it acts as management's agent. To be sure, as the Court points out, *ante*, at 11, OIG's mission is to conduct audits and investigations of the *agency's* programs and operations. See *5 U.S.C. App. §§ 2*, 4(a). But just because two arms of the same agency work to promote overall agency concerns does not make one the other's representative. In any event, OIG serves more than just agency concerns. It also provides the separate function of keeping Congress aware of agency developments, a function that is of substantial assistance to the congressional oversight function.

The Court mentions, *ante*, at 13, that the Inspector General lacks the authority to compel witnesses to appear at an interview as if that provided support for the Authority's decision. Perhaps it is of the view that because the Inspector General must rely upon the agency head to compel an employee's attendance at an interview, management's authority is somehow imputed to OIG, or OIG somehow derives its authority from the agency. This proposition seems dubious at best. The Inspector General is provided the authority to investigate under the Inspector General Act, and is [*261] given power to effectuate her responsibilities through, *inter alia*, requesting assistance as may be necessary in carrying out her duties. *5 U.S.C. App. § 6*(a)(3). The head of the agency must furnish information and assistance to the IG, "insofar as is practicable and not in contravention" of law. § 6(b)(1). Perhaps, then, when agency management directs an employee to appear at an OIG interview, *management* acts as OIG's agent. [***284]

The proposition seems especially dubious in this case, as P *agreed* to be interviewed. The record does not reveal that NASA's management compelled him to attend the interview nor does it reveal that P was threatened with discipline if he did not attend the interview. The Eleventh Circuit, to be sure, indicated that OIG's investigator threatened P with discipline if he did not answer the questions put to him. But that threat, assuming it indeed was made, had little to do with attendance and more to do with the conduct of the interview. As the Authority has interpreted § 7114(a)(2)(B), as the Court notes, *ante*, at 13, n. 7, no unfair labor practice is committed if an employee who requests representation is given the choice of proceeding without representation and discontinuing the interview altogether. Perhaps it could be argued that by threatening P with discipline if he did not answer the questions put to him, rather than giving P the choice of proceeding without representation, that OIG's investigator invoked agency management's authority to compel (continued) attendance. Along those lines, respondent AFGE contends that OIG's representative must have been acting for agency management by threatening P with discipline because only NASA's administrator and his delegates, *5 U.S.C. § 302*(b)(1); *42 U.S.C. § 2472*(a), have the authority to discipline agency employees. Brief for Respondent AFGE 15–16. If OIG's investigator did mention that P could face discipline, he was either simply stating a fact or clearly acting *ultra vires*. OIG has no authority to discipline or otherwise control agency employees. Since the mere invocation [*262] of agency management's authority is not enough to vest that authority with OIG's investigator, the argument, then, must be that it was reasonable for P to believe that OIG's investigator might have the ability to exercise agency management's authority. That is a question we simply cannot answer on this record. And more important, I do not think that § 7114(a)(2)(B) can be read to have its applicability turn on an after–the–fact assessment of interviewees' subjective perceptions, or even an assessment of their reasonable beliefs.

* * *

In light of the Inspector General's independence — guaranteed by statute and commonly [**1997] understood as a practical reality — an investigator employed within NASA's OIG will not, in the usual course, represent NASA's management within the meaning of § 7114(a)(2)(B). Perhaps there are exceptional cases where, under some unusual combination of facts, investigators of the OIG might be said to represent agency management, as the statute requires. Cf. *FLRA v. United States Dept. of Justice, 137 F.3d 683, 690–691 (CA2 1997)* ("So long as the OIG agent is questioning an employee for bona fide purposes within the authority of the [Inspector General Act] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a 'representative' of the employee's [***285] agency for

purposes of section 7114(a)(2)(B)"), cert. pending, No. 98–667. This case, however, certainly does not present such facts. For the foregoing reasons, I respectfully dissent.

**REFERENCES:** Return To Full Text Opinion

Go to Supreme Court Briefs

Go to Oral Argument Transcript

48 Am Jur 2d, Labor and Labor Relations 386

*5 USCS 7114*(a)(2)(B); *5 USCS Appx 1* et seq.

L Ed Digest, Civil Service 1

L Ed Index, Federal Labor Relations Authority; Federal Service Labor–Management Relations Statute

Annotation References:

Supreme Court's construction and application of labor–management and employee relations provisions of 204, 205, and 701 of Civil Service Reform Act of 1978 *(5 USCS 7501*–7521, 7701–7703, 7101–7135). *98 L Ed 2d 1089.*

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. *39 L Ed 2d 942.*

LEXSEE 2001 USAPP LEXIS 21573

# U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C. AND OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, PETITIONERS v. FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 709, INTERVENOR

**No. 00–1433**

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

***266 F.3d 1228; 2001 U.S. App. LEXIS 21573; 168 L.R.R.M. 2505***

**September 13, 2001, Argued**
**October 9, 2001, Decided**

**DISPOSITION:** [**1] Affirmed.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** Howard S. Scher, Attorney, U.S. Department of Justice, argued the cause for petitioners. With him on the briefs was William Kanter, Deputy Director.

Ann M. Boehm, Attorney, Federal Labor Relations Authority, argued the cause for respondent. With her on the brief was David M. Smith, Solicitor. William R. Tobey, Deputy Solicitor, entered an appearance.

Stuart A. Kirsch and Mark D. Roth were on the brief for intervenor.

**JUDGES:** Before: TATEL and GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge *. Opinion for the Court filed by Senior Judge WILLIAMS.

* Senior Circuit Judge WILLIAMS was in regular active service at the time of oral argument.

**OPINIONBY:** WILLIAMS

**OPINION:** [*1228]

On Petition for Review and Cross–Application for Enforcement of an Order of the Federal Labor Relations Authority [*1229]

WILLIAMS, *Senior Circuit Judge*: This is an appeal from the Federal Labor Relations Authority's finding of an unfair labor practice on the part of the Department of Justice's Office of the Inspector General ("OIG"). The FLRA found that the OIG had violated the so–called *Weingarten* rule during its investigation of a Department employee, see *NLRB v. J. Weingarten, Inc., 420 U.S. 251, 43 L. Ed. 2d 171, 95 S. Ct. 959 (1975)* [**2] (codified as to federal employees in *5 U.S.C. § 7114*(a)(2)(B)), by refusing the employee's request for the assistance of a union representative. Believing the case to be controlled by Supreme Court precedent, we uphold the FLRA's decision.

* * *

The OIG received a report that an employee of the Federal Correctional Institution Englewood, in Littleton, Colorado had smuggled illegal drugs into that facility. The employee, a member of a bargaining unit, asked for union representation, but the investigating agents denied the request and interviewed him anyway. The criminal investigation was later closed when the prison warden wrote a memorandum to the employee informing him that "there was nothing to substantiate the allegations, and that there would be no further investigation."

The union representing the employee filed an unfair labor practice charge, claiming that the agents' denial of the employee's request had violated *5 U.S.C. § 7114*(a)(2)(B). That section requires an agency to give an employee the opportunity to have a union representative at an interrogation under certain circumstances. The FLRA's General Counsel issued a complaint. [**3] The ALJ granted summary judgment for the FLRA, and the Department and OIG filed exceptions. In the meantime the Supreme Court issued an opinion upholding a prior FLRA decision that a NASA Inspector General was a "representative of the agency" within the meaning of § 7114(a)(2)(B), and that he therefore violated that section when he interviewed a NASA employee without allowing adequate union representation. *National Aeronautics and Space Administration v. FLRA, 527 U.S.*

*229, 119 S. Ct. 1979, 144 L. Ed. 2d 258 (1999)* ("*NASA*"). Following that decision, the FLRA adopted the ALJ's decision and order. *U.S. Department of Justice v. Federal Labor Relations Authority, 56 F.L.R.A. 556 (2000).* It rejected the Department's argument that, in view of the Court's statement in *NASA* that it was not considering the applicability of § 7114(a)(2)(B) to "law enforcement officials with a broader charge," *527 U.S. at 244 n.8,* the section could not properly be applied to the OIG's *criminal* investigations—as distinct from the administrative investigation at issue in *NASA*. Like the FLRA, we find no basis for carving out such an exception from *NASA*.

* * *

The statutory provision [**4] at issue here provides in relevant part:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (B) any *examination* of an employee in the unit *by a representative of the agency* in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

[*1230]

*5 U.S.C. § 7114*(a)(2)(B) (emphasis added). As the section is part of the FLRA's organic statute, we owe its interpretation deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* See *NASA, 527 U.S. at 234.* To the extent that the FLRA decision is simply an interpretation of *NASA* itself, however, we owe the FLRA no deference. See *New York v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)* (holding that "an agency has no special competence or role in interpreting a judicial decision"); cf. *Professional Reactor Operator Society v. United States Nuclear Regulatory Commission, 291 U.S. App. D.C. 219, 939 F.2d 1047, 1051 (D.C. Cir. 1991)* [**5] (deference is inappropriate when the agency interprets a statute it is not charged to administer). In fact the case turns on the force of the Department's efforts to distinguish *NASA*, and we agree with the Authority's conclusion that the attempted distinctions are flawed. Like the Court in *NASA* itself, we need not consider whether § 7114(a)(2)(B) permits other readings. See *NASA, 527 U.S. at 234.*

As in *NASA*, no one here questions that there was an "examination" of a bargaining unit employee, that the examination was "in connection with an investigation," that the employee requested representation, or that the employee reasonably believed that he might be subject to disciplinary action. See *NASA, 527 U.S. at 233.* Thus, the only issue in dispute is whether, as the Court found there, the Authority could find that the OIG agents were "representatives of the agency" when they conducted the interview.

To support the proposed distinction between criminal and administrative investigations, the Department points to a provision of the Inspector General Statute that it says creates special consequences for an investigation's being criminal. *5 U.S.C. App. § 4* [**6] (d) requires any OIG agent to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *Id*. According to the Department, this implies that whenever a criminal investigation is underway, the OIG agent is for purposes of § 7114(a)(2)(B) no longer a "representative of the agency" but rather answers to the Attorney General.

First we note that § 4(d) is triggered whenever an Inspector General comes upon "reasonable grounds to believe" that federal criminal law was violated. This is a broader test than what the Department regards as the key distinction of this case from *NASA*, namely the OIG's own classification of the investigation as criminal; our acceptance of it as controlling would thus sweep an unknown number of administrative inquiries into the exception. More important, nothing in § 4(d) overrides *5 U.S.C. App. § 3*(a), which requires that each Inspector General shall "report to and be under the general supervision of the head of the establishment involved...." The *NASA* Court relied at least in part on this provision in holding that OIG agents [**7] are "representatives" of their respective agencies. *527 U.S. at 239.* Section 4(d)'s extra reporting requirement does not extract OIG agents from the organizational spot that is assigned them by § 3(a)—under the head of the relevant *agency*.

Thus the Department's effort at a statutory distinction between criminal and administrative investigations fails. Its remaining argument is mostly that the *NASA* decision rested on factors that are peculiar to administrative investigations and therefore it does not apply to criminal ones. None of the distinctions seems convincing. [*1231]

First, the Department argues that *NASA* was based on the fear that agency managers might hand off their dirty work to OIG agents, thus circumventing § 7114(a)(2)(B) by using the OIG to conduct investigations for their own purposes. See *NASA, 527 U.S. at 234.* With criminal investigations, the Department says, this concern is "totally

absent" because agency managers have no "criminal investigative duties" in the first place. But the *NASA* decision rested (in part) on a recognition that the overlaps between "pure" management activities and OIG duties would naturally generate [**8] cooperation between agency managers and *OIGs. 527 U.S. at 242.* It would be astonishing for us to ignore the parallel, and equally obvious, overlap of administrative and criminal enforcement goals and to create an exception resting on this ignorance. In fact, we once observed that "the results of inspections, when no criminal proceedings ensue, are routinely turned over to management for possible use in disciplinary actions." *U.S. Postal Service v. NLRB, 297 F.2d 64, 969 F.2d 1064, 1072 (D.C. Cir. 1992).*

Second, the Department argues that *NASA* was in part compelled by the fact that Inspectors General, when conducting an administrative investigation, need the cooperation of agency managers, who can direct the employee's use of his time—here, to attend the interview and answer questions. See *NASA, 527 U.S. at 242.* The Department attributes this power to the fact that the employee's refusal to answer questions related to his duties *may* be used against him in an administrative investigation. See *Kalkines v. United States, 200 Ct. Cl. 570, 473 F.2d 1391, 1393 n.4 (Ct. Cl. 1973).* In contrast, says the Department, the [**9] employee's refusal to answer questions in a criminal investigation *may not* be used against him. See *Garrity v. New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967).* It follows that the agency manager has "no role" to play in forcing the employee to answer questions in a criminal investigation.

We cannot see that the "no role" consequence follows. In *both* administrative and criminal investigations, the employee enjoys a Fifth Amendment right not to incriminate himself in his answers to a government investigator. The only difference appears to be that in administrative investigations, the investigators usually grant criminal immunity to the employee, see *Kalkines, 473 F.2d at 1393 n.4,* so that they may threaten the employee with administrative penalties unhampered by the Fifth Amendment. But this is a choice made by the Inspector General in a given case, depending on what penalties he or she wishes to seek. In other words, the difference between administrative and criminal investigations in this respect is one of investigative strategy, not one of law. In either case, both OIG and agency management can benefit by mutual cooperation, [**10] and it was the likelihood of such cooperation that the *NASA* Court saw as militating in favor of treating OIG interrogators as "representatives of the agency."

Third, the Department argues that in a criminal investigation an employee has the right to an attorney and therefore doesn't need a union representative. But nothing in the language of the statute or of *NASA* suggests that the application of § 7114(a)(2)(B) depends on whether a particular employee "needs" union representation. Moreover, the section implicates the union's rights as well. See *Weingarten, 420 U.S. at 260–61.* In fact, we've already rejected a suggestion that an interrogatee's right to counsel could render § 7114(a)(2)(B) inapplicable. *American Federation of Government Employees, Local 1941, AFL–CIO v. FLRA, 267 U.S. App. D.C. 72, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988).* [*1232]

Apart from the supposedly distinguishing "factors" and the reference to § 4(d), the Department relies heavily on the *NASA* Court's statement that it was not deciding the applicability of § 7114(a)(2)(B) to "law enforcement officials with a broader charge." *NASA, 527 U.S. at 244 n.8.* But the reference doesn't [**11] appear to address OIG agents at all. In the previous sentence the Court mentioned the concern that applying § 7114(a)(2)(B) to the OIG might hinder "joint or independent FBI investigations of federal employees." *Id.* Thus the later reference to "law enforcement officials" clearly means "FBI officials" or the like, not an agency's OIG officials pursuing a criminal investigation on their own. As was true for the Court in *NASA*, we need not address the possible application of § 7114(a)(2)(B) to a joint OIG/FBI investigation.

The Department also argues that application of § 7114(a)(2)(B) to criminal investigations is "simply unworkable." Specifically, it says, the union representative might be called to testify at a trial, thereby working against the employee's true interests. But where an administrative investigation turns out to uncover criminality, the union representative may equally be called to testify. And if the employee is concerned about the possible testimony of the union representative, he can simply decide not to ask for one. Cf. *U.S. Postal Service, 969 F.2d at 1072 n.5* (rejecting idea that risks of a union representative's testimony against an [**12] employee could enable the *employer* to deny the *Weingarten* right). Perhaps inconsistently, the Department also says that application of § 7114(a)(2)(B) will impede criminal investigations. We have no doubt that there is a risk of such impediments, but it presumably closely parallels the risks to effective management (and successful criminal prosecutions) that flow from application of § 7114(a)(2)(B) to administrative investigations, risks that the Court regarded as "not weighty enough to justify a nontextual construction of § 7114(a)(2)(B) rejected by the Authority." *NASA, 527 U.S. at 243–44.*

Further, on the score of workability, the Department's approach presents problems of its own. Many if not most investigations will have both administrative and criminal potential. Classification appears to depend—as one would expect—on the ongoing flow of information. The inves-

tigation at issue in *NASA*, for instance, was instigated by information from the *FBI, see 527 U.S. at 231–32,* and according to the FLRA decision involved "a serious threat to co–workers," *NASA, 50 F.L.R.A. 601, 1995 FLRA LEXIS 82,* at *3 (1995). See also *id* [**13] . at *48 (ALJ decision, noting that documents "set forth potential threats and plans for violence"). The investigator determined, "after consulting appropriate investigative agencies," that the employee "had not violated the law and, as a result, that the matter would be administratively, rather than criminally, investigated." *Id.* at *3 n.2. At what point, then, would the agent's investigation have become subject to § 7114(a)(2)(B)? When the agent—to some degree independently—decided to treat it administratively? What if he had viewed the matter as unclassified, and interviewed the employee in part in order to decide on the classification? Such possibilities erode the likelihood of any bright–line distinction between administrative and criminal investigations.

* * *

Accordingly, the order of the FLRA is

*Affirmed*.

LEXSEE 251 F3D 183

# TRUCKERS UNITED FOR SAFETY, ET AL., APPELLANTS v. KENNETH M. MEAD, THE INSPECTOR GENERAL, DEPARTMENT OF TRANSPORTATION, APPELLEE

**No. 00–5175**

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

***346 U.S. App. D.C. 122; 251 F.3d 183; 2001 U.S. App. LEXIS 11680***

**March 22, 2001, Argued**
**June 5, 2001, Decided**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the District of Columbia. (No. 98cv02793).

**DISPOSITION:** Government ordered to return all materials seized during ultra vires searches of appellants' premises; District Court's decision regarding scope of § 228 of MCSIA vacated; appellants' claims resting on their construction of MCSIA dismissed; issues focused on meaning and future application of § 228 are not ripe for review.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** Anthony J. McMahon argued the cause and filed the briefs for appellants. Edward M. McClure entered an appearance.

Eric M. Jaffe, Assistant United States Attorney, argued the cause for appellee. With him on the brief were Wilma A. Lewis, United States Attorney at the time the brief was filed, and R. Craig Lawrence, Assistant United States Attorney.

**JUDGES:** Before: EDWARDS, Chief Judge, WILLIAMS and HENDERSON, Circuit Judges. Opinion for the Court filed by Chief Judge EDWARDS.

**OPINIONBY:** EDWARDS

**OPINION:** [*185]

EDWARDS, *Chief Judge*: In keeping with its mission to enforce motor carrier safety regulations, the Office of Motor Carriers ("OMC") initiated compliance review investigations into appellants' record keeping practices. As part of that effort, the Department of Transportation's [**2] Office of Inspector General ("DOT OIG") was engaged to use its purported search and seizure authority to obtain appellants' business records. Under the legal framework in effect at the time of the underlying events, the Inspector General Act of 1978, Pub. L. No. 95–452, 92 Stat. 1101 (1978) ("Inspector General Act" or "Act"), the Inspector General ("IG") had no authority to engage in the kinds of criminal investigations at issue here–criminal investigations that are at the heart of an agency's general compliance enforcement responsibilities. We therefore hold that appellants are entitled to the return of records and other property seized from them during the IG's *ultra vires* investigations and seizures.

Following the IG's investigation of appellants, and subsequent to appellants' filing of the lawsuit in this case, Congress enacted the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106–159, 113 Stat. 1748, 1773 (1999) ("MCSIA"). The District Court found that the MCSIA granted the IG new authority to conduct investigations of motor carriers' fraudulent and criminal activities related to DOT's operations and programs. *Truckers United for Safety v. Mead, 86 F. Supp. 2d 1, 19 (D.D.C. 2000).* [**3] In reaching this conclusion, the District Court correctly rejected the IG's argument that the 1999 law merely clarified that his office always possessed the authority to conduct such investigations. *Id. at 19 n.7.* It is also undisputed that the MCSIA does not retroactively authorize IG investigations that were conducted prior to its enactment. Therefore, the District Court erred in holding that, although the IG violated the Inspector General Act, he was nonetheless entitled to summary judgment because the actions taken by the IG in 1998 are authorized by the 1999 law.

Finally, appellants contend that, because there is a threat that the office of the IG will exceed its authority under the MCSIA, we should construe the new law narrowly and then grant an injunction preventing the IG from violating the statute in the future. Although appellants are

entitled to relief for unlawful actions taken pursuant to the Inspector General Act, there is no live dispute under the MCSIA. Accordingly, we vacate the District Court's decision insofar as it purports to construe the MCSIA, and we dismiss appellants' claims resting on their construction of the MCSIA; the issues focused on [**4] the meaning and future application of the MCSIA are not ripe for review.

**I. BACKGROUND**

A. Statutory Framework

1. Inspector General Act

The Inspector General Act established the Office of Inspector General ("OIG") in [*186] order to facilitate "objective inquiries into bureaucratic waste ... and mismanagement." *NASA v. Fed. Labor Relations Auth., 527 U.S. 229, 240, 119 S. Ct. 1979, 144 L. Ed. 2d 258 (1999).* The IG's mandate focuses on systemic agency–wide issues. Congress created the OIG to "provide leadership and coordination and recommend policies for activities designed ... to promote economy, efficiency, and effectiveness in the administration of, and ... to prevent and detect fraud and abuse in, such programs and operations." *5 U.S.C. App. 3* § 2(2). There are limits to the IG's powers, however. Most prominently, the Act specifically prohibits the OIG from assuming "program operating responsibilities." *5 U.S.C. App. 3* § 9(a)(2).

The general parameters of the Inspector General Act are fairly clear cut. First, Congress consolidated pre–existing agency offices into the OIG, thereby transferring the various offices' investigative duties to the OIG. In the [**5] case of the DOT, Congress mandated that the responsibilities of offices such as the "Office of Investigations and Security" and the "Office of Audit" be consolidated into the OIG. *5 U.S.C. App. 3* § 9(a)(1)(k). Second, the Act defines the IG's core role as preventing fraud and abuse, by conducting audits and investigations relating to agency programs and operations. *5 U.S.C. App. 3* §§ 2(1), 4(a)(1), 6(a)(2). Finally, Congress authorized agencies to make discretionary transfers of duties to the OIG. However, discretionary transfers of authority only can be made if the duties are properly related to the functions of the IG, further the purpose of the Act, and do not constitute program operating responsibilities. *5 U.S.C. App. 3* § 9(a)(2).

Congress structured the OIG to promote independence and objectivity. The Inspector General Act indicates that Inspectors General will be appointed directly by the President and confirmed by the Senate. *5 U.S.C. App. 3* § 3(a). An IG is under the general supervision of the head of the agency, but the head of the agency may not interfere with any IG investigation. *Id.* In [**6] a similar vein, Inspectors General report directly to Congress regarding their agencies. *Id.* Furthermore, the OIG has investigatory means at its disposal, such as subpoena power and access to regulated motor carriers' records to aid it in fulfilling its mission. *5 U.S.C. App. 3* §§ 3(a), 6(a). The OIG also may, in appropriate circumstances, conduct searches and seizures. *See 28 C.F.R. § 60.3*.

In 1999 Congress passed the MCSIA which further addresses the power of the DOT IG. In particular, § 228 of the MCSIA states:

> (a) IN GENERAL.—The statutory authority of the Inspector General of the Department of Transportation includes authority to conduct, pursuant to Federal criminal statutes, investigations of allegations that a person or entity has engaged in fraudulent or other criminal activity relating to the programs and operations of the Department or its operating administrations.
>
> (b) REGULATED ENTITIES.—The authority to conduct investigations referred to in subsection (a) extends to any person or entity subject to the laws and regulations of the Department or its operating administrations, whether or not they are recipients [**7] of funds from the Department or its operating administrations.

§ 228, 113 Stat. at 1773. This statutory provision was not in effect when the IG investigated appellants.

2. Operations of the Department of Transportation

Under the Motor Carrier Safety Act of 1984, Pub. L. No. 98–554, 98 Stat. 2829 [*187] (1984), the Secretary of the DOT has authority to issue regulations governing vehicle safety. *See, e.g., 49 U.S.C. § 31133*(a). The Secretary's authority includes the power to initiate an investigation, subpoena witnesses and records, and inspect motor carriers or documents belonging to motor carriers. *49 U.S.C. §§ 502*(a), 504(c)(1)–(2), 506(a). The IG has no responsibility in these areas of operation.

The Secretary of Transportation has delegated this authority to the Federal Highway Administration ("FHA"), which in turn has issued federal motor carrier safety regulations. *See 49 U.S.C. § 104; 49 C.F.R. §§ 350.1–399*.207. Until January 1, 2000, FHA's Office of Motor Carriers administered the regulation of interstate motor carriers. However, pursuant to the MCSIA, responsibility [**8] for administering regulations governing interstate motor carriers was transferred to the Federal Motor Carrier Safety Administration ("FMCSA").

The Motor Carrier Safety Act of 1984 authorizes the FHA to enforce safety regulations and conduct compliance reviews. *49 U.S.C. § 31115.* The FHA can itself bring a civil action or request that the Attorney General enforce a regulation or prosecute an alleged violator. *49 U.S.C. § 507* (b). The Act prescribes both civil and criminal penalties for violations of the safety regulations. *49 U.S.C. § 521.* Although the FHA is authorized to oversee motor carrier compliance with safety regulations, the Motor Carrier Safety Act of 1984 does not authorize the FHA to engage in searches and seizures.

B. Underlying Events

During the period preceding the events at issue in this case, the DOT OIG and the OMC embarked on a joint project reviewing motor carrier operations. *See* Joint OIG/OMC Review of Motor Carrier Operations, *reprinted in* J.A. 40. The "objective" of the joint project was "to combine the efforts of OIG and OMC staffs in a joint investigative review of specific motor [**9] carriers to create a greater deterrence to motor carrier violations of the Federal Motor Carrier Safety Regulations." *Id*. The effort targeted "all motor carrier operating areas subject to falsification and having a direct impact on safety," including drivers' hours of service, driver medical certificates and testing for drugs. *Id.* The document describing the joint project specifically noted that the "focus of the review will not be on OMC operations." *Id.* Under this project, according to appellees, the OMC engages in regulatory compliance reviews of motor carriers and refers egregious violators to the IG. The IG pursues criminal investigation of the misconduct.

Appellants, Florilli, Northland, Kistler, Lone Wolf, and K&C, individual trucking companies, each have been investigated by the DOT IG. The record on appeal describes events involving K & C and Lone Wolf, companies operating from the same location, to illustrate the role the IG played in investigating appellants. On July 13, 1998 the OMC sent an investigator to K & C and Lone Wolf to conduct a compliance review. Subpoena (July 14, 1998), *reprinted in* J.A. 66. Lone Wolf believed that the review had been triggered [**10] by a complaint filed by a disgruntled driver. DOT asserted that the investigation was an attempt to uncover falsification of "hours of service" logs, that is, records of the number of consecutive hours drivers are on the road without a rest. The Company refused to cooperate with the compliance review, although it agreed to comply with the investigation of the underlying complaint. Letter from Lone Wolf Counsel, *reprinted in* J.A. 54. On July 14, 1998 the OMC served a subpoena on the companies [*188] demanding that the companies produce all documents necessary to the investigation. Subpoena (July 15, 1998), *reprinted in* J.A. 66. The companies refused to comply. On October 22, 1998 a special agent of the DOT IG, Eric Johnson, obtained a warrant to search the premises of the companies. Search Warrant (Oct. 22, 1998), *reprinted in* J.A. 73. On the following day, Johnson executed the search warrant and seized the relevant documents. *See* Declarations, *reprinted in* J.A. 57, 58, 60, 62, 64, 65.

C. Procedural History

Truckers United for Safety ("TUFS"), a nonprofit organization of motor carriers, along with the individually named companies, filed suit in District Court alleging [**11] that the DOT IG lacked legal authority to engage in the contested compliance review investigations. Appellants sought preliminary injunction and declaratory relief because, they argued, the IG was not authorized to engage in DOT operations, specifically investigation of standard compliance with federal motor carrier safety regulations. Appellants also sought the return of any seized materials that had not already been returned by the Government. Appellee filed a motion for summary judgment, asserting that TUFS lacked standing and that the DOT IG acted within its authority in authorizing the investigations.

The District Court found that the Inspector General Act did not authorize the DOT IG to conduct investigations into motor carrier compliance. *Truckers United for Safety v. Mead, 86 F. Supp. 2d at 19.* As a result the IG had no authority to search appellants' premises or seize their records. *Id.* However, the District Court found that the MCSIA amended the Inspector General Act, and constituted a new grant of authority broad enough to encompass the kind of investigations at issue here. *Id*. Although the OIG did not have the authority to investigate appellants [**12] as part of a compliance review in 1998, the District Court explained that the MCSIA has given the IG authority to do so in the future. *Id.* The District Court therefore concluded that the IG was entitled to summary judgment on the merits. *Id*. Because appellants' claims arise from an appeal of a summary judgment ruling, we review the District Court's ruling *de novo*. *See, e.g., Ctr. for Auto Safety v. NHTSA, 244 F.3d 144, 147 (D.C. Cir. 2001).*

**II. DISCUSSION**

A. Standing

The IG has asserted, and the District Court agreed, that TUFS lacks standing to pursue claims on behalf of its members, the individual trucking companies. We find this argument to be plainly wrong.

TUFS asserts no basis for *organizational standing*, *see Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982), Am. Trucking*

*Ass'ns v. United States Dep't of Transp., 334 U.S. App. D.C. 246, 166 F.3d 374, 386 (D.C. Cir. 1999),* because it asserts no cognizable injury to the organization or its activities. It is clear, however, that TUFS has asserted more than enough to satisfy the requirements of *representational* [**13] *standing*. *See, e.g., Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 342–43, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)* (setting out the requirements for associations to have standing); *Am. Trucking, 166 F.3d at 385; Int'l Bhd. of Teamsters v. Pena, 305 U.S. App. D.C. 125, 17 F.3d 1478, 1482–83 (1994).*

TUFS asserts, and the Government does not dispute, that the individual trucking companies are members of the association. TUFS further claims that the IG injured individual trucking companies by conducting [*189] unlawful investigations and seizing their records. These claims, which are substantial and well documented, easily satisfy the injury/causation/redressability requirements of Article III of the Constitution. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).* Furthermore, it is uncontested that TUFS' members have standing to sue in their own right; the interests that TUFS seeks to protect are indisputably germane to the organization's purpose; and neither the claims asserted nor the relief requested requires the participation in the lawsuit of each of the [**14] organization's individual members. *Hunt, 432 U.S. at 343.* TUFS therefore has representational standing to sue on behalf of its members.

B. The Legality of the IG's Investigations and Seizures in 1998 Pursuant to the Inspector General Act

The principal issue in this case is whether the IG had authority in 1998 to investigate motor carriers' compliance with safety regulations. The District Court held that the legislative history and structure of the Inspector General Act make it plain that Congress did not intend to grant the IG authority to conduct investigations constituting an integral part of DOT programs. The trial court also held that the Secretary of DOT could not transfer to the IG his authority to investigate motor carriers' compliance with federal motor carrier safety regulations. The District Court therefore concluded that the IG acted outside the scope of his authority in conducting investigations of motor carriers' compliance with the federal safety regulations. We agree with this conclusion.

The IG has authority to investigate the DOT's administration of programs and operations. In carrying out its charge, "honest cooperation" between the IG [**15] and agency personnel can be expected. *NASA, 527 U.S. at 242.* The IG, however, is not authorized to conduct investigations as part of enforcing motor carrier safety regulations—a role which is central to the basic operations of the agency. *See, e.g., Winters Ranch P'ship v. Viadero, 123 F.3d 327 (5th Cir. 1997)* (upholding IG's subpoena because it was part of an investigation to test the effectiveness of the agency's conduct of a program and not part of program operating responsibilities); *Burlington N. R.R. Co. v. Office of Inspector General, 983 F.2d 631 (5th Cir.1993)* (refusing to enforce IG's subpoena because Inspectors General have no authority to engage in regulatory compliance investigations that are part of an agency's general functioning).

The record in this case makes it clear that, when he investigated the plaintiffs and seized their records, the DOT IG was not engaged in an investigation relating to abuse and mismanagement in the administration of the DOT or an audit of agency enforcement procedures or policies. Rather, the DOT IG merely lent his search and seizure authority to standard OMC enforcement investigations. [**16] In other words, the DOT IG involved himself in a routine agency investigation that was designed to determine whether individual trucking companies were complying with federal motor carrier safety regulations. This was beyond his authority.

Under *5 U.S.C. App. 3* § 9(a)(1)(K), the Office of Investigations and Security, Office of Audit of the Department, the Offices of Investigations and Security, Federal Aviation Administration, and External Audit Divisions, Federal Aviation Administration, the Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration, and the Office of Program Audits, Urban Mass Transportation [*190] Administration were consolidated as part of the OIG. Congress did not, however, indicate that these investigative units were to conduct investigations into motor carrier compliance with safety regulations or that consolidation of these offices authorized the OIG to engage in criminal investigations of particular motor carriers, in contravention of the Inspector General Act. *5 U.S.C. App. 3* § 9(a)(2). The DOT IG was not authorized, pursuant to the Act's consolidation [**17] of duties, to search appellants' premises and seize their records as part of a compliance review which was under the jurisdiction of the FHA.

Finally, under *5 U.S.C. App. 3* § 9(a)(2), the Secretary of DOT may transfer additional powers and duties to the IG beyond those responsibilities specifically defined in the Inspector General Act. However, the Secretary's transfer of authority is explicitly limited to exclude matters that constitute "program operating responsibilities." *Id.* As the District Court correctly found, there was no valid transfer of authority in this case.

On the record at hand, there can be no doubt that the IG violated the Inspector General Act when he conducted the disputed investigations and seizures of appellants' records in 1998. The actions of the IG were *ultra vires*, causing injury to appellants for which they are entitled to relief.

C. Actions Arising Under the MCSIA

The District Court found that, as of December 1999, after the occurrence of the investigations and seizures that are in dispute in this case, the IG was granted authority pursuant to the MCSIA "to conduct investigations of motor carriers' fraudulent and criminal activities [**18] that are related to the DOT's operations and programs." *Truckers United for Safety v. Mead, 86 F. Supp. 2d at 19.* The District Court's opinion thus appears to suggest that the enactment of the MCSIA mooted appellants' challenges to the IG's unlawful actions taken before its passage. *Id*. That holding is erroneous and it is hereby reversed. The District Court also denied appellants' request for declaratory and injunctive relief that would bar the IG from engaging in unlawful actions in the future pursuant to the MCSIA. Because appellants' claims rest on a fear of injuries that have yet to arise under the MCSIA, we dismiss them as unripe.

The IG argues that even though the MCSIA does not directly govern the 1998 investigations, the MCSIA provides evidence that, even in 1998 before the MCSIA was enacted, the OIG had authority to investigate appellants. To substantiate this position, the IG points to a comment in the Congressional Record that § 228 "clarifies Congressional intent with respect to the authority of the IG, reaffirming the IG's ability and authority to continue to conduct criminal investigations of parties subject to DOT laws or regulations, whether or [**19] not such parties receive Federal funds from the Department." 145 Cong. Rec. H12874 (daily ed. Nov. 18, 1999); 145 Cong. Rec. S15211 (daily ed. Nov. 19, 1999). This sparse piece of legislative history cannot carry the day for the IG.

Prior to the passage of § 228, the statutory and legal framework defining the IG's authority focused on the IG's role as an independent and objective investigator of agency fraud and abuse. These responsibilities contrasted with the responsibilities delegated to other offices in the DOT which were in charge of implementation and enforcement of the motor carrier safety regulations. Within this institutional framework the IG was not authorized to engage in ordinary compliance reviews, even those potentially implicating criminal [*191] punishments. The characterization of the MCSIA as "clarifying" in the Congressional Record does not undermine this finding. The DOT's attempt to read § 228 as a retroactive authority has no legitimate basis.

A much harder question in this case concerns appellants' requests for a judicial declaration that § 228 of the MCSIA did not amend the Inspector General Act to authorize the IG to conduct investigations of the sort that are [**20] at issue in this case and an injunction barring such criminal investigations in the future. In other words, appellants ask that we reverse the District Court's holding that § 228 of the MCSIA created *new* authority for the DOT IG. Section 228—for example, the language sanctioning IG investigations of "fraudulent or other criminal activity"—is hardly free from ambiguity and it is far from clear that it expands the authority of the IG as the District Court found. We need not reach these issues, however. We agree that the District Court's decision construing the MCSIA cannot stand, but not for the reasons asserted by appellants. Rather, we hereby vacate the District Court's decision insofar as it addresses the scope of the MCSIA, because the issues raised by appellants regarding the scope of § 228 are not ripe for review.

The disputed actions taken by the IG in this case occurred in 1998 under the Inspector General Act. The MCSIA had not yet been enacted, so there is no evidence before the court concerning investigations or seizures taken pursuant to the MCSIA. Appellants claim that the IG's future conduct under the MCSIA may violate the law; but, of course, this court has no [**21] way of knowing what the DOT IG may do in the future. The only matters of relevance that are before the court at this time are the text of § 228 of the MCSIA, the District Court's construction of the statutory provision, and the parties' differing opinions as to what the new law means. This is not enough to justify an opinion from this court on the meaning of § 228, because such an opinion would be purely "advisory" and thus beyond this court's authority under Article III of the Constitution. *Cf. Los Angeles v. Lyons, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)* (Speculative claims about possible future harms do not afford a basis for equitable relief.).

There will be no ripe case fit for judicial review until the Government acts to apply the statute "in a concrete factual setting." *Truckers United for Safety v. Fed. Highway Admin., 139 F.3d 934, 937 (D.C. Cir. 1998)* (citing *Abbott Labs. v. Gardner, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), rev'd on other grounds, Califano v. Sanders, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977))*. It is possible that, since passage of the MCSIA, the [**22] DOT IG has, in practice, properly exercised its authority. Without any particular action by the IG before us for review, the question of future relief is not fit for determination.

In assessing whether a case is ripe for review, we must consider not only the "fitness of the issues" for judicial

review, but also whether a delay in judicial consideration of the issues will cause undue "hardship" to appellants. *See City of Houston v. Dep't of Hous. & Urban Dev., 306 U.S. App. D.C. 313, 24 F.3d 1421, 1431–32 (D.C. Cir. 1994).* The closest appellants come to raising a claim of hardship is in asserting that the investigations of Florilli, Kistler, K & C and Lone Wolf are "continuing," implying that appellants persist in being harmed as a result of the underlying events. However, this harm results from searches and seizures authorized by the IG in 1998, not actions initiated by the IG following the enactment of the MCSIA. [*192]

The main hardship that may result to appellants from delayed review of the IG's proper role under the MCSIA is the need to file another suit. However, the burden of pursuing future litigation is not enough, by itself, to demonstrate hardship justifying [**23] premature judicial decision–making. *See 24 F.3d at 1432.*

**III. CONCLUSION**

Because the DOT IG acted without lawful authority in investigating appellants and seizing their records pursuant to the Inspector General Act, the Government is hereby ordered to return all materials seized during the *ultra vires* searches of appellants' premises. We also hereby vacate the District Court's decision regarding the scope of § 228 of the MCSIA and dismiss appellants' claims resting on their construction of the MCSIA; the issues focused on the meaning and future application of § 228 are not ripe for review.

LEXSEE 25 F3D 229

# UNITED STATES NUCLEAR REGULATORY COMMISSION, WASHINGTON, D.C., Petitioner, v. FEDERAL LABOR RELATIONS AUTHORITY, Respondent. NATIONAL TREASURY EMPLOYEES UNION, Intervenor. FEDERAL LABOR RELATIONS AUTHORITY, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, WASHINGTON, D.C., Respondent. NATIONAL TREASURY EMPLOYEES UNION, Intervenor.

**No. 93-1704, No. 93-1851**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

***25 F.3d 229; 1994 U.S. App. LEXIS 13213; 146 L.R.R.M. 2453***

**February 7, 1994, Argued**
**June 3, 1994, Decided**

**PRIOR HISTORY:** [**1] On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:** Argued: Sushma Soni, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner.

Argued: Frederick Michael Herrera, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondent.

Argued: Timothy Brendan Hannapel, Assistant Counsel, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C., for Intervenor.

On Brief: Frank W. Hunger, Assistant Attorney General, Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioner.

On Brief: David M. Smith, Solicitor, William R. Tobey, Deputy Solicitor, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondent.

On Brief: Gregory O'Duden, General Counsel, Barbara A. Atkin, Associate General Counsel for Appellate Litigation, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C., for Intervenor.

**JUDGES:** Before MURNAGHAN and NIEMEYER, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Niemeyer wrote the opinion, in which Judge Ellis joined. Judge Murnaghan wrote a separate dissenting opinion.

**OPINIONBY:** [**2] NIEMEYER

**OPINION:** [*230] **OPINION**

NIEMEYER, Circuit Judge:

The question presented in this case is whether the United States Nuclear Regulatory Commission can be compelled to negotiate with a union for proposals defining employee rights and procedures for investigatory interviews of the Commission's employees conducted by the Office of Inspector General. The National Treasury Employees Union, the authorized bargaining representative of certain Nuclear Regulatory Commission employees, advanced four proposals to the Nuclear Regulatory Commission regarding procedures to be followed during investigatory interviews of the agency's employees by the Inspector General. The Nuclear Regulatory Commission refused to negotiate with respect to these proposals, contending that to do so would infringe on the independence of the Inspector General mandated by the Inspector General Act of 1978, *5 U.S.C. app. 3* § 1 et seq. On the Union's petition, filed with the Federal Labor Relations Authority, [*231] the Authority found that the proposals were proper subjects for negotiation and entered an order directing the agency to negotiate. For the reasons that follow, we grant the NRC's petition [**3] for review of that order and deny the Authority's cross-application for enforcement.

I

The Federal Service Labor-Management Relations

Statute ("the FSLMRS"), *5 U.S.C. § 7101* et seq., establishes the right of federal employees to form and join labor unions and engage in collective bargaining over conditions of employment. *5 U.S.C. § 7102*. The statute requires federal agency officials to "meet and negotiate in good faith [with union representatives] for the purposes of arriving at a collective bargaining agreement." *5 U.S.C. § 7114*(a)(4). This duty to bargain exists, however, only to the extent that it is"not inconsistent with any Federal law or any Government–wide rule or regulation." *5 U.S.C. § 7117*(a)(1).

During the course of negotiations with the Nuclear Regulatory Commission ("NRC"), the National Treasury Employees Union ("the Union"), which represents NRC employees, submitted four proposals which have given rise to this dispute. The proposals would define employee rights and establish procedures to be followed when agency employees [**4] are interviewed or interrogated in connection with both criminal and disciplinary investigations. The parties agree that these investigations would be conducted only by the Office of Inspector General. "Proposal 1" would give union representatives the right, during investigatory interviews, to clarify questions posed to employees and answers given by them, to suggest the names of other employees with knowledge of the issue, and generally to advise the employees. "Proposal 2" would require an investigator to apprise employees subject to disciplinary action of the general nature of the interview and of the employee's right to have a union representative present at the interview. "Proposal 3" would require an investigator to provide Miranda warnings to employees being interviewed for possible criminal conduct. Finally, "Proposal 4" would require similar warnings when the criminal prosecution has been declined but the employees may be subject to dismissal for failure to answer questions. n1

n1 The language of the Union's proposals is as follows:

Proposal 1

Article 3 — Employee Rights

Section 3.3.2

When the person being interviewed is accompanied by a Union representative, in both criminal and non[ ]criminal cases, the role of the representative includes, but is not limited to[,] the following rights:

(1) to clarify the questions;

(2) to clarify the answers;

(3) to assist the employee in providing favorable or extenuating facts;

(4) to suggest other employees who have knowledge of relevant facts; and

(5) to advise the employee.

Proposal 2

Section 3.4

The NRC [Nuclear Regulatory Commission] shall advise the employees annually of their rights to Union representation under Section 3.3. In addition, when an investigation is being conducted and where the employee is a potential recipient of disciplinary action, the employee shall be advised by the investigator of the general nature of the interview, and of his/her right to be represented by the Union in accordance with Section 3.3.1 and 3.3.2 above, prior to taking any oral or written statement from that employee.

Proposal 3

Section 3.4.1

Where the subject of an investigation is being interviewed regarding possible criminal conduct and prosecution, at the beginning of the interview the employee shall be given a statement of Miranda rights. The warning shall contain the language listed in Appendix A to this Agreement. If the employee waives his/her rights, the employee shall so indicate in writing and will be given a copy for his/her records.

Proposal 4

Section 3.4.2

In an interview involving possible criminal conduct where prosecution

> has been declined by appropriate authority, at the beginning of the interview the employee shall be given a statement of the Kalkines warning in writing. Further, the employee will acknowledge receipt of the warning in writing and shall receive a copy for his/her records.

[**5]

The NRC refused to negotiate over the four proposals, taking the position that its negotiating contractual limitations on the conduct of investigatory interviews by the Office of Inspector General would be inconsistent with the statutory independence of the Inspector General mandated by the Inspector General Act of 1978. Therefore, according [*232] to the NRC, such proposals are not negotiable by virtue of *5 U.S.C. § 7117*(a)(1), which establishes the NRC's duty to bargain only to the extent that the proposals are not inconsistent with any federal law. The Union filed a petition with the Federal Labor Relations Authority ("the Authority") pursuant to *5 U.S.C. § 7105*(a)(2)(E), to determine whether the proposals were negotiable. In response to the petition, the NRC relied upon the Authority's prior decision in *National Federation of Federal Employees, Local 1300, and General Services Administration, 18 F.L.R.A. 789 (1985)* (hereinafter,"General Services Administration"), which held that an agency has no duty to bargain over any union proposals purporting to influence the conduct of investigations [**6] conducted by the Office of Inspector General. In General Services Administration, the Authority stated:

> Insofar as the proposal would seek to have the Agency head utilize his general supervisory authority over the IG [Inspector General] to influence the manner in which that official conducts investigations it impermissibly infringes upon the independence of the IG to undertake such investigations. The intent of Congress . . . is that agency officials respect the freedom of the IG to determine what, when, and how to investigate agency operations and that the IG not be subjected to pressure by any part of the agency. Thus, the independence of the IG under law precludes negotiation on proposals purporting to influence the conduct of IG investigations.

*18 F.L.R.A. at 794–95.*

By a decision dated April 9, 1993, the Authority found that the four proposals of the Union were negotiable, concluding that it would no longer follow its earlier decision in General Services Administration. Relying on *Defense Criminal Investigative Service v. FLRA, 855 F.2d 93 (3d Cir. 1988)* (holding that statutory rights granted to federal employees [**7] when being questioned by "a representative of the agency" apply when the questioning is conducted by the Inspector General), the Authority concluded:

> We find that because IG representatives are employees of an agency and, thus, are subject to the agency's obligations under the Statute, an agency cannot declare proposals concerning IG investigations non–negotiable solely on the ground that, under section 3(a) of the IG Act, all proposals concerning IG investigations are outside the duty to bargain.

47 FLRA No. 29, at 9. The Authority entered an order stating that the NRC "must negotiate" on the proposals submitted by the Union.

The NRC filed a petition for review in this Court, and the Authority filed a cross–application for enforcement of its order.

II

Orders of the Federal Labor Relations Authority are reviewed by the courts of appeals pursuant to a petition for review filed by an aggrieved party or by a petition for enforcement filed by the Authority, *5 U.S.C. § 7123*(a) & (b), and the appropriate standard of review is that specified in § 706 of the Administrative Procedure Act. *5 U.S.C. § 7123*(c). Thus, [**8] the reviewing court will set aside an agency ruling only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706*(2)(A). In determining whether the Authority's action is "in accordance with law," the reviewing court ordinarily gives deference to the Authority's interpretation of the FSLMRS because the Authority has specialized expertise in this field. See *Social Security Administration v. FLRA, 956 F.2d 1280, 1283 (4th Cir. 1992).* In this case, however, the Authority's order was based on its conclusion that the Union's bargaining proposals were not inconsistent with other federal law. In particular, the Authority determined that the Union's proposals were not inconsistent with the Inspector General Act of 1978 as it interpreted that Act. Because the Authority does not have special competence in the interpretation of that Act, its legal interpretations of that Act do not deserve any particular deference. See *Internal Revenue Service v. FLRA, 902 F.2d 998, 1000 (D.C. Cir. 1990); Defense Criminal Investigative Service v. FLRA, 855 F.2d 93, 97* [*233] *(3d Cir. 1988).* [**9] Hence, we review the Authority's decision in this case de

novo.

In the context of the statutory mandate that federal agencies meet with representatives of unions and bargain in good faith for the purpose of arriving at a collective bargaining agreement, except on matters "inconsistent with any Federal law," we must now decide whether the four proposals advanced by the Union are matters that are inconsistent with the Inspector General Act of 1978.

Congress enacted the Inspector General Act of 1978 in order "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of . . . departments and agencies." S.Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2676 (hereinafter "Senate Report"). To that end, Congress established in each specified governmental agency n2 an Office of Inspector General as an "independent and objective unit," charging each unit with the responsibility of conducting and supervising audits and civil and criminal investigations relating to that agency's operations. *5 U.S.C. app. 3* § 4(a)(1). One of the most important goals of the Inspector General Act was [**10] to make Inspectors General independent enough that their investigations and audits would be wholly unbiased:

> There is a natural tendency for an agency administrator to be protective of the programs that he administers. In some cases, frank recognition of waste, mismanagement or wrongdoing reflects on him personally. Even if he is not personally implicated, revelations of wrongdoing or waste may reflect adversely on his programs and undercut public and congressional support for them. Under these circumstances, it is a fact of life that agency managers and supervisors in the executive branch do not always identify or come forward with evidence of failings in the programs they administer. For that reason, the audit and investigative functions should be assigned to an individual whose independence is clear and whose responsibility runs directly to the agency head and ultimately to the Congress.
>
> This legislation accomplishes that, removing the inherent conflict of interest that exists when audit and investigative operations are under the authority of an individual whose programs are being audited. The Inspector and Auditor General would be under the general supervision [**11] of the head of the agency or his deputy, but not under the supervision of any other official in the agency. Even the agency head would have no authority to prevent the Inspector and Auditor General from initiating and completing audits and investigations he believes necessary.

n2 In addition to the Nuclear Regulatory Commission, the Inspector General Act created an office of Inspector General in each of the following agencies: the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, and the Treasury; the Agency for International Development, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Office of Personnel Management, the Railroad Retirement Board, the Small Business Administration, the United States Information Agency, and the Veterans' Administration. *5 U.S.C. app. 3* § 11(2).

[**12]

Senate Report at 2682 (emphasis added).

The bulk of the Inspector General Act's provisions are accordingly devoted to establishing the independence of the Inspectors General from the agencies that they oversee. Thus, Inspectors General are appointed by the President and confirmed by the Senate, "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." 5 U.S.C. app. 3 § 3(a). Moreover, only the President, and not the agency head, may remove an Inspector General, and even then the President must provide Congress with his reasons for doing so. *5 U.S.C. app. 3* § 3(b). Inspectors General are required to prepare semi–annual reports to Congress on the results of their investigations, and, even though an agency head may add comments on a report, he or she generally cannot prevent the report from going to Congress or change its contents. *5 U.S.C. app. 3* § 5(b)(1); Senate Report at 2684. Inspectors [*234] General are required to notify the Attorney [**13] General directly, without notice to other agency officials, upon discovery of "reasonable grounds to believe there has been a violation of Federal criminal law." *5 U.S.C. app. 3* § 4(d). Inspectors General are also granted the power to select and employ whatever personnel are necessary to conduct their affairs, to employ experts and consultants, and to enter into contracts for au-

dits, studies and other necessary services. *5 U.S.C. app. 3* §§ 6(a), (7)–(9). Even though Inspectors General are under the "general supervision" of the agency head and one deputy, neither may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation," *5 U.S.C. app. 3* § 3(a), nor may they transfer "program operating responsibilities" to the Inspector General. *5 U.S.C. app. 3* § 9(a). Most importantly, apart from the limited supervision of the top two agency heads, no one else in the agency may provide any supervision to Inspectors General: the Act provides that the Inspector General "shall not report to, or be subject to [**14] supervision by, any other officer of [the agency]." 5 .S.C. app. 3 § 3(a).

Thus, shielded with independence from agency interference, the Inspector General in each agency is entrusted with the responsibility of auditing and investigating the agency, a function which may be exercised in the judgment of the Inspector General as each deems it "necessary or desirable." *5 U.S.C. app. 3* § 6(a)(2). To facilitate that function, the Act gives to each Inspector General access to the agency's documents and agency personnel. The Inspector General may issue subpoenas, administer oaths, and investigate complaints and information from any employee of the agency "concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety." *5 U.S.C. app. 3* § 7(a).

With the provisions and purposes of the Inspector General Act in hand, we now turn to the question of whether it is permissible to subject investigatory interviews conducted by the Inspector General under the Act to contractual [**15] limitations through negotiations between the agency and its union. We conclude that proposals which concern investigations conducted by the Inspector General, such as those at issue here, are not appropriately the subject of bargaining between an agency and a union. Such proposals run afoul of the Inspector General Act's mandate that it is the Inspector General who has the authority to "conduct, supervise, and coordinate audits and investigations" relating to the NRC. Congress intended that the Inspector General's investigatory authority include the power to determine when and how to investigate. To allow the NRC and the Union, which represents the NRC's employees, to bargain over restrictions that would apply in the course of the Inspector General's investigatory interviews in the agency would impinge on the statutory independence of the Inspector General, particularly when it is recognized, as the parties do here, that investigations within the NRC are conducted solely by the Office of Inspector General. The four proposals establishing employee rights and procedures for conducting investigatory interviews are therefore inconsistent with the Inspector General's independence and the [**16] Inspector General Act. In reaching this result, however, we do not limit the right of the NRC and the Union to negotiate employee rights and procedures for any investigations that may be conducted by other employees of the NRC, who are not from the Office of the Inspector General.

The fact that the Inspector General Act provides that the Inspectors General are "under the general supervision" of the agency head does not alter our ruling. Congress did not intend that the power of "general supervision" given to the two top agency heads could be used to limit or restrict the investigatory power of the Inspector General. This intent is manifested by the specific rights and duties conferred exclusively on the Inspector General by the Inspector General Act, as we have already noted above, see, e.g., *5 U.S.C. app. 3* §§ 6 & 7, and is explained by the Act's legislative history. The Senate Report indicates that placing Inspectors General "under the general supervision" of agency heads was not done to give the agency head [*235] any authority over the conduct of investigations. Instead, Congress was fearful that efforts of the Inspector General might be "significantly [**17] impaired if he does not have a smooth working relationship with the department head." Senate Report at 2684. The Report expresses hope that placing an Inspector General under the nominal supervision of an agency head would allow the Inspector General to be "his strong right arm . . . while maintaining the independence needed to honor [the Inspector General's] reporting obligations to Congress." Id. Combining this expressed intent together with the actual provisions of the Act giving powers to the Inspectors General, we cannot conclude that Congress intended for the "general supervision" granted to agency heads to include any authority to compromise the investigatory rights conferred on Inspectors General.

Until this case, the Authority had followed the interpretation that we have expressed. See General Services Administration, supra. In light of the Third Circuit decision in Defense Criminal Investigative Service, however, the Authority has now abandoned its earlier position. In Defense Criminal Investigative Service , the Third Circuit held that the Defense Criminal Investigative Service, which is the equivalent of the Inspector General within the Defense Department, [**18] was a representative of the Department of Defense, and therefore, the employees' statutory rights to have union representatives present during an agency investigation, see *5 U.S.C. § 7114*(a)(2), apply to similar investigations by the Defense Criminal Investigation Service. See *855 F.2d at 100–101*. The Third Circuit there relied heavily upon the fact that only by viewing Inspectors General as representatives of

the agency for this purpose could it effectuate the obvious congressional intent to grant employees certain rights during investigations.

The Authority has chosen to expand the limited holding of Defense Criminal Investigative Service n3 in this case to support its newly adopted position that an agency head can negotiate and compromise the investigatory rights of the Inspector General so long as the resulting regime is not otherwise inconsistent with federal law. When that expanded holding is applied to a union proposal here, the result would permit the NRC to negotiate over whether, for example, a union representative can answer or clarify an answer provided by an employee to an Inspector General during [**19] a criminal investigation. See Proposal 1, supra note 1. Undoubtedly, that would result in an expansion of the union's rights contained in *5 U.S.C. § 7114*(a)(2) and would directly interfere with the ability of the Inspector General to conduct investigations.

> n3 In Defense Criminal Investigative Service, the Third Circuit was careful to note that the term "representative of the agency" as used in *5 U.S.C. § 7114*(a)(2) may be defined differently depending on the specific rights and duties at issue. *855 F.2d at 100.*

Had the Defense Criminal Investigative Service court been willing to expand its holding to cover the circumstances here, as held by the Authority, it would have been faced with the task of addressing the reason for Congress' inclusion of the provisions in the FSLMRS that exclude Inspector General employees from collective bargaining units. Section 7112(b)(7) provides that no bargaining unit may [**20] include employees "primarily engaged in investigative or audit functions." The Authority has, indeed, interpreted this language to mean that employees of the Inspector General may not engage in collective bargaining. See *Small Business Administration & American Fed. of Government Employees Local 2532 & Council 228, AFL-CIO, 34 F.L.R.A. 392 (1990).* Having excluded employees of the Office of Inspector General from any collective bargaining, Congress surely could not have intended that other employees in an agency be given the right to negotiate the conditions of work for Inspector General employees.

In summary, if we were to interpret the FSLMRS to require the NRC to bargain over rights and procedures for investigatory interviews conducted by the Inspector General, we would indirectly be authorizing the parties to collective bargaining to compromise, limit, and interfere with the independent status of the Inspector General under the Inspector General Act of 1978. That Act [*236] carefully defines and preserves the independence of Inspectors General, both in organization and function, and in the FSLMRS Congress accommodated the Inspector General Act by requiring bargaining [**21] only when "not inconsistent" with other laws. See *5 U.S.C. § 7117.* Because we conclude that the four proposals advanced by the Union here would compromise the Inspector General's independence and would be inconsistent with the Inspector General Act within the meaning of *5 U.S.C. § 7117*, we grant the NRC's petition for review and deny enforcement of the Authority's order.

IT IS SO ORDERED

**DISSENTBY:** MURNAGHAN

**DISSENT:**

MURNAGHAN, Circuit Judge, dissenting:

As stated well by the majority, the FSLMRS establishes the right of federal employees to engage in collective bargaining. The duty to bargain exists to the extent that it is "not inconsistent with any Federal law or any Government-wide rule or regulation." *5 U.S.C. § 7117*(a)(1). Since I do not believe that the process of collective bargaining per se "prevents or prohibits the Inspector General from initiating, carrying out, or completing any audit or investigation," see *5 U.S.C. app. 3* § 3(a), and therefore is not "inconsistent" with federal law, I respectfully dissent.

It is perhaps well to [**22] underscore precisely what question we are asked to answer. We have not been asked, nor could we from the record before us determine, whether the four collective bargaining proposals on the merits are inconsistent with the Inspector General Act. Certainly, an argument might be made that each of the four proposals would so constrain the Office of Inspector General that in effect each would "prevent or prohibit" that office from conducting its investigations. Were we in a position to give an answer to the question on the merits and to answer it affirmatively, I could well agree that the four proposals cannot be the subject of collective bargaining.

In the present case, however, the Authority did not reach the merits of the proposals. Rather, because the NRC set forth no specific grounds in opposition to the four proposals and instead relied on General Services Administration to the effect that all collective bargaining matters related to Inspector General investigations are nonnegotiable, the Authority determined that there were no grounds upon which it could find that any of the proposals should be considered nonnegotiable on the merits.

47 FLRA No. 29, at 10. The NRC has [**23] urged the same all–encompassing, general theory on appeal, stating in its brief that "the very process of negotiation would give both management and the union leverage over the IG." (emphasis added).

The Authority rejected such a blanket argument, instead choosing an approach that I believe vindicates the statutory aims of both the collective bargaining statute and the Inspector General statute. It held that "proposals that concern the conduct of IG investigations under the IG Act will be found nonnegotiable if they are inconsistent with the IG Act or are nonnegotiable on other grounds." 47 FLRA No. 29, at 10.

In my view, the Authority's approach preserves the important independence of the Inspector General, by prohibiting collective bargaining proposals that "prevent or prohibit" the conduct of investigations. Such proposals would be "inconsistent" with federal law, and so would be improper subjects for collective bargaining. At the same time, the approach preserves the right of employees to bargain collectively over all matters not inconsistent with federal law.

Moreover, I do not share the majority's conclusion that Defense Criminal Investigative Service is significantly [**24] distinguishable from the case before us. There, the Third Circuit plainly rejected the argument that the Inspector General Act was intended to create "an independent investigatory office . . . which would not be subject to interference by any other agency programmatic concerns, including federal labor relations concerns." *855 F.2d at 98* (internal quotation omitted). Instead, the Defense Criminal Investigative Service Court determined that the purpose of the Inspector General Act "was to insulate Inspector Generals (sic) from pressure from agency management which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse." Id. [*237] (citation omitted). It seems to me unlikely, and the NRC has not demonstrated, that the "very process" of collective bargaining would impermissibly intrude on the type of insulation described by the Third Circuit.

Finally, I am not persuaded by the majority's argument that Defense Criminal Investigative Service and the instant case are distinguishable because in the former at issue was a specific statute conferring a right on employees, while here the rights would derive from collective bargaining. It is plain [**25] that federal law entitles federal employees to bargain collectively over proposals not inconsistent with federal law. Neither the Inspector General Act nor the FSLMRS nor the statute considered by the Third Circuit is deserving of more or less statutory dignity than the other. Since the Authority's interpretation of the two statutes at issue here preserves their distinct purposes while preventing a conflict between them, I would affirm.

Accordingly, I respectfully dissent.

LEXSEE 867 FSUPP 1111

# JOHN J. ADAIR, INSPECTOR GENERAL OF THE RESOLUTION TRUST CORPORATION, Petitioner, v. ROSE LAW FIRM, A PROFESSIONAL ASSOCIATION, Respondent.

**Misc. No. 94–0278 PLF**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

***867 F. Supp. 1111; 1994 U.S. Dist. LEXIS 19585***

**November 16, 1994, Decided**
**November 16, 1994, FILED**

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:**

For JOHN J. ADAIR, Inspector General Of The Resolution Trust Corporation, petitioner: John Hamilton Korns, II, PETTIT & MARTIN, Washington, DC. Patricia Marlene Black, RESOLUTION TRUST CORPORATION, Rosslyn, VA.

For ROSE LAW FIRM, A Professional Association, respondent: Alden Lewis Atkins, VINSON & ELKINS, L.L.P., Washington, DC. Walter B. Stuart, VINSON & ELKINS, L.L.P. Houston, TX.

**JUDGES:** [**1] PAUL L. FRIEDMAN, United States District Judge

**OPINIONBY:** PAUL L. FRIEDMAN

**OPINION:**

[*1112] OPINION AND ORDER

This case is before the Court on the Petition of the Inspector General of the Resolution [*1113] Trust Corporation For Summary Enforcement of an Administrative Subpoena Duces Tecum and the Motion of Respondent Rose Law Firm for a Protective Order. The Court has determined that the subpoena should be enforced, as narrowed by the Petition and the representations of counsel that Rose may produce a list of Rose's clients for the relevant period and need not produce the other client–identifying documents originally sought. In view of the revised Confidentiality Undertaking and the additional protections now offered by the Inspector General, the Court denies Rose's Motion for a Protective Order.

I. BACKGROUND

In response to the savings and loan imbroglio, Congress created the Resolution Trust Corporation in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). *12 U.S.C. §§ 1441a*(b), 1811 et seq. The RTC acts as receiver for failed thrifts and succeeds to the entirety of each association's rights, assets and obligations. *12 U.S.C. §§ 1821* [**2] (d)(2)(A), (B). n1 FIRREA requires the RTC to maximize the net present value of thrift assets, minimize the impact of its transactions on local real estate and financial markets, make efficient use of government funds and minimize any loss from resolution of cases. *12 U.S.C. § 1441a*(b)(3)(C). To facilitate the completion of the RTC's duties, FIRREA authorizes the RTC to contract with private law firms and others in the private sector to obtain services. *12 U.S.C. § 1441a*(b)(10)(A).

> n1 See also *12 U.S.C. § 1441a*(b)(4)(A) (granting RTC "the same powers and rights to carry out its duties" as the Federal Deposit Insurance Corporation has under *12 U.S.C. §§ 1821*–1823).

Since 1989, the Rose Law Firm has entered several legal service agreements with the Federal Deposit Insurance Corporation and the RTC to provide them with legal services with respect to a number of failed [**3] thrift institutions; and it continues to represent the RTC. Declaration of John J. Adair, RTC Inspector General ("Adair Decl.") P 4; Declaration of Clark W. Blight, Assistant Inspector General for Investigation ("Blight Decl.") P 5; Second Affidavit of Ronald M. Clark, chief operating officer of Rose ("Clark Aff.") PP 4, 5. These service agreements, as well as retainer letters, FDIC and RTC guidelines and policies, and RTC regulations, 12 C.F.R. Part 1606, imposed obligations on Rose to disclose, and to certify that it had disclosed, all actual or potential conflicts of interest to the FDIC and the RTC. Blight Decl. P 6. n2 Rose certified that it had found no conflicts of interest that had

not already been waived. Adair Decl. P 4; Blight Decl. P 6.

> n2 The actual or potential conflicts that Rose was required to disclose include participation of any partner or associate of the firm as a director or officer of any insured institution that has failed or that is the subject of any ongoing supervisory action; representation of an officer, director, debtor, creditor or stockholder of any failed or assisted institution in a matter related to the FDIC or RTC; representation of a creditor whose claim competes with that of the FDIC or RTC; the existence of any outstanding loans from a failed institution on which any partner or associate of the firm is a borrower or guarantor; and representation of a client in a matter adverse to the FDIC or RTC. Blight Decl. P 6.

[**4]

In addition to retaining Rose for other engagements, the FDIC retained the firm to represent the interests of the FDIC and later the RTC as conservator of Madison Guaranty Savings and Loan Association in litigation against Frost & Company, an accounting firm. Adair Decl. P 5. Clark Aff. P 6. In 1993, allegations surfaced that Rose had not disclosed actual or potential conflicts in this matter. Adair Decl. P 5; Blight Decl. P 7; Clark Aff. P 7. The RTC's Office of Contractor Oversight and Surveillance ("OCOS") reviewed the allegations and issued a report on February 8, 1994. The FDIC Legal Division also issued a report regarding conflict of interest issues on February 17, 1994. Adair Decl. P 6; Blight Decl. P 8.

During a hearing before the Senate Committee on Banking, Housing and Urban Affairs on February 24, 1994, certain Senators criticized the FDIC and RTC reports and requested that the Inspector General of the RTC conduct an independent investigation of the matters addressed by the OCOS report. Adair Decl. P 7; Blight Decl. P 9. On March [*1114] 2, 1994, John E. Ryan, Deputy CEO of the RTC, sent a formal request to the Inspector General of the RTC to conduct such an investigation. Adair [**5] Decl. P 8; Blight Decl. P 10.

The IG immediately initiated an investigation of the Rose Law Firm to determine whether Rose had failed to disclose to the FDIC and later the RTC any actual or potential conflicts of interest on matters for which it was retained by the FDIC or the RTC; whether any such failures violated any laws, regulations, agreements, guidelines or policies; and whether the FDIC and the RTC properly conducted their review of any such conflicts. Adair Decl. PP 9–10; Blight Decl. P 11. Under the Inspector General Act, the IG must report his findings and recommendations to the head of the RTC, to the Congress and, if he believes there has been a violation of criminal law, to the Attorney General. *5 U.S.C. App. 3* §§ 4(d), 5.

As a first step in its investigation, the IG sought to identify conflicts of interest by reviewing and comparing the identities of Rose's clients against the records of the RTC and of the failed institutions for which Rose provided legal services. Adair Decl. P 11; Blight Decl. P 13. On April 18, 1994, the IG issued a subpoena duces tecum to the Rose Law Firm for information regarding the firm's clients. The subpoena [**6] demanded the production of

> any documents listing the names of any individual, partnership, corporation, association or other person or entity to whom the Rose Law Firm . . . provided legal services at any time or from time to time during the period from January 1, 1985 through April 15, 1994. The documents to be produced may consist of a single list, or multiple lists, identifying clients during such period.

Rose failed to produce the documents requested, and the IG petitioned this Court to enforce its subpoena.

On September 8, 1994, Respondent moved the Court to transfer the case to the United States District Court for the Eastern District of Arkansas. Rose argued that an evidentiary hearing was required to determine whether the subpoena was too burdensome and whether the IG issued the subpoena for an improper purpose. Rose claimed that the witnesses and documents regarding those issues are located in Little Rock and urged the Court to transfer the case there for the convenience of the parties and witnesses. Rose's burdensomeness argument was based on its conviction that it would have to produce all documents containing client names to satisfy the subpoena. This argument [**7] was undermined when the IG assured Rose that it could respond to the subpoena by producing a client list or lists and no other documents.

The Court denied Respondent's motion to transfer. It noted that a subpoena enforcement action is a summary proceeding and found that Respondent had failed to prove that "extraordinary circumstances" existed that would justify an evidentiary hearing. See *FTC v. Invention Submission Corp., 296 U.S. App. D.C. 124, 965 F.2d 1086, 1091 (D.C. Cir. 1992)*, cert. denied, *122 L. Ed. 2d 654, 113 S. Ct. 1255 (1993)*. The Court concluded that Rose could use affidavits rather than the testimony of witnesses to address the issue of burdensomeness. The Court also rejected Rose's argument that improper political pressure from members of Congress induced the IG to initiate the investigation that led to the issuance of the subpoena. The

Court found that Rose had failed to make the required threshold showing that members of Congress exerted undue influence or control over the IG's investigation that caused the IG to initiate the investigation or issue the subpoena in bad faith [**8] or for improper purposes. See *FTC v. Invention Submission Corp., 965 F.2d at 1091; United States v. Aero Mayflower Transit Co., Inc., 265 U.S. App. D.C. 383, 831 F.2d 1142, 1145–47 (D.C. Cir. 1987).*

On October 7, 1994, Petitioner and Respondent entered into a Memorandum of Understanding that describes how the Rose Law Firm may comply with the subpoena by providing client lists and no other documents. Appendix A. The Memorandum specifies the client lists that Rose will provide if the Court enforces the subpoena. As a result, Respondent has abandoned its burdensomeness argument and has submitted no affidavits regarding the onerousness of complying with the subpoena.

[*1115] II. DISCUSSION

In opposing the IG's petition, the Rose Law Firm argues that the Inspector General's subpoena exceeds his statutory authority. Rose also argues that if the Court enforces the subpoena, the Court should grant its motion for a protective order, which would more closely control the IG's use of the subpoenaed information than the Confidentiality Undertaking the IG has offered.

*A. The Subpoena Was Within The Authority* [**9] *Of The Inspector General*

In enforcing an administrative subpoena, the Court's role is limited to determining whether the subpoena is issued for a lawful purpose within the statutory authority of the agency that has issued it, whether the demand is sufficiently definite and not unduly burdensome, and whether the subpoena seeks information reasonably relevant to the agency's investigation. *RTC v. Walde, 18 F.3d 943, 946 (D.C. Cir. 1994); Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC, 303 U.S. App. D.C. 316, 5 F.3d 1508, 1513 (D.C. Cir. 1993); FTC v. Invention Submission Corp., 965 F.2d at 1089.* Rose does not oppose the IG's subpoena on the grounds that it seeks irrelevant information, that it is indefinite or that it is unduly burdensome. Respondent does assert, however, that the IG's investigation exceeds his statutory authority. n3

> n3 As noted, the issue of burdensomeness was resolved when the IG made it clear that Rose could comply with the subpoena by providing a client list to the IG and no other documents. In a footnote in its Reply Memorandum, Rose once again argues that improper political pressure caused the IG to initiate the investigation. Rose has failed to present any additional facts that would convince the Court to change its earlier rejection of this argument.

[**10]

Rose argues that the Inspector General Act, by its language and legislative history, limits Inspectors General to investigating only the internal operations of federal departments and agencies. It maintains that the IG's investigation should be limited in its scope to determining whether the RTC properly conducted its review of any conflicts of interest and should not extend to a de novo review of any potential or actual conflicts that Rose may have had that were not considered by the OCOS. The Court disagrees.

The Inspector General Act grants Inspectors General authority to conduct investigations and audits:

> It shall be the duty and responsibility of each Inspector General . . . to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [the agency].

*5 U.S.C. App. 3* § 4(a)(1). Respondent argues that "relating to the programs and operations of" the agency is limiting language that restricts the IG to internal investigations of the agency's own conduct. The Court does not accept this construction of the statute and finds the "relating to" language a broad grant of authority rather than a limitation. [**11] This language is expansive enough to extend the IG's authority beyond investigations of the agency itself to investigations of individuals and entities outside the agency involved with an agency's programs. Furthermore, other sections of the Inspector General Act clarify, if clarification is needed, that the IG's authority extends to conducting audits and investigations of programs that the agency finances, including investigations into alleged fraud, abuse and waste by government contractors and other recipients of government funds in connection with those programs.

Section 2 of the Inspector General Act states that the purpose for the creation of independent offices of Inspectors General in various agencies was to provide "independent and objective units . . . to conduct and supervise audits and investigations relating to the programs and operations of" such agencies and "to provide leadership and coordination and recommend policies for activities designed . . . to prevent and detect fraud and abuse in, such programs and operations . . . ." *5 U.S.C. App. 3* § 2. Sections 4(a)(2) through 4(a)(5) grant to Inspectors General the responsibility for conducting [**12] reviews and making recommendations regarding fraud, abuse and

waste in programs administered or financed by the agency. *5 U.S.C. App. 3* §§ 4a(2)–(a)(5). Section 5 requires the IG to prepare reports regarding its activities, including its findings regarding fraud, abuse [*1116] and waste in programs of the agency. *5 U.S.C. App. 3* § 5.

It is obvious that the IG could not fulfill many of its responsibilities under sections 4(a)(2) through 4(a)(5) and section 5 of the Act, as well as under section 4(a)(1), without investigating fraud, abuse and waste by both the agency administering and financing the program and the participants in the program. The "relating to" language of Section 4(a)(1) is extremely broad, and it is given context by these other sections of the Act. The Court therefore finds that the investigatory authority granted by section 4(a)(1) necessarily extends to investigations of fraud, waste and abuse by government contractors and other recipients of government funds under or relating to programs of a Department or agency.

The legislative history of the Act also makes plain that Congress intended the IG's [**13] investigatory authority to extend to the investigation of recipients of government funding as well as to government agencies themselves. Congress enacted the Inspector General Act in part because of revelations of significant corruption and waste in the operations of the federal government and among government contractors, government grantees and other recipients of federal funds. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2679, 2683. In justifying the need for subpoena power, the Senate Report stated that Inspectors General are to investigate both an agency's "internal operations and its federally–funded programs" and that the IG should identify "perpetrators of programmatic fraud." 1978 U.S.C.C.A.N. at 2702. The Senate Report also stated:

> Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General's functions. There are literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities, the Inspector and Auditor General could have no serious impact on the way federal [**14] funds are expended. . . .
>
> The committee does not believe that the Inspector and Auditor General will have to resort very often to the use of subpoenas. There are substantial incentives for institutions that are involved with the Federal Government to comply with requests by an Inspector and Auditor General. In any case, however, knowing that the Inspector and Auditor General has recourse to subpoena power should encourage prompt and thorough cooperation with his audits and investigations.

1978 U.S.C.C.A.N. at 2709. See also *United States v. Areo Mayflower Transit Co., Inc., 831 F.2d at 1145.*

Representative Levitas, one of the co–sponsors of the Act, explained the IG's intended role:

> The Offices of Inspector General would not be a new "layer of bureaucracy" to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. [**15] Rec. 10,405 (1978) (emphasis added). As the co–sponsor of the Act, Representative Levitas's remarks "are an authoritative guide to the statute's construction." *North Haven Board of Education v. Bell, 456 U.S. 512, 526–27, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982).* Representative Levitas's statement and the Senate Report demonstrate that Congress understood the Act to give the Inspectors General the authority to investigate recipients of federal funds, such as government contractors, who may have misused or stolen the funds through fraud, abuse or waste.

Rose argues, however, that the IG's authority is not boundless and that it is expressly limited by sections 8G(b) and 9(a)(2) of the Inspector General Act. Both sections provide that in establishing an Office of Inspector General, the agency head may not transfer to the IG "any program operating responsibilities." *5 U.S.C. App. 3* §§ 8G(b), 9(a)(2). Just as the agency head [*1117] may not transfer such responsibilities to the IG, reciprocally, Respondent argues, the IG may not usurp the agency's program operating responsibilities. Rose asserts that [**16] one of the RTC's program operating responsibilities is determining whether its contractors have any conflicts of interest. Thus, the IG's investigation of whether Rose had any conflicts of interest is really an investigation of Rose's compliance with the RTC's regulations at 12 C.F.R. Part 1606, an investigation that is within the purview of the OCOS and consequently exceeds the IG's authority.

Petitioner responds that sections 8G(b) and 9(a)(2) do not limit the IG's authority established under the earlier sections of the Act. The IG maintains that these sections

are directed at the agency heads who are given authority to transfer certain functions to the IG, but are expressly prohibited from transferring to the IG the responsibility for operating the programs entrusted to the agency. The sections do not impose a reciprocal limitation on the IG that circumscribes his authority to investigate fraud, abuse and waste in programs of the agency. Respondent's reading of the Act is strained and is inconsistent with the language, legislative history and overall scheme of the statute. The Court therefore agrees with Petitioner.

The Court is not persuaded to the contrary by the decision in *Burlington Northern R.R. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d 631, 643 (5th Cir. 1993),* [**17] on which Rose relies. n4 The court in Burlington Northern concluded that Congress intended that "Inspectors General should not be allowed to conduct 'program operating responsibilities' of an agency," that "the Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes" and that "he may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself." *Burlington Northern R.R. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d at 642, 643.*

> n4 Rose also relies on *United States v. Montgomery County Crisis Center, 676 F. Supp. 98 (D. Md. 1987),* but that reliance is misplaced. In that case, the IG's subpoena was not in connection with an investigation of alleged fraud, inefficiency or waste, but of a security matter not involving the expenditure of federal funds relating to a program of the Department involved.

Burlington Northern [**18] imposed limits on the authority of Inspectors General that do not appear on the face of the statute or in its legislative history. In addition, it turns on a set of facts clearly distinguishable from the facts before the Court in this case. In Burlington Northern, the Railroad Retirement Board Inspector General investigated tax compliance by a regulated railroad that was not a recipient of federal fluids. The IG's investigation was in no way related to its oversight responsibilities for a federal program. Furthermore, the IG in Burlington Northern was not investigating fraud, abuse or waste. The court noted that "the Inspector General never suggested that he had any reason to suspect that Burlington Northern was engaged in fraudulent or abusive reporting," and thus upheld the district court's determination "that the detection of fraud and abuse in the RRB's programs would have only been a by–product of the proposed" regulatory audit. *Burlington Northern R.R. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d at 640.*

By contrast, the IG's investigation into Rose's possible conflicts of interest directly concerns whether a government [**19] contractor receiving federal funds related to a federal program may have committed fraud or abuse or wasted taxpayer dollars by failing to disclose actual or potential conflicts. Any undisclosed Rose conflicts of interest could have denied the RTC the independent, loyal and diligent legal representation and advice for which taxpayer dollars were paid, which the IG might conclude constituted waste and abuse. Any miscertification of the nonexistence of conflicts could have constituted false statements and fraud.

The Inspector General's investigation into Rose's conflicts of interest does not exceed his statutory authority and does not usurp the program operating responsibilities of the RTC. As part of its mission to resolve failed thrift institutions, the RTC may investigate the possible conflicts of interest of its contractors. As part of its mission to root out [*1118] fraud, abuse and waste in RTC programs, the Inspector General may also investigate conflicts of interest of the RTC's contractors. In this situation, the RTC investigation and the IG investigation are not, and need not be, mutually exclusive. The failure to disclose a conflict of interest, if there was such a failure, may constitute [**20] not only a violation of the RTC's regulations, which the RTC through OCOS has authority to investigate, but also may constitute fraud, abuse or waste in federal programs by a recipient of federal funds which the IG has authority to investigate. Accordingly, the Court will enforce the subpoena.

*B. The IG's Revised Confidentiality Undertaking Makes It Unnecessary For The Court To Exercise Its Authority To Issue A Protective Order*

To protect the confidentiality of the materials sought from the Rose Law Firm, the IG provided a Confidentiality Undertaking to Respondent on June 28, 1994. Following discussions between the parties, the IG provided a revised Confidentiality Undertaking on August 15, 1994. After the Court denied its Motion to Transfer, Respondent moved the Court to enter a Protective Order that would provide greater assurances of confidentiality.

Rose requested a protective order that would require the documents produced to be kept in a neutral location under the control of the Court, limit the number of persons in the IG's office who would be permitted access to the documents, require the IG to maintain a log of persons with access and when they had access to the documents, [**21] prohibit disclosure outside the IG's office of information derived from the documents, require the IG to give reasonable notice before disclosure of the documents to other agencies or the Congress, and require the return of the documents within 30 days after production. Rose ar-

gued that in the circumstances of this case the IG's August 15 Confidentiality Undertaking was insufficient to protect the client list from disclosure or leaks.

At the October 20 hearing, the Court expressed its concern about the privacy interests of Rose's clients who have no relationship to this investigation. It suggested that those clients had a right to engage a law firm with the legitimate expectation that even the fact of that engagement would not become a matter of public knowledge in the course of a highly–publicized, politically–charged investigation relating to the law firm they had chosen. October 20, 1994, Hearing Transcript at 35–44, 50–51. The Court suggested that the parties attempt to negotiate further changes to the IG's August 15 Confidentiality Undertaking that might accommodate both parties, provide greater protection to Rose and its clients and respond to the concerns expressed by the Court. [**22] Transcript at 73. Despite their inability to reach agreement, on October 26, 1994, the Inspector General did offer an amended Confidentiality Undertaking that provided additional protections. Appendix B. The Court must decide whether those protections are sufficient and whether it has the authority to provide greater confidentiality protections.

Petitioner argues that the Court may not substitute its judgment for the IG's regarding the level of confidentiality protections a subpoenaed party should receive. Rather, the IG asserts, once a court has determined that an agency's subpoena should be enforced, it may evaluate only the reasonableness of the way in which the agency has exercised its discretion regarding what confidentiality protections are necessary. *United States International Trade Comm. v. Tenneco West, 261 U.S. App. D.C. 341, 822 F.2d 73, 76 (D.C. Cir. 1987).* Where an agency has promulgated a reasonable regulation governing the confidentiality of documents produced to the agency, the courts usually will defer to the agency's regulations or rules regarding the level of protection to be provided. *United States International Trade Comm. v. Tenneco West, 822 F.2d at 79.* [**23] The IG notes that even in the absence of formal regulation, courts usually will defer to reasonable written assurances of confidentiality like the Confidentiality Undertaking provided here. Id.; *FTC v. Owens–Corning Fiberglas Corp., 200 U.S. App. D.C. 102, 626 F.2d 966, 973–74 (D.C. Cir. 1980).*

Notwithstanding the IG's assertions, the Court concludes that its authority is not so limited. "Since the enforcement of [*1119] a subpoena is an independent judicial action, and not merely an action ancillary to an earlier agency action, a court is free to change the terms of an agency subpoena as it sees fit." *United States v. Exxon Corp., 202 U.S. App. D.C. 70, 628 F.2d 70, 77* (D.C. Cir.), cert. denied, *466 U.S. 964 (1980)* (citations omitted). It therefore necessarily falls within the Court's discretion to provide additional confidentiality protections beyond those offered by the agency when it concludes that the agency, in the exercise of its discretion, has not provided safeguards sufficient to protect the interests of those at risk. *FTC v. Owens–Corning Fiberglas Corp., 626 F.2d at 974.* [**24] Indeed, in appropriate circumstances, it may modify a subpoena it is asked to enforce to incorporate such confidentiality provisions. *United States v. Exxon Corp., 628 F.2d at 77.*

An agency invoking the aid of a court to enforce a subpoena may not tell a court it has no authority to condition or modify the subpoena to protect those whom enforcement of the subpoena may put at risk. After all, a court is not merely a "rubberstamp" in subpoena enforcement proceedings. *FTC v. Owens–Corning Fiberglas Corp., 626 F.2d at 974.* A court may place "some limits . . . on an agency's use of court process, since . . . it is the court's process that compels the respondent to comply with these administrative demands. . . . Where the processes of the Court are involved, there must be opportunity for the Court to satisfy itself that the agency's power will be properly used." *RTC v. KPMG Peat Marwick, 779 F. Supp. 2, 3–4 (D.D.C. 1991).* See also *SEC v. Arthur Young & Co., 190 U.S. App. D.C. 37, 584 F.2d 1018, 1032–33 (D.C. Cir. 1978),* [**25] cert. denied *439 U.S. 1071, 59 L. Ed. 2d 37, 99 S. Ct. 841 (1979).* "Agency determinations on confidentiality are not sacrosanct." *FTC v. Owens–Corning Fiberglas Corp., 626 F.2d at 980* (Wald, J., concurring in part and dissenting in part); see id. at 981–84. It is a legitimate exercise of the court's authority to modify the terms of an agency subpoena by providing additional confidentiality protections for a person or entity to whom the subpoena is directed, and particularly for innocent third parties about whom the respondent that is the subject of subpoena may possess information. See *United States v. Exxon Corp., 628 F.2d at 77.*

In the highly–charged political atmosphere surrounding the Whitewater investigations, Rose's submission of the client list to the IG creates the risk of public disclosure of the names of clients who have themselves done nothing wrong, whose engagement of the Rose Law Firm is wholly irrelevant to any legitimate conflict of interest investigation by the IG, and who had an expectation of privacy when they [**26] chose the law firm. The Court is concerned that the media and other interested individuals and organizations may seek to learn the names of Rose's clients in order to embarrass the firm or simply to see what prominent or newsworthy individuals or companies may have chosen Rose as their law firm at any time from 1985 to 1994. If the IG transfers the client lists to other entities within the RTC, to other Departments or

agencies of government or to the Congress, the risk of advertent or inadvertent public disclosure increases. Indeed, as Respondent has pointed out, the RTC's Deputy CEO, John Ryan, testified before Congress that "the RTC does leak . . . it's almost a certainty around the RTC that any matter that has any kind of public interest at all is leaked to the press prematurely." Hearings on Whitewater Inquiry Before the Senate Committee on Banking, Housing and Urban Affairs, 33, 55 (August 1, 1994), Respondent's Exhibit D. n5

> n5 Rose argues that Mr. Ryan did not exclude the IG's office from his testimony discussing the certainty of leaks at the RTC. The Office of the Inspector General is independent from the RTC, however, and the Confidentiality Undertaking offered by the IG provides a sufficient wall between the IG and other components of the RTC. The purpose of the Inspector General Act is to create independent and objective watchdogs of agencies. See *5 U.S.C. App. 3* § 2; S. Rep. No. 1071, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2682. Accordingly, the Court will not treat Mr. Ryan's statements as extending to the IG's office. Furthermore, "allegations of the prevalence of 'leaks' . . . notwithstanding," the Court will not presume that improper disclosure will occur in the absence of specific evidence of an "immediate threat of illegal disclosure." *Exxon Corp. v. FTC, 589 F.2d 582, 591 (D.C. Cir. 1978)*, cert. denied, *441 U.S. 943 (1979)*.

[**27]

[*1120] As the IG acknowledged in open court, the vast majority of the clients on Rose's client list will not present potential or actual conflicts. When the IG compares the client list with the documents and records he has within his own files or has acquired from others during the course of his investigation, he is likely to uncover only a small subset of clients whose relationship with Rose warrants further investigation as to whether their representation by Rose may present a conflict of interest. The Court therefore finds that most of the names on the client list Rose is to provide to the IG pursuant to subpoena are irrelevant to the IG's investigation and that the IG himself will quickly see that major portions of the list are wholly irrelevant.

Public disclosure of names of clients irrelevant to the investigation would harm the Respondent in its business and in its relationship with its clients and could also harm the clients whose names are disclosed. The Court is concerned that clients who are not and never will be implicated in the IG's investigation will become subject to media and political speculation that intrudes on the client's legitimate expectation of privacy. But for the [**28] fact that there is no feasible way to separate relevant from irrelevant client names until after the IG has completed the preliminary phase of his investigation, the Court would be justified in refusing to enforce the subpoena at all as to client names that the RTC could not show are relevant. See *FTC v. Invention Submission Corp., 965 F.2d at 1089* (citation omitted); *FTC v. Anderson, 631 F.2d at 746* (citation omitted). Because there is no practical way to provide that relief, however, the question is whether a protective order can achieve a comparable result.

The Confidentiality Undertaking now offered by the IG provides that the Office of Inspector General will not disclose the confidential documents of the Rose law firm or their contents except with certain protections. See Appendix B. First, the client list will not be disclosed in response to a Freedom of Information Act request without the IG providing Rose ten days' prior notice. Confidentiality Undertaking P 1. n6 Second, the IG will provide Rose ten days' prior notice where possible, or as much advance notice as can reasonably be given under [**29] the circumstances, before disclosing the client list or parts thereof in response to an official request from Congress. P 2. Third, the IG will give Rose ten days' prior notice before disclosing the client list to other federal or state agencies, except that no notice will be provided to Rose for disclosures to the Department of Justice or the Independent Counsel investigating Whitewater. P 3. The IG will inform any entity, either Congress or an agency to which the client list is disclosed, that the list is confidential. PP 2–3. Fourth, only those personnel within the OIG who need to use the Rose client list in the performance of their official duties may have access to the information. Those personnel also will be informed of the information's confidentiality. P 4.

> n6 This provision is typical of regulations promulgated by other Departments and agencies of the government, including the RTC, at least with respect to confidential commercial information, such as client lists, under exemption 4 of the FOIA. See *12 C.F.R. § 1615.6*. The FOIA regulations governing the RTC Inspector General, however, have no such notice provision. See 12 C.F.R. Part 1680.

[**30]

Nothing in the Confidentiality Undertaking, however, would prohibit the OIG's right to use, retain or bring to the attention of other components of the RTC, the Justice Department, the Independent Counsel, Congress or any other governmental agency, without notice to Rose, any client names or relevant portions of documents that the

OIG concludes are "relevant to conflicts–of–interest issues, to violations of law, regulation or contract, to misrepresentations, or to any findings or recommendations the OIG intends to make." Confidentiality Undertaking P 5. Finally, when the IG concludes that he no longer requires physical possession of the client list or after 180 days, whichever is the shorter period, the IG will submit all documents that Rose has produced and all client lists that the OIG has created to the Clerk of this Court to be held by the Court under seal. Thereafter, relevant personnel [*1121] within the OIG will have access to the documents only at the courthouse. P 6.

The IG's revised Confidentiality Undertaking provides significant protections beyond those offered in the August 15 Confidentiality Undertaking. It also goes a long way towards dealing with the concerns expressed by [**31] the Court at the October 20 hearing. With respect to almost all situations in which the lists, or portions of them, will be disclosed to others, and particularly with respect to Rose's clients who are wholly irrelevant to the IG's investigation and whose expectations of privacy deserve special protection, it provides Rose with notice sufficient to object and make its arguments before any disclosure See, e.g., *FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 884–85* (D.C. Cir.), cert. denied, *431 U.S. 974 (1977).* While the Confidentiality Undertaking does not limit the OIG's use, or the use by other enforcement agencies, of client names that the OIG in its discretion determines are relevant to its conflicts investigation or other violations of law, the Court concludes that this exclusion from the protections of the Confidentiality Undertaking is a legitimate exercise by the IG of his discretion consistent with his statutory responsibilities.

Despite its expressed concerns, the Court cannot devise any greater protections for those unimplicated clients of the Rose law firm, consistent with the IG's [**32] law enforcement and other statutory responsibilities, than those the IG himself has offered. A careful examination of the two proposals now made by Rose demonstrates that Rose, too, has been unable to develop additional workable protections for the privacy interests of the non–relevant clients. First, Rose maintains that the IG should not retain possession of the client list at all, in part because the IG intends to carry the list to various sites where failed thrift institutions are located, which Rose argues will increase the risk of leaks. Instead, Rose proposes that copies of the client list should reside only at the offices of the Rose Law Firm in Little Rock, Arkansas and in Washington, D.C. Second, and in the alternative, Rose argues that the Court should require the IG to return the client list to Rose at the completion of the initial phase of the IG's investigation, rather than have the IG file the list under seal with the Court. This procedure, Rose claims, would prevent the risk of disclosure from remaining open–ended beyond the time necessary for the RTC to conduct its comparison and would insulate the Court from media and other requests.

The Court rejects Respondent's [**33] request that the client list be retained at the offices of the Rose Law Firm rather than be turned over to the IG. Rose's request that the IG's access to the subpoenaed materials be limited to such locations would impermissibly interfere with the IG's discretion to conduct its investigation as he sees fit, without disclosing the scope of the investigation to those who may be affected. It would impose unnecessary practical impediments to the ability of the IG to work with the list. See Third Declaration of Assistant Inspector General Clark W. Blight PP 4–7; *FTC v. Texaco, Inc., 555 F.2d at 871, 883.* Furthermore, Rose has not made a showing that the Inspector General will act "cavalierly or in bad faith" and thus has not overcome the presumption of administrative regularity and good faith that the Court is obliged to give to the IG. See *FTC v. Invention Submission Corp., 965 F.2d at 1091* (quoting *FTC v. Owens–Corning Fiberglas Corp., 626 F.2d at 975).*

The Court also rejects Respondent's request that the client list be returned to the Rose Law Firm [**34] at the end of the initial phase of the IG's investigation rather than being filed under seal with the Court. While the Court may have discretion to require the IG to return the client list to Rose, *United States v. Exxon Corp., 628 F.2d at 77;* SEC v. Arthur Young & Co., 584 at 1032–33, it is more appropriate to defer to the agency's discretion on this matter if it is being reasonably exercised in the circumstances. The Court will not impose Rose's requested requirement on the IG over his objection because to do so would not alleviate the Court's primary concern in this case: that the privacy and confidentiality interests of the clients who are not relevant to the investigation be protected. Requiring the IG to return all documents and all client lists to Rose would not afford these clients any [*1122] greater protection than will be furnished by having this information filed under seal with the Court.

The IG has acted in good faith in addressing the concerns the Court raised at the October 20 hearing. His new Confidentiality Undertaking incorporates many of the additional protections for Rose and its clients that the Court had indicated were [**35] reasonable and appropriate. The IG's considered judgment and reasonable exercise of his discretion strengthens his argument that his judgment deserves deference from the Court. Accordingly, the Court concludes that the IG has exercised his discretion within permissible limits and defers to his judgment. See *FCC v. Schreiber, 381 U.S. 279, 291, 14 L. Ed. 2d 383, 85 S. Ct. 1459 (1965); FTC v. Owens–Corning Fiberglas Corp., 626 F.2d at 974.*

The Court does, however, remain concerned about the possibility of leaks and about the possible disclosure of the identities of clients of the Rose Law Firm who have no relationship to the IG's investigation. The notice provisions of the IG's October 26 Confidentiality Undertaking provide a mechanism for Rose to object to disclosure and to attempt to protect that information under relevant exceptions to the Freedom of Information Act and recognized state and federal privileges. If these procedures prove unworkable or unsatisfactory or if unauthorized disclosures or leaks do take place, or if Rose has reason to believe they are about to take place, [**36] the Court remains ready on short notice to deal with such concerns. It will make itself available to address these matters on an expedited basis and is prepared to deal appropriately with those who violate the Confidentiality Undertaking, the Orders of this Court or the rights of Rose or its clients.

III. CONCLUSION

The Court finds that Respondent has failed to carry its burden of proving that the subpoena exceeds the statutory authority of the Inspector General. The Court also concludes that, in view of the substantial additional protections the Inspector General provided in his October 26, 1994 Confidentiality Undertaking, Respondent has failed to supply a sufficient basis for the Court to enter an order requiring, inter alia, that the client list remain in the possession of the Rose Law Firm or, alternatively, that it be returned to Rose rather than filed under seal with the Court.

For the foregoing reasons, it is hereby

ORDERED that the Petition of the Inspector General of the Resolution Trust Corporation For Summary Enforcement Of Administrative Subpoena Duces Tecum is GRANTED; it is

FURTHER ORDERED that the Rose Law Firm, A Professional Association, shall commence its compliance [**37] with the terms of the Memorandum of Understanding entered into on October 7, 1994, attached as Appendix A, within fifteen (15) days of the date of this Order and proceed to produce the subpoenaed information in accordance with the schedule agreed to in Paragraph II.F. of the Memorandum of Understanding; it is

FURTHER ORDERED that the Respondent's Motion for Protective Order is DENIED; and it is

FURTHER ORDERED that the Inspector General, the Office of Inspector General and its employees, and all other agencies of government and government employees to whom Rose Law Firm documents are provided pursuant to the Memorandum of Understanding or the Confidentiality Undertaking shall comply with the terms of the Confidentiality Undertaking provided by the RTC on October 26, 1994, attached as Appendix B.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 11/16/94

APPENDIX A

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into this 7th day of October, 1994, between the Office of Inspector General, Resolution Trust Corporation ("OIG") and Rose Law Firm, P.A., ("RLF") with respect to the Inspector General subpoena dated April 18, 1994 issued to RLF ("the [**38] subpoena") and the subpoena enforcement action John J. Adair, Inspector General of the Resolution Trust Corporation v. Rose Law [*1123] Firm, A Professional Association, Misc. No. 94–278 (PLF), which is pending in the United States District Court for the District of Columbia ("Adair v. RLF").

I. RLF Representations

RLF represents that it does not have, in either hard copy or computer medium, a list containing all the client identities demanded by the subpoena. Further, RLF represents that it does not maintain any other centralized system(s) containing client identities that could be searched to produce a more comprehensive list of clients during the period January 1, 1985 through April 15, 1994, than the aggregate of client identities covered under Section II below.

II. Production Constituting Compliance With Subpoena

RLF represents that it has the following systems containing client identities covered by the subpoena and RLF agrees that, if the district court in Adair v. RLF orders enforcement of the subpoena, RLF will produce the following information, and OIG agrees that production of the following information will constitute full and complete compliance with the [**39] subpoena:

A. RLF maintains hard copy monthly fee credit reports, generated over time by its accounting system, for each calendar month from January 1985 through April 1994, which reports list all RLF clients that paid fees to the firm during the prior month. RLF will produce copies of all these reports, redacted to show only the title and date of the report and the names of all clients included in the report.

B. RLF's accounting system generates each month a hard copy alphabetical list which includes all active clients ("alpha list"). From time to time clients for which RLF no longer actively provides legal services are purged from the system and thus are not included in succeeding alpha lists. RLF routinely discards prior alpha lists when the following month's alpha list is produced. To the best of its knowledge, the earliest alpha list that RLF currently possesses is the alpha list dated August 5, 1994. RLF will produce that alpha list, redacted to show only the title and date of the list and the names of all clients contained in that alpha list.

C. As part of its system for checking conflicts, beginning in 1987 RLF created a computer data base that included its then–active clients, [**40] and thereafter it added all new clients to that computer data base through some time in 1992, after which no new clients were added to the data base (("Wang/TextWare Data Base"). RLF will print out a list of all clients names contained in the Wang/TextWare Data Base and produce this list. If it can reasonably be done, RLF will also provide the same names on a computer tape in a form useable by the OIG, and the OIG will reimburse RLF for the reasonable cost of producing the tape.

D. When RLF discontinued entering new client names into the Wang/TextWare Data Base in 1992, it relied on identification of all new clients in Weekly Summaries, hard copies of which it has retained. RLF will produce copies of the Weekly Summaries for January 1, 1992 through April 15, 1994, redacted to show only the title and date of the summary and the names of all clients included in the summary.

E. To cover the period before the initiation of the Wang/TextWare Data Base, RLF will produce the following documents to the extent that it has them in its possession or control: (a) for January 1, 1986 through December 31, 1987, copies of Weekly Summaries redacted to show only the title and date of the summary and [**41] the names of all clients included in the summary; and (b) for April 25, 1985 (before which date RLF represents that it does not have such documents) through December 31, 1985, copies from microfilm of Daily Briefs redacted to show only the title and date of the Daily Brief and the names of all clients included in the Daily Brief. The OIG will reimburse RLF for the reasonable cost of retrieving and producing these copies.

F. RLF will produce the documents as necessary redactions are completed, but not later than the following number of days after issuance of an order of the district court enforcing the subpoena, unless that order is [*1124] stayed by that court or by the United States Court of Appeals for the District of Columbia Circuit, in which case the time would begin to run if and when such stay is dissolved: RLF will produce the alpha list specified under paragraph B within 15 days; RLF will produce the information specified under paragraphs C and D on a rolling basis, with completion of such production within 30 days; and RLF will produce the documents specified under paragraphs A and E within 45 days.

G. When RLF's production of the documents and information described above to the [**42] OIG is complete, RLF will so certify in the form provided in Section III below.

RLF hereby makes the representations and agreements contained in Sections I and II above.

Ronald M. Clark

Chief Operating Officer

Rose Law Firm, P.A.

OIG hereby agrees that production of the documents and information described in Section II will constitute full and complete compliance with the subpoena and that it will reimburse RLF as specified in paragraphs II.C and II.E.

Patricia M. Black

Counsel to the Inspector General

of the Resolution Trust Corporation

III. RLF Certification

I hereby certify that RLF has produced to the OIG a complete set of all of the documents described in Sections II.A, B, C, D and E above to the extent that they are in RLF's possession or control, disclosing all client names contained therein, with no redactions of client names.

Ronald M. Clark

Chief Operating Officer

Rose Law Firm, P.A.

Date: , 1994

APPENDIX B

OFFICE OF INSPECTOR GENERAL

RESOLUTION TRUST CORPORATION

CONFIDENTIALITY UNDERTAKING BY THE INSPECTOR GENERAL OF THE RESOLUTION TRUST CORPORATION WITH RESPECT TO THE ROSE LAW FIRM

In connection with the April 18, 1994 subpoena issued by the Inspector [**43] General, Resolution Trust

Corporation to the Rose Law Firm, P.A. ("Rose") and the October 7, 1994 Memorandum of Understanding between the Office of Inspector General ("OIG") and Rose regarding what documents would constitute full and complete compliance with that subpoena ("MOU"), I am issuing this Confidentiality Undertaking to Rose. Prior to Rose's producing such documents to the OIG, Rose may designate such documents as confidential by stamping each page "CONFIDENTIAL". I have determined that the OIG will not disclose these documents or their contents except pursuant to the following provisions and that the following provisions will protect the confidentiality of such documents and their contents:

(1) The OIG acknowledges that these documents, which reveal the identity of Rose's clients, constitute "confidential commercial information" within the meaning of Executive Order 12600, and will not be disclosed pursuant to a FOIA request without giving Rose ten days prior notice and complying with the other procedures specified in that Executive Order. Any request that does not meet the requirements of paragraphs 2 and 3 below will be treated as a FOIA request.

(2) In response to any [**44] official request from Congress, either House thereof, or a Congressional Committee or Subcommittee acting pursuant to Committee business, the OIG may disclose the documents to the requesting entity, but will not do so without (a) giving Rose ten days prior notice where possible, and in any event, as much advance notice as can reasonably be given under the circumstances, [*1125] before releasing or granting access to the documents, and (b) informing the requesting entity that the documents should be considered confidential.

(3) In response to any request from another federal agency (including other components of the RTC) or a state agency, the OIG may disclose the documents to the requesting entity as follows.

> (A) In response to a request from the Department of Justice or the Independent Counsel, the OIG may disclose the documents to the requesting agency or instrumentality and, if it does so, will inform the requesting entity that the documents should be considered confidential;
>
> (B) In response to any request not within subparagraph (A) above, the OIG may disclose the documents to the requesting entity, but will not do so without (1) giving Rose ten days prior notice, and (2) informing [**45] the requesting entity that the documents should be considered confidential.

(4) Nothing herein shall limit the OIG's internal use of the documents or information contained therein, such use to be determined solely by the OIG. However, within the OIG, Rose's client list and the identities of individual clients will be kept confidential and will be shared internally only with those OIG employees and counsel who have a need for such documents or information in the performance of their duties. Such employees and counsel shall be apprised of this confidentiality undertaking and the need to maintain the confidentiality of such documents and information.

(5) Nothing herein shall limit the OIG's right to use, to retain or to bring to the attention of other components of the RTC, the Department of Justice, the Independent Counsel, Congress, or any other government agency or instrumentality, without notice to Rose, any client names or relevant portions of particular documents which names or portions of documents the OIG concludes are relevant to conflicts–of–interest issues, to violations of law, regulation or contract, to misrepresentations, or to any findings or recommendations the OIG intends [**46] to make.

(6) When the Inspector General determines that the OIG no longer needs to have physical possession of the documents in order to continue his investigation, but in any event no later than 180 days following the OIG's receipt of all the documents and the certification called for by the MOU, the OIG will submit (a) all the documents produced by Rose, and (b) all lists of Rose clients created by OIG from the documents produced by Rose, to the Office of the Clerk of the United States District Court for the District of Columbia ("Clerk") to be held by the Clerk under seal pursuant to court order in John J. Adair, Inspector General of the Resolution Trust Corporation v. Rose Law Firm, A Professional Association, Misc. No. 94–278, pending in that Court, provided, however, that:

> (A) The OIG will retain possession of the names and documents described in paragraph 5 above;
>
> (B) The OIG will be entitled to review within the Courthouse upon request to the Clerk, but not to remove from the Courthouse, the documents held under seal by the Clerk at any reasonable time and as often as it wishes, and shall have the right to take possession of and retain any individual client names and/or [**47] documents that the OIG determines fall within the scope of paragraph 5 above but which the OIG theretofore had not retained under said paragraph 5, all without notice to Rose and without the need for approval by the Court;

(C) If any request for documents pursuant to paragraphs 2 and 3 is pending at the time the OIG is to deliver the documents to the Clerk (e.g., because of a notice period, stay or timing of receipt of the request), the OIG will process such request pursuant to the provisions of said paragraphs and will delay delivering the documents to the Clerk until it completes processing such request; and

(D) When the Inspector General determines that there is no further need for the documents to be retained, he shall so notify the Clerk and Rose. The Clerk shall then destroy the documents.

[*1126] JOHN J. ADAIR

Inspector General

Resolution Trust Corporation

October 26, 1994

LEXSEE 688 F. SUPP. 689

**Gould Inc., Plaintiff, v. General Services Administration, Defendant**

**Civil Action No. 87-1319**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

***688 F. Supp. 689; 1988 U.S. Dist. LEXIS 5508; 34 Cont. Cas. Fed. (CCH) P75,500***

**June 1, 1988, Decided**
**June 1, 1988, Filed**

**DISPOSITION:**

[**1] Defendant's motion for summary judgment is granted.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**JUDGES:**

Stanley Sporkin, United States District Judge.

**OPINIONBY:**

SPORKIN

**OPINION:**

[*690] *Memorandum Opinion and Order*

Stanley Sporkin, United States District Judge

This case comes before me on the parties' cross motions for summary judgment. Plaintiff Gould Incorporated (Gould) has brought this action under the Freedom of Information Act (FOIA), *5 U.S.C. § 552*, to enjoin the General Services Administration (GSA) from withholding certain records. The records at issue are two post-award audit reports prepared by the GSA's Office of Inspector General (OIG) and supporting materials, including certain records obtained from Gould.

The defendant has denied plaintiff access to these records on the ground that they are exempt from disclosure pursuant to Exemption 7(A) of FOIA. According to the GSA, the records at issue are "records or information compiled for law enforcement purposes." *5 U.S.C. § 552*(b)(7)(A). Defendant contends that disclosure of these records "could reasonably be expected to interfere with enforcement proceedings." *Id.* § (b)(7)(A). Plaintiff takes issue with both of these contentions and advances several other arguments.

The central argument plaintiff advances, however, relates to defendant's assertion that the records at issue were "compiled [**2] for law enforcement purposes." According to plaintiff, "the threshold legal issue" I must resolve is:

> May otherwise non-exempt contract documents originally created for routine auditing purposes be classed as "records or information compiled for law enforcement purposes" under *5 U.S.C.* [*691] *§ 552*(b)(7) merely because such documents are subsequently placed in an investigatory file and utilized for purposes of a law enforcement investigation.

Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Summary Judgment Brief") at 2. n1 Because otherwise non-exempt documents created by a government agency *may* subsequently become eligible for Exemption 7(a) if they are thereafter "compiled for law enforcement purposes," I have resolved this "threshold legal issue" in favor of defendant GSA. The post-award audit reports at issue in this case were "compiled for law enforcement purposes."

> n1 Plaintiff's characterization of the audit reports at issue as having been "created for routine auditing purposes" is not a fully accurate description of the circumstances under which these reports were originally produced. *See infra*.

[**3]

Because the records sought in this case are now an integral part of an ongoing criminal investigation, and because their disclosure "could reasonably be expected to interfere with [those] enforcement proceedings," *5 U.S.C. § 552* (b)(7)(A), defendant is entitled to Summary Judgment.

THE FACTS

Beginning in October 1980, the DeAnza Systems, Inc. ("DeAnza") and its successor company, Gould Inc. Imaging and Graphics Division ("Gould") have had a series of GSA Multiple Award Schedule ("MAS") contracts for the purchase of image array processors. The first two contracts (GS–00S–6385 and GS–00S–41001) were for one year terms. The third contract (GS–GS–00S–45271) was in effect from July 19, 1982 to May 31, 1984. *See* Declaration of Otis R. Duvernay, Jr. ("Duvernay Declaration") at para. 8. Gould's fourth GSA MAS contract (GS–00F–78072) — which is the focus of this controversy — was entered into on November 30, 1984 and was scheduled to expire on September 30, 1987.

In 1984, the OIG's Field Office of Audits in San Francisco, California, n2 conducted a pre–award audit of a pricing proposal submitted by Gould in response to a GSA solicitation for a $2.4 million MAS contract to [**4] supply instruments and laboratory equipment. According to defendant, "the pre–award audit raised questions regarding the extent to which Gould had properly disclosed to GSA discounts offered to some of its other customers." Defendant's Summary Judgment Brief at 4. A copy of the pre–award audit was provided to Gould on July 10, 1984. *See* Duvernay Declaration at para. 4.

> n2 The GSA Office of Inspector General ("OIG") was established by the Inspector General Act of 1978, which consolidated all of the administrative agencies' then–existing auditing, investigating and law enforcement functions into new Offices of the Inspector General ("OIGs"). Pub. L. 95–452, *5 U.S.C. app. § 2* and § 9(a). The OIG is responsible for promoting economy and efficiency in agency programs and for detecting and preventing fraud and abuse in such programs. *5 U.S.C. App. § 2*. The Act divided responsibilities within the OIGs between an Assistant Inspector General for Auditing — who is responsible for auditing activities — and an Assistant Inspector for Investigations — who is charged with supervising enforcement investigations. *See 5 U.S.C. app. § 3*(d). The day to day auditing and investigative activities of the OIG are performed by field offices located in GSA's eleven regions.

[**5]

As a result of the findings of the pre–award audit, particularly concerns raised about certain pricing discounts, GSA delayed awarding the (fourth) contract to Gould. Subsequent explanations by Gould satisfied GSA's concerns. Accordingly, GSA awarded the fourth contract (GS–00F–78072) to Gould on November 30, 1984. *See* Duvernay Declaration at para. 5.

On June 26, 1984, prior to the award of contract GS–00F–78072, the Office of Audits provided the Regional Inspector General for Investigation in San Francisco with its pre–award audit findings. On February 25, 1985, the Office of Investigations advised the Office of Audits that it would not initiate an investigation of Gould at that time. It asked the Office of Audits to keep it informed if any further developments took place during the post–award audits of Gould's earlier contracts. n3

> n3 According to defendants, at this time, the Office of Investigations:
>
> > advised the Office of Audits that it would withhold any investigation of suspected irregularities pending a review of the results of a post–award audit of Gould's earlier contract. The Regional Inspector General for Investigation requested that he be kept advised of developments during the post–award audit so that a joint determination could be made regarding further investigative action by that Office.
>
> Defendant's Statement of Material Facts as to Which There is No Genuine Issue at para. 4; *see also* Duvernay Declaration at para. 6 and Attachment 4 thereto; Declaration of Vincent G. Cavallo, Jr. ("Cavallo Declaration") at para. 4. Defendant contends that such a cooperative arrangement had the effect of making the records generated by the Office of Audits eligible for coverage under Exemption 7(A). *See infra*.

[**6]

[*692] In September, 1985, the Office of Audits began a post–award audit of Gould's third contract, GS–00S–45271, which was for the supply of imaging processing systems, and which was in effect from July 19, 1982 to May 31, 1984. After preliminary work on this audit was completed, the scope of the audit was expanded to conclude the first year of Gould's (fourth) contract GS–00F–78072, even though this three–year contract had not yet been completed. According to defendant, initiation of a post–award audit prior to the completion of the contract is not GSA's common practice. *See* Duvernay Declaration at paras. 3, 7, 10. n4 Defendant also claims that the Office of Audits — per Mr. Duvernay, the auditor chiefly responsible for the Gould matter, — kept the Office of Investigations informed about its findings during the course of its post–award audits. *See* Cavallo Declaration

at para. 5; Duvernay Declaration at para. 6. These draft audit reports were substantially completed by March 20, 1986. n5

n4 Defendant contends that the expansion of the post–award audit to include Gould's fourth contract occurred "because the preliminary audit work on [the third] contract started to confirm suspicions about Gould's pricing practices that were raised in the pre–award audit of [the fourth] contract GS–00F–78072." Although plaintiff concedes that the post–award audit was expanded to include the fourth contract, it asserts that it is entitled to discovery pursuant to Rule 56(f) to contest defendant's explanation for that expansion. Plaintiff also contests defendant's claim that "under normal circumstances, a post–award audit is not initiated until after a contract is completed." *See generally* Plaintiff's Counter Statement of Facts as to Which There is a Genuine Issue at para. 5. Defendant also seeks discovery regarding that claim.

[**7]

n5 Plaintiff's Counter Statement of Facts as to Which There is a Genuine Issue ("Plaintiff's Counter Statement") at para. 7.

Based on the findings in the post–award audits, it was determined that Mr. Duvernay's pencil draft audit reports would not be reduced to final draft reports for review by the contracting officer and contractor. n6 Instead, they were converted into two final audit reports dated October 29 and 31, 1986, and were transmitted directly to the Inspector General's Field Office of Investigations at that time. n7

n6 Defendant's Statement of Material Facts as to Which There is No Genuine Issue ("Defendant's Statement") at para. 7.

n7 *See* Plaintiff's Counter Statement at para. 7; Defendant's Statement at para. 7.

The audit reports submitted to the OIG'S Office of Investigations by Duvernay are the subject of a current investigation being conducted jointly by the Office of Investigations and the United States Attorney's Office in San Francisco. n8 The records collected and generated by the Office of Audits during its post–award audit are now an integral part of this investigative effort. *See* Cavallo Declaration at para. 6.

n8 Plaintiff's Counter Statement at para. 8; Defendant's Statement at para. 8.

On November 12, 1986, Gould received an administrative subpoena from the GSA's Office of Investigations.

[**8]

This all occurred prior to Gould's filing of its January 15, 1987, FOIA request with GSA seeking among other things, "all audit reports from audits conducted by the GSA of [Gould] or Deanza Systems, Inc., and all supporting documents thereto; all [Gould] documents held by or otherwise in the possession of GSA; and all indices, catalogs, descriptions, or other lists of documents relating to all GSA audits of [Gould]." n9 On February 5, 1987, Defendant denied plaintiff access to the requested materials on the ground that they were exempt from disclosure pursuant to Exemption 7(A) of [*693] FOIA. n10 According to defendant, access to the audit reports and related documents was denied to plaintiff because they:

> . . . contain the names of witnesses and sources of information and also consist of records furnished in confidence to the OIG by these sources. The documents also contain auditor Duvernay's opinions and articulations of his suspicions of fraud which resulted from information gathered during the post–award audits, including information provided by Gould employees.

*See* Cavallo Declaration at paras. 7–8; Defendant's Statement at para. 9. After exhausting its administrative appeals, [**9] n11 plaintiff filed this action on May 15, 1987.

n9 *See* Exhibit 1 to Plaintiff's Complaint; Plaintiff's Statement of Material Facts as to Which There is no Material Issue at para. 8.

n10 *See generally* Exhibits 1 and 2 of Plaintiff's Complaint; Defendant's Statement at paras. 10–11.

n11 *See* Exhibits 3 and 4 to Plaintiff's Complaint (February 10, 1987 appeal letter from Gould to GSA; March 25, 1987 denial of plaintiff's appeal by GSA on the ground that the records requested were exempt under Exemption 7(A)).

ANALYSIS

The Freedom of Information Act was enacted by Congress in 1966, and substantively amended in 1974,

1976 and 1986 to provide a statutory right of public access to documents and records held by federal government agencies. The Act sets forth "a policy of broad disclosure of Government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.'" *Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 621, 72 L. Ed. 2d 376, 102 S. Ct. 2054 (1982)* (quoting *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)).* The FOIA requires disclosure of requested records and documents unless the requested material fits within one of [**10] the nine statutory exemptions set out in subsection (b), *5 U.S.C. § 552*(b). n12

n12 *See also Abramson, 456 U.S. at 621* ("Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused."); *Hobart Corp. v. EEOC, 603 F. Supp. 1431, 1438 (S.D. Ohio 1984)* (collecting cases).

This case concerns the appropriate interpretation of Exemption 7, as applied to the GSA. The seventh exemption of FOIA provides in relevant part that:

> (b) This section does not apply to matters that are:
>
> * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
>
> (A) could reasonably be expected to interfere with enforcement proceedings. . . .

*5 U.S.C. § 552*(b)(7)(A) (as amended in 1986 by Pub. L. 99–570). In order to fall within Exemption 7(A), records or information must be "compiled for law enforcement purposes" and it must be established by the agency that their production "could reasonably be expected to interfere with enforcement proceedings." *5 U.S.C.* [**11] *§ 552* (b)(7)(A); *Abramson, 456 U.S. at 622–23; Bevis v. Department of State, 255 U.S. App. D.C. 347, 801 F.2d 1386, 1388 (D.C. Cir. 1986).*

A. *The Records Were Compiled for Law Enforcement Purposes*

Defendant has suggested two related, but independent bases for finding that the audit reports were "compiled for law enforcement purposes." First, defendants contend that the original drafting of the audit reports by Duvernay and the Office of Audits constituted a compilation of records for law enforcement purposes. In the alternative, assuming that the documents were not initially prepared for law enforcement purposes, defendant contends that the subsequent inclusion — or compiliation — of these materials into an active law enforcement investigative file satisfies this threshold requirement. I consider each argument in turn.

[*694] **1. The Original Preparation of the Reports**

Determining whether records have been compiled for law enforcement purposes often requires a careful analysis of the functions of the agency involved. As the D.C. Circuit has emphasized, "it is important to distinguish an agency serving principally the cause of criminal law enforcement from one having an admixture of [**12] law enforcement and administrative functions." *Birch v. United States, 256 U.S. App. D.C. 128, 803 F.2d 1206, 1209 (D.C. Cir. 1986). See also Pratt v. Webster, 218 U.S. App. D.C. 17, 673 F.2d 408, 416–18 (D.C. Cir. 1982).* When evaluating agency claims that a record or document has been compiled for enforcement purposes, the D.C. Circuit has utilized different criteria depending on the agency's "primary mission." *Birch, 803 F.2d at 1209.* When an agency's primary function is law enforcement, agency "claims of satisfaction of Exemption 7's threshold requirement call for less rigorous scrutiny." *Pratt v. Webster, supra, 429 F.2d at 413–421; Birch, supra, 803 F.2d at 1210.*

In contrast, the D.C. Circuit has articulated a more demanding standard for application to agencies, such as the GSA, and for that matter the GSA's Office of Inspector General, having an admixture of law enforcement and administrative functions. In the leading FOIA Exemption 7 case requiring the D.C. Circuit to determine whether a mixed–function agency had a "law enforcement purpose" in generating certain records, the D.C. Circuit differentiated between "general agency oversight (including program monitoring) and agency investigations specifically [**13] directed at allegedly illegal activity." *Pratt v. Webster, supra, 673 F.2d at 419* (interpreting *Rural Housing Alliance v. United States Department of Agriculture, 162 U.S. App. D.C. 122, 498 F.2d 73 (D.C. Cir. 1974)).* In *Rural Housing Alliance,* which involved a report by the Department of Agriculture's Inspector General regarding allegations of housing discrimination, the panel described investigations that satisfy the Exemption 7 "law enforcement test" as "investigations which focus directly on specifically alleged illegal acts,

illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Id.* at 81 (footnote omitted). n13 In reaching that conclusion, the court emphasized that, "the purpose of the 'investigatory files' is thus the crucial factor." *Id.* at 82. n14 If the records are accumulated or generated in the course of "an inquiry as to an identifiable possible violation of law," *Birch, supra, 803 F.2d at 1210,* then they are eligible for protection under Exemption 7.

n13 *See also Center for National Policy Review v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974),* where Judge Leventhal wrote:

> There is no clear distinction between investigative reports and material that, despite occasionally alerting the administrator to violations of the law, is acquired essentially as a matter of routine. What is clear, however, *is that where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way.*

(emphasis added).
[**14]

n14 The *Rural Housing Alliance* court recognized the danger of a broad or imprecise construction of Exemption 7's requirement that the records of a mixed–function agency be compiled for law enforcement purposes:

> On its face, exemption 7's language appears broad enough to include all such internal audits. If this broad interpretation is accepted, however, we immediately encounter the problem that most information sought by the Government about its own operations is for the purpose of ultimately determining whether such operations comport with applicable law, and thus is "for law enforcement purposes." . . . But if this broad interpretation is correct, then the exemption swallows up the Act. . . .

*Id., 498 F.2d at 81. See also Birch, supra, 803 F.2d at 1209; Stern v. F.B.I., 237 U.S. App. D.C. 302, 737 F.2d 84, 89 (D.C. Cir. 1984).*

In this case, the initial post–award audits of Gould were principally conducted by Duvernay, who was a part of the staff of the GSA's Office of Audits. In completing these audits, the degree of cooperation and support Duvernay received from the Office of Investigations is a matter of dispute. The ensuing enforcement investigation has been conducted by [**15] the GSA's Office of Investigations (in cooperation with the United States Attorney's Office of San Francisco).

[*695] Plaintiff contends that the entity which performed the post–award audits, the Office of Audits, is neither a law enforcement agency (or sub–agency entity) nor a mixed function agency or (sub–agency entity). According to plaintiff, the Office of Audits is without any law enforcement functions or responsibilities. As a result, according to plaintiff, by definition, documents and records which the Office of Audits generates or compiles cannot qualify under Exemption 7. In addition, Gould asserts that the post award audits conducted by Duvernay — and for that matter, *all* the audits conducted by the Office of Audits — are "routine" contract audits because of the identity of who performs these audits. n15 Based on these two assertions, plaintiff syllogistically claims that the records it has requested "were not 'compiled for law enforcement purposes' within the meaning of *5 U.S.C. § 552*(b)(7)." n16

n15 *See* Plaintiff's Summary Judgment Brief at 8.

n16 *Id.*

Plaintiff's contention that the Office of Audits is without the capacity to generate or compile documents [**16] for law enforcement purposes is overly formalistic and artificial. It ignores the realities of the relationship between the two halves of the OIG — Audits and Investigations. As defendant GSA correctly argues:

> . . . notwithstanding that a primary function of the GSA Office of Audits is the auditing of pre–award offers and compliance with the terms and conditions of a contract after award, there is a *natural overlap* with the Office of Investigations when the auditors begin to detect and suspect specific violations of law by a company or individuals . . . the two offices work together and cooperate when a contract audit reveals suspected irregularities.

Defendant's Summary Judgment Brief at 11–12. *See also* Cavallo Declaration at para. 2; Duvernay Declaration

at para. 17. Merely because Duvernay is a staff member of the Office of Audits — and not the Office of Investigations — does not preclude his work-product — which may be the same or similar to that generated by his peers on the staff of the Office of Investigations — from qualifying for Exemption 7.

Therefore, considered realistically, the Office of the Inspector General is a "mixed function agency." Each of its [**17] functional arms investigates compliance with the law and both have the capacity to generate records for law enforcement purposes. The particular factual circumstances of a given investigation, and not the identity or title of the investigator, dictate whether the records generated are compiled for law enforcement purposes or are merely produced as part of a routine monitoring exercise. Granted, the majority of the work product generated by the Office of Investigations may be records "compiled for law enforcement purposes." That fact, however, does not in any way preclude the Office of Audits, under certain circumstances, from also compiling such records. Hence, it may be relevant to the *Rural Housing Alliance* analysis, but it is certainly not dispositive of that analysis, that the audit reports at issue were prepared principally, and perhaps entirely, by the Office of Audits.

Whether the post-award audits were initially generated as part of a "routine contract audit" or as part of a "law enforcement investigation" into "specific suspected violations of the law" n17 is not easily [*696] determined on the basis of the record before me. There is apparently no dispute that the initial pre-award [**18] audit of Gould's fourth contract, GS-00F-78072, began as a routine audit. There is also no dispute that the current investigation of Gould constitutes a law enforcement investigation — and that any records currently being generated or compiled therein meet the *Rural Housing Alliance* test. The issue that the parties seek to have decided is *when* the GSA's initially routine auditing of Gould changed in character into a law enforcement investigation.

> n17 Differentiating records generated pursuant to routine administrative functions from records compiled as part of an inquiry into specific suspected violations of law, a methodology initially used by the *Rural Housing Alliance* court, has become the accepted method for determining whether or not records of a mixed function agency qualify for Exemption 7. *See Rural Housing Alliance, supra, 498 F.2d at 81-82; Pratt v. Webster, supra, 673 F.2d at 419* (citing *Rural Housing Alliance*); *Birch, supra, 803 F.2d at 1209-1210* ("Exemption 7 embraces only 'investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.'") (citing *Rural Housing Alliance*). *Center for National Policy Review on Race and Urban Issues v. Weinberger, 163 U.S. App. D.C. 368, 502 F.2d 370, 373-74 (D.C. Cir. 1974)* (". . . where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way."); *Goldschmidt v. United States Agricultural Department, 557 F. Supp. 274, 276 (D.D.C. 1983); Hobart Corp. v. EEOC, 603 F. Supp. 1431, 1443 (S.D. Ohio 1984)* (collecting cases).

[**19]

According to plaintiff, the fact that the audits were conducted by the Office of Audits necessarily means that they were "routine" and could not possibly have focused on specific acts of wrongdoing. Plaintiff contends that the change in character of the investigation therefore must have occurred sometime after the written audit reports were formally presented to the Office of Investigations. In addition, plaintiff contends that the routine auditing process could only be transformed into an investigation of specific alleged acts of wrongdoing by formal notice by GSA notifying Gould of a law enforcement investigation — and that such notice was first given Gould in November, 1986, when it received the GSA's Inspector General's subpoena for documents. n18

> n18 *See generally* Plaintiff's Summary Judgment Brief at 9-10.

Neither of these arguments has merit. As discussed above, the Office of Audits has the capacity to perform other than routine functions. The investigation could have changed in character while Duvernay was in the process of investigating and drafting the audit reports. As discussed at some length in the Oral Argument, n19 although the failure to provide formal notice [**20] to Gould that it was under investigation may have repercussions not relevant to this case, such notice is not a prerequisite for the initiation of a law enforcement investigation. n20 The appropriate focus for determining when a law enforcement investigation is initiated is on the intentions and actions of the investigators. Attention directed toward the perceptions of the target(s) of the investigation is misplaced.

> n19 *See* Transcript of Oral Argument at 39-42, 47-48.
>
> n20 Defendant, of course, argues that despite the lack of any formal notice, plaintiff was well aware that the audits were being conducted for law

enforcement purposes. *See* Defendant's Summary Judgment Brief at 14, n.4.

Defendant, for its part, contends that the contract audits conducted by Duvernay were not routine because: 1) the earlier pre–award audit had uncovered possible violations of law; 2) the Office of Investigations had expressed interest in Duvernay's findings and asked to be kept informed; 3) the audits focused on a specific party and specific potential violations of law; and 4) the audits triggered a subsequent criminal investigation and are now an integral part of that investigatory file. [**21] *See* Defendant's Summary Judgment Brief at 13–14. Based on these four factors, defendant readily distinguishes those "routine monitoring" cases relied upon by plaintiff — in which courts find certain records to have been prepared as a matter of routine. *See* Defendant's Summary Judgment Brief at 12–14 (distinguishing *Goldschmidt v. Department of Agriculture, 557 F. Supp. 274 (D.D.C. 1983)* (routine monthly inspection reports of meat and poultry plants not covered by Exemption 7); *Hatcher v. United States Postal Service, 556 F. Supp. 331 (D.D.C. 1982)* (contract negotiation material obtained as part of routine contract administration and general interpretations of agency policies and regulations not covered by Exemption 7)). n21

n21 Other cases involving routine records which were held not subject to Exemption 7 include: *Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), cert. denied, 431 U.S. 924, 53 L. Ed. 2d 238, 97 S. Ct. 2198 (1977); aff'd sub nom., NOW v. Social Security Administration, 237 U.S. App. D.C. 118, 736 F.2d 727 (D.C. Cir. 1984); Stern v. Small Business Administration, 516 F. Supp. 145 (D.D.C. 1980).*

[*697] I agree with defendant's position that the audit reports were not [**22] prepared as a matter of routine. At the time these reports were in the process of being completed — and perhaps even when they were initiated — GSA's inquiry had "departed from the routine" and had "focuse[d] with special intensity" upon specific Gould activities. n22 An investigation was underway.

n22 *Center for National Policy Review v. Weinberger, 163 U.S. App. D.C. 368, 502 F.2d 370, 373 (D.D.C. 1974)* (Leventhal, J.) (*see supra*, n.13).

Pre and post audits are an integral part of the government contracting process. An agency can only carry out its mission in the public interest if these audit investigations are thoroughly and meticulously conducted with an appropriate degree of healthy skepticism designed to expose wrongdoing if it exists. While an ultimate law enforcement investigation may not be the critical objective of this audit process, it clearly is a real possibility. And until this audit process is completed — with the result that no further proceedings are recommended — these audits have the requisite law enforcement tilt to them which should cloak them with Exemption 7 protection. This, however, need not be the only holding in this case because of what follows.

**2. The Compilation** [**23] **of the Reports Into The Law Enforcement File**

The issue here is essentially whether records compiled by an agency, as part of an investigation of acts of possible misconduct which eventually develops into a law enforcement investigation, may qualify under Exemption 7(A) as "records compiled for law enforcement purposes." Plaintiff, relying on what it terms "well established precedent" and its reading of the 1974 amendments to the FOIA, contends that "an agency's original purpose in gathering the information contained in or generating the documents requested under the FOIA, and not its ultimate use of the documents, determines whether they may be withheld on the grounds that they are 'compiled for law enforcement purposes' under *5 U.S.C.A. § 552*(b)(7)." Plaintiff's Reply Brief at 13–14 (citations omitted). Defendant, contends that "the pre–[1986]amendment precedent on which plaintiff relies is not dispositive." Defendant's Summary Judgment Brief at 17.

A canvass of the relevant precedents shows that at no time has the plain meaning of the statute required an exclusive focus on whether records or information was *originally* compiled for law enforcement purposes. Rather, in determining [**24] whether materials can be covered under Exemption 7, the Act permits consideration of subsequent uses and compilations of those materials — including the possibility that materials originally collected for a benign purpose will eventually be compiled or incorporated into a law enforcement investigatory file. The legislative history of the 1974 amendments evinces no intent to alter or narrow the test for whether documents were compiled for "law enforcement purposes." Furthermore, there is no basis in policy or common sense for the narrow construction of the statute advocated by plaintiff.

a. *The Statute and Policy*

Plaintiff's contention that the original purpose in collecting materials controls whether such materials are "compiled for law enforcement purposes" would render it irrelevant how that information is eventually used and compiled — or re–compiled. In effect, plaintiff's construc-

tion of the term compiled would introduce an artificial cutoff point for determining when a document or piece of information had been compiled for law enforcement purposes — and would essentially introduce the adjective "originally" into the statute to modify the term "compiled for law enforcement [**25] purposes." The introduction of such a narrowing term would undercut Congress' deliberate selection of the word "compiled" for usage in the statute. According to Webster's Ninth Collegiate Dictionary, the word "compile" means:

> to collect and edit into a volume; to compose out of materials from other documents; [*698] to run (as a program) through a compiler; to build up gradually. . . .

(1985). A compilation of information or materials "compiled" for law enforcement purposes therefore can be "composed out of materials from other documents" — including other documents already generated or collected by the government for non–law enforcement purposes. Therefore, materials originally drafted, generated or even compiled for one purpose — even if that purpose is benign — subsequently can be "compiled for law enforcement purposes."

The fact that the source of the requested materials — that is, the audit reports and supporting materials — was other government files and records — rather than, for instance, newspapers or other materials in the public domain — has no bearing on whether the materials can qualify for Exemption 7 once they hold an important office in an ongoing criminal investigation. [**26] Materials in a criminal or other law enforcement file can emanate from a number of different sources, some even from the public domain, which may in themselves be benign — such as newspaper articles. Some materials may emanate from government agency files — which of course, are themselves often largely compilations of documents and pieces of information that are derived from the public domain. Among those materials compiled in the course of a law enforcement investigation, there is no basis to draw a distinction between those which are drawn directly from the public domain and those which are drawn from materials already collected from the public domain in the course of other government "collection activity."

Plaintiff argues that the incorporation of the word "originally" into the statute is justified by the fact that the materials sought, when they were allegedly part of the routine audit file, were readily available had a FOIA request been made at that time. This prior availability, plaintiff contends, renders contradictory defendants' contention that disclosure of these audit reports now will interfere with an ongoing criminal investigation. This argument is without merit.

Information [**27] drawn from a number of different sources can be benign when separately considered. When combined, or "compiled for law enforcement purposes," however, these various pieces of information can indeed become accusatory. As a direct result of their becoming accusatory in nature, these materials may qualify for Exemption 7 of FOIA for their release may interfere with an ongoing law enforcement investigation. Hence, even though the component, derivative parts of a criminal investigatory file, when considered independently and without reference to the remainder of the materials in the investigatory file, may not be covered by any exemption from FOIA, those materials, once combined and incorporated in a law "enforcement "mosaic," may well be entitled to Exemption 7. n23

> n23 In addition, of course, plaintiff may not circumvent the effect of Exemption 7 by seeking information in the investigatory file from other unprotected government sources. Merely because other copies exist in government files does not strip these documents — and the information they contain — of their exemption from disclosure.

Plaintiff's argument would require an artificial distinction to be made regularly — in [**28] order to deny Exemption 7 to those materials in an active law enforcement investigatory file originally compiled for a purpose other than law enforcement. In order to avoid withholding documents originally compiled for non–law enforcement purposes, agencies frequently would have to separate out from its investigatory files those materials obtained from non–exempt government sources — such as routine internal audits. These materials, of course, would then be privy to disclosure regardless of the impact of such disclosure on an ongoing criminal investigation. Only by undertaking such a process could the agency comply with plaintiff's reading of the FOIA. The making of such distinctions among materials based on their sources is not appropriate, is not required by the FOIA or the caselaw, and clearly was not contemplated by the legislators who enacted and amended the FOIA.

[*699] Without doubt, Congress' use of the term "compiled" was designed to avoid inflicting on agencies the painstaking and fact–intensive task of parsing exactly when an investigation like the one at issue here was transformed from the routine to law enforcement in character. Were plaintiff's construction of the statute to [**29] control, such a retrospectively oriented parsing often would be required to differentiate those documents originally generated as a matter of routine from those acquired or

created after an investigation became law enforcement in nature — even though all such materials eventually were compiled or incorporated in an active investigatory file for legitimate and non–pretextual reasons.

Moreover, the release of those documents originally gathered by the government for purposes other than law enforcement — regardless of the impact of such a release on ongoing law enforcement efforts — does not seem to serve any rational, worthwhile purpose. Plaintiff has not come forth with any policy basis for justifying the expense and effort of separating out materials based on the manner and context in which they were originally obtained or generated by the government. n24

> n24 Sorting materials based on the character of the process by which they were originally collected or generated by the government, aside from being without either any basis in the statute or any policy rationale, also would be a difficult, time–consuming and resource–draining exercise in line drawing.

The process of determining [**30] whether a document is "compiled for law enforcement purposes," thus, must focus on where a document or record is *currently* bona fide in place. At a minimum, that means where it is "performing" at the time a FOIA request is made on the agency. In certain cases, it may mean the focus must be on the document's or record's "performance" at a later time, even up to the time that the matter is before a court. Hence, where documents or records are positioned in a particular investigation and that they are of interest to investigators is extremely important "intelligence." It entitles them to protection so that the investigation can proceed unobstructed.

In this case, as outlined above, at the time Gould requested these materials from the GSA, a law enforcement investigation was already fully underway. This investigation arose out of an audit of Gould which had been conducted by the GSA. The final audit reports provided by Duvernay to the Office of Investigations — which are the target of Gould's FOIA request — were the basis and starting point for the law enforcement investigation. n25 The material circumstances thus are materially different — both now and at the time of Gould's FOIA [**31] request — from those that prevailed during the time when GSA was merely conducting a routine audit of Gould. Because a criminal investigation is ongoing and the documents at issue have been incorporated (or compiled) into the active investigatory file, the documents are eligible for coverage under Exemption 7.

> n25 The reports are very likely among the most central and sensitive documents compiled by the investigators during the early stages of the law enforcement investigation.

b. *The Legislative History*

Despite the plain meaning of the word "compiled," plaintiff contends that "Congress amended exemption 7 in 1974 to substitute the term "investigatory *records* [compiled for law enforcement purposes] " for "investigatory *files* [compiled for law enforcement purposes] " in order to make clear that materials generated in the course of routine government operations are not made exempt simply by being placed in the *file* of the subsequently initiated law enforcement investigation." Plaintiff's Summary Judgment Brief at 16 (emphasis added by plaintiff); *see also* Plaintiff's Reply Brief at 12. n26

> n26 Defendant, in contrast, asks me to interpret the 1986 congressional amendments as enlarging the universe of records or information which may qualify under the "compiled for law enforcement purposes" test. *See* Defendant's Summary Judgment Brief at 15–16. The 1986 amendments removed the word "investigatory" from the phrase "investigatory records compiled for law enforcement purpose," and inserted the words "or information after the word "records" so that § 552(b)(7) now exempts "records or information compiled for law enforcement purposes."
>
> Although some courts have construed these amendments as generally broadening the scope of materials eligible for Exemption 7, plaintiffs interpret the amendments as precisely dealing with a more specific problem. *Compare Irons v. Federal Bureau of Investigation, 811 F.2d 681, 687 (1st Cir. 1987)* (citing statement of Senator Hatch that the avowed purpose of the 1986 amendments to Exemption 7 was, "enhancing the ability of all Federal law enforcement agencies to withhold additional law enforcement information . . . [and] to broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it"); *Curran v. Department of Justice, 813 F.2d 473 (1st Cir. 1987)* ("drift" of 1986 amendments is "to ease — rather than increase — the government's burden in respect to Exemption 7(A)" . . . amendments use "slightly more relaxed phraseology"); *Korkala v. United States Department of Justice, 1987 U.S. Dist. LEXIS 14943,* Civil Action No. 86–0242 (D.D.C. July 31, 1987), Memorandum Opinion at 6, *with*

> Plaintiff's Reply Brief at 13–14 ("Congress specifically intended the change to reverse two cases holding that law enforcement manuals were not exempt because the information contained in the manuals, although compiled for general law enforcement purposes by a law enforcement agency, was not compiled in the course of a specific investigation."); *King v. United States Department of Justice, 265 U.S. App. D.C. 62, 830 F.2d 210, 229, n.141 (D.C. Cir. 1987)* (1986 amendment to Exemption 7 "does not affect the threshold question of whether 'records or information' withheld under (b)(7) were 'compiled for law enforcement purposes'") (citing and recounting legislative adoption of Senate Judiciary Committee Report No. 221, 98th Cong., 1st Sess. 23 (1983) *reprinted in relevant part in* 132 Cong.Rec. H9466 (daily ed. Oct. 8, 1986)).
>
> Because no court, however, has viewed the 1986 amendments as in any way narrowing the scope of Exemption 7, they need be discussed no further. Reliance on them is unnecessary to reach the holding in this case.

[**32]

[*700] The objective of the 1974 amendments, in fact, was to deal with an altogether different problem. The 1974 amendments were not intended to change the threshold "compiled for law enforcement purposes" test.

As the Supreme Court outlined in detail in *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226–236, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)*, Congress amended Exemption 7 in order "to respond to four decisions of the District of Columbia Circuit" . . . which held that "the investigatory file exemption was available even if an enforcement proceeding were neither imminent nor likely either at the time of the compilation or at the time disclosure was sought." *Id. at 228.* n27 According to Senator Hart, the principal sponsor of the 1974 amendments to Exemption 7, these cases "erected a stone wall" against public access to materials in investigatory files. *Id*. According to the Court:

> Senator Hart believed that his amendment would rectify these erroneous judicial interpretations and clarify Congress' original intent in two ways. First, by substituting the word "records" for "files," it would make clear that courts had to consider the nature of the particular document as to which exemption was claimed, in order [**33] to avoid the possibility of impermissible "commingling" by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential. Second, it would explicitly enumerate the purposes and objectives of the Exemption, and thus require reviewing courts to "loo[k] to the reasons" for allowing withholding of investigatory files before making their decisions. . . . As Congressman Moorhead explained to the House, the Senate amendment was needed to address "recent court decisions" that had applied the exemptions to investigatory files "even if they ha[d] long since lost any requirement for secrecy."
>
> Thus, the thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not protect material simply because it was in an investigatory file.

*Robbins, supra, 437 U.S. at 229–30* (citations to 1975 Freedom of Information Source Book omitted). n28

n27 The four cases cited were: *Center for National Policy Review on Race and Urban Issues v. Weinberger, 163 U.S. App. D.C. 368, 502 F.2d 370 (1974); Ditlow v. Brinegar, 161 U.S. App. D.C. 154, 494 F.2d 1073 (1974); Aspin v. Department of Defense, 160 U.S. App. D.C. 231, 491 F.2d 24 (1973); Weisberg v. United States Department of Justice, 160 U.S. App. D.C. 71, 489 F.2d 1195 (1973), cert. denied, 416 U.S. 993, 40 L. Ed. 2d 772, 94 S. Ct. 2405 (1974). See generally Robbins, supra, 437 U.S. at 227–29* (discussing cases).

[**34]

n28 According to a witness from the American Civil Liberties Union, "what is being gotten at here . . . is the old investigatory files, the dead files, the files that are yellowing in the Justice Department and the FBI . . . ." 2 Hearings on S. 1142 *et al*. before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Senate Judiciary Committee and the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 93d Cong., 1st Sess. 40 (1973) (statement of John Shattuck, ACLU staff counsel) (as cited in *Robbins, supra, 437 U.S. at 230, n.11). See also Fedders Corp. v. Federal Trade Commission, 494 F. Supp. 325, 328, n.4 (S.D.N.Y. 1980)* ("The 1974 amendments to the FOIA made it clear that exemption 7(A) applied only to records for an active or pending law

> enforcement proceeding and did not serve to 'endlessly protect material simply because it was in an investigatory file.'") (quoting *Robbins, supra, 437 U.S. at 230).*

[*701] Hence, the thrust of the 1974 amendments was not to reformulate the threshold "compilation" requirement of Exemption 7. Rather, the amendments were designed to require agencies [**35] and courts to stop applying the exemption in a "wooden" "mechanical," and literal manner. *Id. at 230.* As the Court emphasized, moreover, the debate over the 1974 amendments indicates they were never intended to permit the release of materials in investigatory files if such release would undercut law enforcement efforts:

> The tenor of this description of the statutory language clearly suggests that the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against. Indeed, Senator Hart stated specifically that *Exemption 7(A) would apply "whenever the Government's cases in court — a concrete prospective law enforcement proceeding — would be harmed by the premature release of evidence or information. . . ."*

*Robbins, 437 U.S. at 232* (citation omitted) (emphasis added). At no point in the debate did any legislator suggest that in such cases Exemption 7(A) would apply only if the potentially damaging materials were *originally* compiled for law enforcement purposes.

Nevertheless, plaintiff contends that the interpretation [**36] of the legislative history of the 1974 amendments set forth in two district court cases, *Goldschmidt v. United States Department of Agriculture, 557 F. Supp. 274 (D.D.C. 1983); Hatcher v. United States Postal Service, 556 F. Supp. 331 (D.D.C. 1982),* supports the contention that only materials *originally* compiled for law enforcement purposes can be protected by Exemption 7. According to the *Hatcher* court, "one of Congress' explicit purposes in substituting the term 'record' for 'file' in exemption 7 was to make clear that materials generated in the course of routine government operations could not be protected by commingling them with investigative materials generated by a subsequently-initiated law enforcement investigation." n29 *556 F. Supp. at 335.*

> n29 The principal basis offered for such a conclusion was Senator Hart's statement that retention of the term "file" would arguably:
>
> > allow an agency to withhold all the records in a file if any portion of it runs afoul of [the specific criteria for withholding investigatory records established by the amendment]. It is precisely this opportunity to exempt whole files which gives an agency incentive to commingle various information into one enormous investigatory file and then claim it is too difficult to sift through and effectively classify that information.
>
> *Hatcher, supra, 556 F. Supp. at 335* (citing 1975 Source Book at 451). Unless Exemption 7 was amended, Senator Hart was concerned that information such as "meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption." *Hatcher, 556 F. Supp. at 33* (quoting 1975 Source Book).

[**37]

In turn, relying on that interpretation of Congress' intent in amending Exemption 7, the *Hatcher* court permitted a target of a criminal investigation to have access to documents "performing" in an active criminal investigation that originally had been compiled or created by the government prior to the initiation of that investigation. According to that court, such a result was unavoidable because documents "not initially created or compiled for law enforcement purposes" cannot "acquire[] investigative significance as the result of initiation of the criminal investigation against plaintiff and his company." *Hatcher, supra, 556 F. Supp. at 334-35.*

[*702] I am in full agreement that Congress, by replacing the word "record" with the word "file" may have sought to prevent agencies from commingling *otherwise* benign materials in law enforcement files as a basis for protecting them from public disclosure under the umbrella of Exemption 7. It is therefore necessary to look beyond where a document is initially filed both to how it is currently compiled, or "performing," and the dangers of releasing it. One of Congress' central purposes in substituting the word "records" for the word [**38] "files" was to "make clear that courts had to consider the nature of the particular document as to which the exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential.'" *Hatcher, supra, 556 F. Supp. at 337, n.7*

(quoting *Robbins, supra, 437 U.S. at 229–30).* The focus must be on a particular record — not the file. The thrust of the 1974 amendments, after all, was to put an end to the mechanical, rigid, wooden granting of exemption to all materials found in any investigatory file.

By the same token, however, there is no basis to read Senator Hart's statements as implying the creation of any new wooden rigid rules for the application of Exemption 7 — including a litmus test that would require the release of any materials *originally* compiled by a government agency for a purpose other than law enforcement *no matter how* such materials are presently being used. As one court has noted in holding documents currently "performing" in a law enforcement proceeding to be covered under Exemption 7, and in rejecting an argument similar to [**39] the one being promoted by plaintiff Gould:

> The documents sought in the instant action, though unsolicited when first received, have become an important part of the record compiled by the FTC for an ongoing investigation. To follow the logic of the plaintiff and exclude these documents from the scope of exemption 7(A) simply because of the manner in which they were received, and despite the fact that they were, at the time requested, an important element in the record of an active investigation, would be to exalt form over substance and to defeat the purpose for which the amendment was enacted.

*Fedders, supra, 494 F. Supp. at 328.* n30 In short, regardless of how the government originally comes into the possession of documents or information, where those:

> . . . documents or information are later compiled into a record for a pending or active investigation, and such investigation is pending or active at the time the request is made, disclosure may be withheld under exemption 7(A).

*Id*. (footnote omitted).

> n30 *See also New England Medical Center v. NLRB, 548 F.2d 377, 386 (1st Cir. 1977)* (fact that records now relevant to an ongoing investigation were originally generated in a different, closed investigation not germane to whether release will interfere with pending proceeding).

[**40]

Neither Senator Hart nor any of the other legislators who enacted the 1974 amendments could have envisioned the amendments as requiring the release of, for instance, *every* routine meat inspection report or *every* routinely generated medicare nursing home report — even if such a report had become an integral part of a top secret highly important law enforcement investigation. As discussed above, the amendments were not intended to effect Exemption 7's central purpose of avoiding interference with law enforcement functions — and constructions of the amendments which attribute such an effect to them are without foundation in the legislative history. n31

> n31 It may be true that "the term 'record' was not substituted for 'file' to overrule any specific judicial result, but rather [was] based on an apprehension that courts might also liberally construe the types of materials protected by exemption 7." *Hatcher, supra, 556 F. Supp. at 337, n.7.* Nevertheless, there is no evidence that the amendments in general, or the substitution of the word "record" for the word "file," in particular, were designed to insure a crabbed construction of the types of materials protected by Exemption 7. The amendments to Exemption 7 were drafted to clarify, not alter the requirements of the 1966 Act — insofar as they dealt with the threshold compiliation issue. In fact, support for this view is found in *Hatcher*, where the court acknowledges, (albeit in the process of denying coverage under Exemption 7 as originally crafted), that the 1974 amendments were not the basis in that case for holding the documents at issue not exempt from the FOIA. *Id*.

[**41]

[*703] Therefore, leaving aside the issue of whether the audit reports which plaintiff seeks were initially drafted as part of an investigation that had by the time of their drafting become law enforcement in nature, the reports are now an integral part of an ongoing criminal investigation. The present inclusion of these audit reports in the investigatory record or file is the result of the natural and legitimate progression of materials underlying a routine audit — after that audit uncovered potential criminal wrongdoing — to a law enforcement file. n32 These materials therefore are covered by Exemption 7 if their disclosure would interfere with an ongoing criminal investigation. It is to that issue which I now turn.

> n32 This characterization of the events that have transpired in this case obviously presupposes that the GSA authorities are acting in the utmost good faith. There is nothing in the record to indicate that anything other than the natural progression of

> events has actually taken place. And there is nothing to suggest that the government has initiated the investigation of Gould as a pretext to avoid disclosure of the materials plaintiff seeks. *See e.g. New England Medical Center Hospital v. NLRB, 548 F.2d 377, 385 (1st Cir. 1976)* ("This is not a case where an agency seeks to bury files which have served their purpose. . .").

[**42]

B. *Disclosure of the Requested Materials Would Interfere With a Law Enforcement Investigation*

The government also has the burden of establishing that release of the requested records "could reasonably be expected to interfere with enforcement proceedings." *5 U.S.C. § 552* (b)(7)(A); *Bevis v. Department of State, 255 U.S. App. D.C. 347, 801 F.2d 1386, 1388 (D.C. Cir. 1986).* n33 In "carrying its burden of demonstrating how the release of the withheld documents would interfere" with the investigation of Gould, the GSA "need not proceed on a document–by–document basis." *Bevis v. Department of State, 255 U.S. App. D.C. 347, 801 F.2d 1386, 1389 (D.C. Cir. 1986).* Rather, GSA may take a "generic approach,"

> grouping documents into relevant categories that are "sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.' The hallmark of an acceptable . . . category is thus that it is *functional*; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."

*Bevis, supra, 801 F.2d at 1389* (quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C.* [**43] *Cir. 1986); Campbell v. Department of Health and Human Services, 221 U.S. App. D.C. 1, 682 F.2d 256, 265 (D.C. Cir. 1982)).* In short, the GSA must accomplish a "three–fold task":

> First, it must define its categories functionally. Second, it must conduct a document–by–document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.

*Bevis, supra, 801 F.2d at 1389–90.* n34

> n33 The 1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings by requiring the government to show merely that production of the requested records "could reasonably be expected" to interfere with enforcement proceedings rather than requiring a showing that release "would" interfere with such proceedings. *See* Pub. L. 99–570.
>
> n34 The functional test set forth in *Bevis* and *Crooker* steers a middle ground between the detail required by a so–called "*Vaughn* Index" and the sort of "blanket exemption" prohibited by Congress in 1974. *See e.g. Robbins supra, 437 U.S. at 236* ("generic determinations of likely interference" sufficient); *Curran, supra, 813 F.2d at 475* (". . . in the environs of Exemption 7(A) . . . provision of the detail which a satisfactory *Vaughn* Index entails would itself breach the dike. In such straitened circumstances, the harm which the exemption was crafted to prevent would be brought about in the course of obtaining the exemption's shelter. The cure should not itself become the carrier of the disease."); *Crooker, supra, 789 F.2d at 67* (withholdings must be justified "cateogry–of–document by category–of–document . . . not . . . file–by–file"); *Hatcher, supra, 556 F. Supp. at 333* ("It is not necessary, under exemtion 7, to show that interference with enforcement proceedings is likely to occur in this case if those documents are disclosed. It is enough if the [defendant] has made a generic showing that disclosure of those particular kinds of investigatory records would generally interfere with enforcement proceedings.").

[**44]

In this case, the GSA has completed satisfactorily this three–fold task. It has explained [*704] its decision to withhold the requested materials in sufficient detail for this court to understand how disclosure would likely interfere with its ongoing investigation of Gould. According to defendant, the requested documents contain the names of witnesses and sources of information. They also consist of records provided by these sources. These sources are unknown to Gould. n35 The documents also contain the opinions and reasoning of the principal auditor, Duvernay, regarding his suspicions of fraud. n36

> n35 *See* Cavallo Declaration at para. 7.
>
> n36 *See* Cavallo Declaration at para. 8. Defendant also emphasizes that "the names and information provided [by confidential sources] are woven throughout the audit documents and cannot be effectively edited or segregated." Cavallo Declaration at para. 7.

Production of these records to Gould, the target of an ongoing criminal investigation, would interfere with the enforcement proceeding in several ways. First, disclosure would have a chilling effect on potential witnesses. It would also increase the possibility of interference with witnesses. [**45] The fact that Gould employees are the source of information increases the likelihood of both such chilling and such interference. Second, disclosure would reveal the nature and focus of the investigation and would provide Gould with the opportunity to unduly interfere with the natural progression of the investigation. n37

n37 *See generally* Cavallo Declaration at paras. 7–8 (explaining likely impact of disclosure on government's investigation of Gould).

Plaintiff, however, contends there are two reasons unique to this case that should permit Gould to have access to the requested materials. First, plaintiff argues that many of the requested documents underlying the audit reports which are now in the government's possession were taken from Gould's files. Disclosure therefore would be ostensibly harmless. Second, plaintiff claims that at some point, one of its employees, Mr. Carbone, was permitted to review a draft of one of the post–award audit reports. (Defendant contests that allegation and asserts that Mr. Carbone was only allowed to review a sales reconciliation analysis which was not part of the draft audit report. *See generally* Duvernay Declaration at paras. 15–16.) As a result, plaintiff contends, "it is difficult to comprehend how renewed disclosure of the document could compromise or in anyway interfere with enforcement proceedings." Plaintiff's Reply at 23.

Neither of these factors has any special significance. The disclosure of a witness' own statements or records has been refused previously pursuant to Exemption 7(A). *See e.g. Willard v. Internal Revenue Service, 776 F.2d 100, 103 (4th Cir. 1985); Linsteadt v. Internal Revenue Service, 729 F.2d 998 (5th Cir. 1984)* (taxpayers refused access to memorandum of factual statements made by them to I.R.S. agent because release would impair Service's administration of tax laws and interfere with enforcement proceedings). As the *Willard* court emphasized, disclosure of which records were selected by investigators from the universe of available materials for copying or compiling would reveal the nature, scope and focus of the government's investigation. *Willard, supra, 776 F.2d at 103.* Moreover, disclosure would provide Gould with clues about the identity of the government's sources.

[**46]

This sort of interference with an ongoing criminal investigation is precisely what Exemption 7 is designed to prevent. As the Supreme Court stated in *Robbins*:

> The most obvious risk of "interference" with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change testimony or not testify at all . . . even without intimidation or harassment a suspected violator with advance access to the Board's case could "'construct defenses which would permit violations to go unremedied.'"

*437 U.S. at 239, 241* (citations omitted). The same risks are present in the context of an ongoing criminal investigation. *See also Hatcher, supra, 556 F. Supp. at 333, n.1; New England Medical Center Hospital v. NLRB, 548 F.2d 377, 383 (1st Cir. 1977).*

The FOIA was not enacted, nor was it ever designed to be a discovery device for a target of a criminal investigation. n38 One of [*705] the principal purposes behind Congress' adoption of Exemption 7(A) was "to prevent a litigant from utilizing the FOIA to obtain premature access to the evidence and strategy to be used by [**47] the Government in the pending law enforcement proceeding." *Fedders, supra, 494 F. Supp. at 329; Robbins, supra, 437 U.S. at 242* (". . . FOIA was not intended to function as a private discovery tool . . ."). Premature release of the information requested by Gould "would tend to show a litigant the 'outer limits of the [Government's] case,' and thereby allow him to 'anticipate the [Government's] presentation of evidence. " *Fedders, supra, 494 F. Supp. at 329* (quoting *New England Medical Center Hospital, supra, 548 F.2d at 383); Hunt v. Commodity Futures Trading Commission, 484 F. Supp. 47, 50 (D.D.C. 1979).* Plaintiff cannot be permitted to use the Act "as a means of obtaining the release of information which would be protected from discovery in a pending or prospective enforcement proceeding." *Fedders, supra,* (quoting *Kanter v. Internal Revenue Service, 433 F. Supp. 812, 824 (N.D.Ill. 1977).* Production of the records requested by Gould would result in the very harms to enforcement proceedings against which Exemption 7 is designed to protect. To grant plaintiff's unwarranted FOIA request in this case, therefore, would result in a perversion of the [**48] Act, and could eventually result in a curtailment of the Act to the ultimate

detriment of those in legitimate need of its protection.

n38 As the Supreme Court stated in *Robbins*, "foremost among the purposes of this Exemption [7] was to prevent 'harm [to] the Government's case in court,' by not allowing litigants 'earlier or greater access' to agency investigatory files than they would otherwise have." *Robbins, supra, 437 U.S. at 224–25* (citations omitted).

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted. An appropriate Order accompanies this Opinion.

Dated: 6/1/88

ORDER

Having considered the defendant's motion for summary judgment, the plaintiff's motion for summary judgment, the oppositions thereto, the entire record in this proceeding, and for the reasons stated in the Memorandum Opinion issued this day, defendant's motion for summary judgment is hereby GRANTED.

This case is therefore ORDERED to be DISMISSED.

Dated: 6/1/88

LEXSEE 484 FSUPP 884

**UNITED STATES OF AMERICA, Petitioner, v. ART METAL–U.S.A., INC., et al, Respondents.**

**Civ. A. No. 80–21**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

***484 F. Supp. 884; 1980 U.S. Dist. LEXIS 9019; 80–2 U.S. Tax Cas. (CCH) P9673; 46 A.F.T.R.2d (RIA) 5433***

**February 27, 1980**

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:**

Robert J. DelTufo, U. S. Atty. by Robert Beller, Asst. U. S. Atty., Newark, N. J., for petitioner.

Slavitt, Fish & Cowen, P. A. by Martin H. Cowen, Newark, N. J., for respondents.

**OPINIONBY:**

FISHER

**OPINION:**

[*885]

OPINION

This action involves a petition filed by the United States, on behalf of the Inspector General of the General Services Administration, to enforce a subpoena duces tecum for certain tax and related business [**2] records of respondents Art Metal–U.S.A., Inc. and Steel Sales, Inc., Art Metal's wholly–owned subsidiary. The Inspector General seeks the objects of the subpoena in connection with an investigation of payoffs and other fraudulent practices allegedly involving Art Metal as well as other government contractors. Respondents were ordered to show cause why the subpoena should not be enforced.

The court offered the parties an evidentiary hearing concerning enforcement but both sides have agreed to have the matter decided on the basis of the submitted memoranda, affidavits and oral argument.

Respondents resist enforcement on three grounds. They contend (1) that a third–party [*886] administrative subpoena cannot be enforced where there is pending a parallel criminal investigation of the target of the administrative inquiry; (2) that enforcement would violate the public policy manifested in *I.R.C. § 6103*; and (3) that the subpoenaed documents are beyond the scope of the Inspector General's subpoena power. For the following reasons the court rejects all of respondents' arguments and rules that the subpoena shall be enforced.

1. The LaSalle objection.

Respondents rely principally on [**3] *United States v. LaSalle National Bank, 437 U.S. 298, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978)* for their claim that the likelihood or imminence of criminal proceedings renders enforcement of a related administrative subpoena impermissible. LaSalle came before the Supreme Court as a result of confusion among the circuits concerning the circumstances under which IRS summonses could be enforced. See *id. at 305, 98 S. Ct. at 2362*. Third Circuit cases preceding LaSalle involved questions of the enforceability of such summonses before commencement of criminal actions and, although not squarely presented with the question of enforcement after the criminal process had begun to run, the clear import of the reasoning of those pre–LaSalle cases is that post–commencement enforcement is flatly prohibited. See *United States v. Lafko, 520 F.2d 622, 624–25 (3d Cir. 1975); United States v. McCarthy, 514 F.2d 368, 371 (3d Cir. 1975); United States v. Fisher, 500 F.2d 683, 687–88 (3d Cir. 1974)*, aff'd, *425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)*. In LaSalle the Supreme Court appeared to agree with the Third Circuit and to lay down an absolute prohibition on the enforcement of IRS summonses once [**4] the criminal process has effectively been commenced. *LaSalle, supra at 311–14, 316–18, 98 S. Ct. at 2365–66, 2367–68.* See also SEC v. Dresser Industries, Inc., No. 78–1702, slip op. at 13 (D.C. Cir. Nov. 19, 1979) ("In LaSalle, the Court agreed that in no case did § 7602 authorize a summons after the IRS had recommended prosecution.") (emphasis supplied).

The Third Circuit has recently placed upon LaSalle the following gloss. Once the IRS has formally recom-

mended prosecution to the Justice Department, IRS summonses may not be enforced in any case. *United States v. Garden State National Bank, 607 F.2d 61, 69–70 (3d Cir. 1979).* However, if there has been merely an institutional (i. e., intra–agency) commitment to refer the matter to Justice, but no formal recommendation, then a summons may be enforced unless the party opposing enforcement is able to show that there is no civil purpose for the summons. *United States v. Genser, 602 F.2d 69, 71 (3d Cir. 1979).*

Applying the Genser construction of LaSalle to administrative summonses or subpoena outside the IRS context, it is clear that the mere likelihood or even the imminence of criminal proceedings does not bar enforcement of a civil [**5] summons or subpoena so long as (1) the agency in question has not itself made a formal recommendation to the Justice Department to prosecute; and (2) the summons or subpoena has a civil purpose.

In the instant case there is no evidence that the Inspector General has formally recommended that the Justice Department prosecute Art Metal. In addition, Art Metal has failed to carry its burden of disproving that the Inspector General's subpoena has a civil purpose. See *Garden State, supra, 607 F.2d at 69.* The Inspector General has the responsibility and the power to conduct, supervise and coordinate audits and investigations relating to GSA programs in order to promote efficiency and to prevent fraud and abuse. See 5 U.S.C. App. I § 4(a)(1) & (3). Unlike the IRS, which by statute loses its power to continue civilly once the Justice Department begins to move criminally (see *I.R.C. § 7122(a)*), the Inspector General's powers are not so limited. See generally 5 U.S.C. App. I § 4(a)(1) & (3). This independence of the Inspector General in relation to the Department of Justice is to be contrasted with the relationship between IRS and Justice, [*887] which historically has been an extremely [**6] close one. See, e.g., *LaSalle, supra, 437 U.S. at 307–13, 98 S. Ct. at 2362–65.* Given the Inspector General's relative independence, the court concludes that, under *Genser, supra,* the likelihood or imminence of criminal proceedings to be commenced independently (and not at the behest) of the administrative agency is no bar to enforcement of the subpoena here at issue. See also *United States v. First National State Bank of New Jersey, 616 F.2d 668, 672 (3d Cir. 1980)* ("Proof of a criminal investigation does not preclude the existence of a civil investigative purpose for the summons, and it is the presence of the latter which is the critical factor, and which must be negated by the . . . (party opposing enforcement).")

2. The Public Policy of *I.R.C. § 6103*.

Respondents' second ground for resisting enforcement of the subpoena is that the public policy underlying *§ 6103 of the Internal Revenue Code* prohibits disclosure of their tax returns to the Inspector General. This argument can be disposed of quickly.

Section 6103 applies to bar disclosure of tax returns or return information by "(any) officer or employee of the United States", *I.R.C. § 6103(a)(1),* once such documents are in [**7] the possession of the United States. Nothing in the statute or in its legislative history can be reasonably regarded as barring any agency of the United States from gaining such documents where relevant to an administrative investigation or to civil discovery. See, e.g., S.Rep.No.94–938, 94th Cong.2d Sess. 315–319, reprinted in (1976) U.S. Code Cong. & Admin. News pp. 2897, 3744–49. Indeed, were this court to accept respondents' unusual "public policy" argument, *I.R.C. § 6103* would effectively change the rules of civil discovery. See *Heathman v. United States District Court for the Central District of California, 503 F.2d 1032, 1035 (9th Cir. 1974);* 4 Moore's Federal Practice P 26.61(5.–2) at 294–96 (2d ed. 1979). In short, § 6103 is not triggered until after the United States comes into possession of tax returns or return information. That is not yet the case in the instant situation.

3. The Scope of the Inspector General's Subpoena Power.

Respondents' third reason for resisting enforcement of the subpoena is that the documents in question are beyond the scope of the Inspector General's subpoena power.

With regard to respondent Art Metal, this argument is meritless. The Inspector [**8] General Act gives the Inspector General the responsibility and authority to conduct and supervise "activities . . . for the purpose of . . . preventing and detecting fraud and abuse" in government programs. 5 U.S.C. App. I § 4(a)(3). It cannot fairly be doubted that acquisition of the tax returns and related documents of a GSA contractor pursuant to an investigation of fraud is within the scope of the Inspector General's powers.

With regard to Steel Sales, Inc., the respondent takes the position that because it is not an express party to the GSA contracts, the Inspector General is exceeding his subpoena power by seeking tax information from it. This argument is also rejected. Administrative agencies vested with investigatory and subpoena powers may compel the production of information and documents from third persons who are not expressly within their regulatory jurisdiction, so long as the information sought is relevant and necessary to the effective conduct of their authorized and lawful inquiry. *Freeman v. Fidelity–Philadelphia Trust Co., 248 F. Supp. 487, 492 (E.D.Pa.1965); FCC v. Cohn,*

*154 F. Supp. 899, 906 (S.D.N.Y.1957)*. See also *Comet Electronics, Inc. v. United States, 381* [**9] *F. Supp. 1233, 1241 (W.D.Mo.1974)*, aff'd, *420 U.S. 999, 95 S. Ct. 1439, 43 L. Ed. 2d 758 (1975)*. Based on the submitted papers and affidavits, the court deems the subpoenaed materials relevant and necessary to the Inspector General's lawful and authorized inquiry and therefore holds that the subpoena as it relates to Steel Sales is enforceable.

[*888] For all of the foregoing reasons the court concludes and rules that the subpoena directed to Art Metal–U.S.A., Inc. and Steel Sales, Inc. shall be enforced. The court is on this date filing an order in conformity with this opinion.

LEXSEE 249 F3D 1077

# UNITED STATES OF AMERICA AND LEONARD KOCZUR, ACTING INSPECTOR GENERAL OF THE LEGAL SERVICES CORPORATION, APPELLEES v. LEGAL SERVICES FOR NEW YORK CITY, APPELLANT

**No. 00–5244**

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

***346 U.S. App. D.C. 83; 249 F.3d 1077; 2001 U.S. App. LEXIS 10793; 50 Fed. R. Serv. 3d (Callaghan) 740***

**April 10, 2001, Argued**
**May 25, 2001, Decided**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the District of Columbia. (00ms0241).

**DISPOSITION:** District court's order granting the petition for summary enforcement affirmed, and the matter remanded for possible further proceedings.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** Carl W. Riehl argued the cause for appellant. With him on the briefs was John S. Kiernan.

Michael S. Raab, Attorney, United States Department of Justice, argued the cause for appellees. With him on the brief were Wilma A. Lewis, United States Attorney at the time the brief was filed, and Mark B. Stern, Attorney.

Laura K. Abel, David S. Udell, and Philip G. Gallagher were on the brief for amici curiae New York State Bar Association, et al., in support of appellant.

**JUDGES:** Before: GINSBURG and HENDERSON, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

**OPINIONBY:** SILBERMAN

**OPINION:**

[*1079] SILBERMAN, *Senior Circuit Judge*: The Inspector General of the Legal Services Corporation petitioned for summary enforcement of a subpoena to appellant Legal Services of New York City. The district court granted the petition, and appellant now seeks review. We affirm.

**I.**

Appellant provides legal services [**2] to the poor. Each year, it and other grantees receive multi–million–dollar federal grants administered through the non–profit Legal Services Corporation. In a series of audits beginning in 1998, the Corporation's Inspector General discovered improprieties in some grantees' reports to the Corporation—most commonly, overstatement of the number of cases handled and failure to keep adequate records. That led the General Accounting Office to audit five grantees, including appellant, and it concluded that of the 221,000 cases reported by these grantees, "approximately 75,000 ... were questionable." Expressing "concerns" about the inaccuracies in grantees' reports, a Congressional committee requested that the Inspector General "assess the case service information provided by the grantees" and "report ... no later than July 30, 2000, as to its accuracy." n1

n1 H.R. CONF. REP. NO. 106–479 (1999).

The Inspector General then required 30 grantees, including appellant, to produce for inspection two different sets of data [**3] on the cases they had reported closed during 1999. The first production, or "data call," required that for each case, identified only by case number, the grantee must select [*1080] one of 52 "problem codes" to describe the subject matter of the representation. The problem codes vary from the specific—"Parental Rights Termination," "Black Lung"—to the general—"Education," "Contracts/Warranties"—and the catch–all—"Other Individual Rights," "Other Miscellaneous." Appellant complied with the first data call.

The second data call required that for each case, again

identified only by case number, grantees identify their client. Appellant, along with one other grantee, refused to comply. It informed the Inspector General that, absent client consent, both attorney–client privilege and its attorneys' professional obligations prevented it from disclosing client names associated with case numbers, because to do so would allow the Inspector General to match client names with the problem codes previously produced. That linkage, appellant argued, would impermissibly reveal the subject matter of clients' representations. Though the Inspector General disagreed that production was barred, he nevertheless [**4] proposed to set up a so–called "Chinese wall"—separate staffs, equipment, storage, etc.—to prevent any linkage. The Inspector General then issued subpoenas for the data. Appellant refused to comply, and the Inspector General petitioned the district court for summary enforcement.

The district court granted the petition. It rejected appellant's blanket claim of attorney–client privilege as insufficient to demonstrate privilege regarding any given record. The court also turned aside appellant's claim based on professional obligations, holding that the subpoenas were within the Inspector General's statutory powers. Appellant had contended that the subpoenas were in addition unduly burdensome because the same verification could be performed without the damage this disclosure might cause to clients' perceptions of confidentiality, but the court deferred to the Inspector General as to requirements of the audit. n2 Appellant renews its arguments here.

n2 *See United States v. Legal Services, 100 F. Supp. 2d 42 (D.D.C. 2000).*

[**5]

**II.**

The Inspector General contends, and the district court agreed, that appellant has not made out a valid claim of privilege. In rejecting appellant's unparticularized assertion of attorney–client privilege, the court stated that its ruling was "not intended to foreclose specific claims of privilege as to individual clients." *100 F. Supp. 2d at 46.* In other words, as to some matters, appellant might be able to introduce contextual information demonstrating that the representation's subject matter is itself confidential. In its reply brief, appellant expressly reserves the right to present particularized privilege claims to the district court in the event that we reject its unparticularized claim. This possibility led us to question our jurisdiction. Appellant asserts that it lies under *28 U.S.C. § 1291,* which authorizes review of district courts' "final decisions," or in the alternative under *28 U.S.C. § 1292*(a)(1), which provides for interlocutory appeals from district court orders regarding injunctions.

We find no authority for treating an order enforcing a subpoena as an injunction appealable under § 1292(a)(1). [**6] Courts have consistently held that grand jury and civil subpoenas are not injunctions appealable under that provision. *See, e.g., United States v. Ryan, 402 U.S. 530, 534, 29 L. Ed. 2d 85, 91 S. Ct. 1580 (1971).* Review is instead procured by refusing to comply and litigating the subpoena's validity in the contempt proceeding that ensues. *See id. at 532; Office of Thrift Supervision v. Dobbs, 289 U.S. App. D.C. 318, 931 F.2d 956, 957* [*1081] *(D.C. Cir. 1991).* Administrative subpoenas are horses of a slightly different color, since upon noncompliance the issuing agency seeks enforcement in the district court. *See 5 U.S.C. app. 3* § 6(a)(4); *Kemp v. Gay, 292 U.S. App. D.C. 124, 947 F.2d 1493, 1496 (D.C. Cir. 1991).* The ensuing district court order, either granting or denying enforcement, is appealable under § 1291 once final. *See 947 F.2d at 1497.* In light of that there is even less reason to regard an administrative subpoena, either before or after enforcement, as an injunction.

Section 1291, which authorizes appeals of district courts' final decisions, presents a more viable jurisdictional ground. [**7] As noted, orders enforcing administrative subpoenas are appealable under § 1291 once final. *See FTC v. Invention Submission Corp., 296 U.S. App. D.C. 124, 965 F.2d 1086, 1089 (D.C. Cir. 1992).* Here, however, the district court has indicated its willingness to entertain particularized claims of privilege. *See 100 F. Supp. 2d at 46.* So it can be asked why the order is final. The answer lies in the breadth of appellant's claim. It argues that the privilege properly understood allows it to refuse to provide any more justification for invoking the privilege than it has. It is not obliged to offer a particularized showing in individual situations. Since this argument is phrased so broadly, it follows that the district judge's rejection of it is final even though he offers the possibility of more limited relief in individual cases. That is so because under appellant's view of the scope of the privilege his order would encroach on the privilege.

The considerations we employ to evaluate finality are more practical than technical and do not require that the order appealed be the last order possible in the matter. *See Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 13 L. Ed. 2d 199, 85 S. Ct. 308 (1964);* [**8] *In re Grand Jury Investigation, 196 U.S. App. D.C. 8, 604 F.2d 672, 674 (D.C. Cir. 1979)* (per curiam). n3 In this case, the matters potentially remaining to be resolved below are substantively different than the claims disputed on appeal, would arise if at all only upon rejection of the appealed claims, and would require of appellant a

potentially onerous effort. In other words, the potential inefficiencies of a piecemeal appeal do not outweigh the "danger of hardship and denial of justice through delay." *Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 94 L. Ed. 299, 70 S. Ct. 322 (1950).* Insofar as appellant contends that the current record justifies an assertion of privilege without particularized showings, we have jurisdiction over that claim.

> n3 *See also FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 873 n.21 (D.C. Cir. 1977)* (en banc) (adopting the jurisdictional reasoning of the vacated panel decision, *see FTC v. Texaco, Inc., 170 U.S. App. D.C. 323, 517 F.2d 137, 143 n.6 (D.C. Cir. 1975)).* For example, where the district court has ordered a subpoena's subject either to comply or to produce a privilege log, we have nonetheless entertained an appeal of claims that would negate the need for such a decision. *See Resolution Trust Corp. v. Thornton, 309 U.S. App. D.C. 384, 41 F.3d 1539, 1541–42 (D.C. Cir. 1994).*

[**9]

Unfortunately for appellant, although its claim is phrased broadly enough to provide us jurisdiction, its very breadth is untenable. Courts have consistently held that the general subject matters of clients' representations are not privileged. *See, e.g., In re Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000).* Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged. To be sure, there are exceptions, but as always the burden of demonstrating the applicability of the privilege lies with those asserting it. *See In re Lindsey, 332 U.S. App. D.C. 357, 158 F.3d 1263, 1270 (D.C. Cir. 1998)* (per curiam); *cf. In re Sealed Case, 278 U.S. App. D.C. 188, 877 F.2d 976, 979–80* [*1082] *(D.C. Cir. 1989).* That burden requires a showing that the privilege applies to each communication for which it is asserted, *see Lindsey, 158 F.3d at 1270–71,* which, of course, appellant has not done.

* * * *

We turn to appellant's contention that the subpoena conflicts with its attorneys' professional obligations and is unduly [**10] burdensome, which the district court flatly rejected. Appellant explains that New York State and American Bar Association ethics rules protect both privileged information, discussed above, and unprivileged information deemed "secret." *See* MODEL RULES OF PROF'L CONDUCT 1.6 cmt. 5 (1999); N.Y. CODE OF PROF'L RESPONSIBILITY DR 4–101(A) (2000). Those rules preclude attorneys from revealing *any* information—privileged or not—relating to the representation of a client who has not consented to the disclosure, particularly where that information would be embarrassing or detrimental to the client. *See* MODEL RULE 1.6(a); DR 4–101(B)(1). n4 The Legal Services Corporation Act of 1974 authorizes the Corporation to supervise grantees' compliance with applicable laws. *See 42 U.S.C. § 2996e*(b)(1)(A). In doing so, however, the Corporation generally must respect the professional responsibilities incumbent on grantees' attorneys:

> The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional [**11] Responsibility of the American Bar Association ... or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

*Id.* § 2996e(b)(3). The Inspector General, because he bears the burden of auditing and investigating grantees, is granted broad subpoena powers. *See 5 U.S.C. app. 3* § 4(a)(1), 6(a)(4). He also enjoys a limited exception to § 2996e(b)(3)'s restrictions:

> *Notwithstanding section [ 42 U.S.C. § 2996e(b)(3)]*, financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, ... except for reports or records subject to the attorney–client [**12] privilege.

Omnibus Appropriations Act of 1996, Pub. L. No. 104–134, § 509(h), 110 Stat. 1321, 1321–59 (emphasis added). n5

> n4 Both rules exempt disclosures required by court order. *See* MODEL RULE 1.6 cmt. 20; DR 4–101(C)(2). If the subpoena is within the Inspector General's power, then disclosure is consistent with appellant's ethical obligations.

n5 Congress has incorporated § 509(h) by reference into subsequent appropriations bills. *See, e.g.*, Consolidated Appropriations Act of 2000, Pub. L. No. 106–113.

The Inspector General contends that § 2996e(b)(3) is not even applicable because it restricts actions taken under the Legal Services Corporation Act, while his subpoena authority arises under the Inspector General Act. We think that argument is far–fetched. The Office of the Inspector General is an arm of the Corporation that "insures the compliance of recipients and their employees" with applicable law. *42 U.S.C. § 2996e*(b)(1)(A); *see 5 U.S.C. app. 3* [**13] § 8G(b). Although the Office was created after the Corporation, [*1083] § 2996e delineated ethical obligations binding on the *entire* Corporation. *See generally 42 U.S.C. § 2996e.*

Auditing the Legal Service Corporation's grantees poses ethical concerns not ordinarily presented to a government auditor. On the specific question of what materials an auditor *of the Corporation's grantees* may subpoena, § 509(h) is our only guidance. Unlike the Inspector General Act, it focuses on the ethical obligations owed by those who audit the Corporation's grantees. Since § 509(h) explicitly exempts auditors *of* the Corporation from § 2996e(b)(3), which applies only *to* the Corporation, the necessary implication is that § 2996e(b)(3) applies to auditors of the Corporation that are themselves part of the Corporation—that is, to the Inspector General. We therefore read §§ 509(h) and 2996e(b)(3) to impose obligations on the Inspector General with regard to both privileged and secret materials.

That is hardly the end of the matter. The restrictions in § 2996e(b)(3) notwithstanding, § 509(h) explicitly authorizes auditors of the Corporation to compel production [**14] of "time records, retainer agreements, ... and client names." The Corporation's own regulations require that retainer agreements "shall clearly identify ... the matter in which representation is sought [and] the nature of the legal services to be provided." *45 C.F.R. § 1611.8(a)*. Disclosure of retainer agreements associated with client names would reveal exactly the sort of information appellant refuses to disclose: the general matter of individual clients' representations. n6

n6 The Corporation's regulation on retainer agreements provides that a grantee "shall make the agreement available for review by the Corporation *in a manner which protects the identity of the client*." *45 C.F.R. § 1611.8(a)* (emphasis added). This is consistent with § 2996e(b)(3)'s protection of client confidences and secrets and is therefore the general policy of the Corporation. But § 509(h) is an explicit exception to § 2996e(b)(3), so while the Corporation's mandate for the contents of retainer agreements informs our analysis, its general regulation regarding protection of client identity cannot trump a more specific—and contrary—statutory provision.

[**15]

Appellant suggests that the required disclosures nonetheless do not require disclosure of retainer agreements in a way that matches agreement to client. But appellant's construction of § 509(h) is unnatural: if Congress had intended to require production of "time records, retainer agreements, ... and client names" only when disassociated from one another, surely it would have said so in terms different from the simple conjunctive phrasing in § 509(h). We think this is the only sensible reading of § 509(h) in the context of the Inspector General's audits of individual representations. Nevertheless, appellant claims that the Inspector General lacks authority to compel production of case numbers. Yet unique identifiers associating clients with their records are part and parcel of responsible legal practice. They are an integral constituent part of the very records to which § 509(h) refers. *See, e.g., 45 C.F.R. § 1635.3(b)(2)*. The lack of an explicit statutory reference does not protect them from production. Since we conclude that grantees' ethical obligations do not prevent the Inspector General from compelling production of client names associated [**16] with problem codes, we need not reach the sufficiency of the Chinese wall instituted to prevent that association.

Appellant's last redoubt is the claim that the subpoena is unduly burdensome. We enforce subpoenas as long as they are "reasonably relevant" to the agency's purpose and "not unduly burdensome." *Invention Submission Corp., 965 F.2d at 1089* (internal quotation marks [*1084] omitted). Appellant eschews the usual complaint about *administrative* burden, *see, e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 303 U.S. App. D.C. 316, 5 F.3d 1508, 1517 (D.C. Cir. 1993)*, and instead has a novel theory: it objects to the harm that disclosure of client secrets will do to its ability to assure clients of the secrecy of their communications. It argues that it could generate an identifier code that is unique to each client but does not reveal his or her identity, and that these identifiers would serve the Inspector General's purposes just as well as client names.

Frequently, concerns over burden are related to relevance: in determining whether a burden is due, courts often examine its tailoring to the purpose for which [**17] the information is requested—that is, its relevance. *See*

*FTC v. Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 882 (D.C. Cir. 1977)* (en banc); *Dow Chem. Co. v. Allen, 672 F.2d 1262, 1269–70 (7th Cir. 1982).* Still, appellant makes both arguments, and we treat burden and relevance separately because subpoenas might be relevant but still unduly burdensome. *See In re FTC Line of Bus. Report Litig., 193 U.S. App. D.C. 300, 595 F.2d 685, 704 (D.C. Cir. 1978)* (per curiam).

Actually, appellant wishes to undertake a greater administrative burden—production plus creation of unique client identifiers—in order to lessen the alleged professional detriment created by the subpoena. That "burden" would be undue if "compliance threatened to unduly disrupt or seriously hinder normal operations." *FTC v. Texaco, 555 F.2d at 882.* This subpoena does not. As discussed, it is wholly consistent with the rules governing client secrets and generally consistent with the attorney–client privilege, so it in no way alters the degree of secrecy appellant can justifiably promise its clients. The Chinese wall renders unlikely the possibility that [**18] any secrets will be disclosed. Even in that event, the information disclosed would be only the subject matter of the representation as stated in broad terms. We cannot say that the remote possibility of a linkage between client identity and problem code "unduly disrupts or seriously hinders" appellant's provision of legal services.

To justify its proposed modification, appellant asserts that actual client names are irrelevant to the Inspector General's purpose. The Inspector General of course disagrees, and we defer to his determinations of relevance unless they are obviously wrong. *See Invention Submission Corp., 965 F.2d at 1089.* The Inspector General asserts that "the most reliable way to detect errors and irregularities in grantee case reporting [is] to obtain the actual client names themselves." He further contends that the proposed unique client identifiers would require expensive and time–consuming independent verification—which would, in any event, probably reveal the information appellant wishes to conceal. We certainly cannot say that the Inspector General is obviously wrong.

* * * *

The district court's order granting the petition for summary enforcement [**19] is affirmed, and the matter is remanded for possible further proceedings.

*So ordered.*

LEXSEE 831 F2D 1142

**United States of America v. Aero Mayflower Transit Co., Inc., et al., Appellants Global Van Lines, Inc.**

**No. 86-5674**

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

***265 U.S. App. D.C. 383; 831 F.2d 1142; 1987 U.S. App. LEXIS 14342; 1987-2 Trade Cas. (CCH) P67,740***

**September 17, 1987, Argued**
**October 30, 1987, Decided**

**PRIOR HISTORY:** [**1]

Appeal from the United States District Court for the District of Columbia, (Misc. No. 86-00281).

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:**

Joseph Brooks, with whom William L. Gardner was on the brief for Appellants Allied Freight Forwarding, Inc., et al.

James A. Calderwood, with whom Edward J. Kiley was on the brief for Appellants Aero Mayflower Transit Co., Inc., et al.

Thomas M. Auchincloss, Jr., and Leo C. Franey were on the brief for Appellant Bekins Van Lines Company.

Joan E. Hartman, Attorney, Department of Justice, with whom Richard K. Willard, Assistant Attorney General, Joseph E. diGenova, United States Attorney, and Michael F. Hertz, Attorney, Department of Justice, were on the brief for the Appellee. John Bates, Assistant United States Attorney, also entered an appearance for the Appellee.

**JUDGES:**

Mikva and Silberman, Circuit Judges, [**2] and Kozinski, * Circuit Judge, United States Court of Appeals for the Ninth Circuit. Opinion for the Court filed by Circuit Judge Silberman.

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

**OPINIONBY:**

SILBERMAN

**OPINION:**

[*1143] SILBERMAN, Circuit Judge

Appellants, a number of interstate van lines, challenged subpoenas duces tecum issued by the Inspector General of the Department of Defense in support of an investigation into allegations of collusion and price fixing with respect to Department of Defense moving and storage contracts. Refusing to comply with the subpoenas, appellants asserted that they were themselves the victims of collusion; in the enforcement proceeding below, they sought limited discovery and an evidentiary hearing to establish that the Inspector General was not conducting an independent investigation but was serving as a mere conduit for an investigation by the Justice Department's Antitrust Division by lending out the Inspector General's subpoena power.

The district court declined to permit discovery and granted the United States' motion for summary enforcement of the administrative subpoenas. *United States v. Aero-Mayflower Transit Co., 646 F. Supp. 1467 (D.D.C. 1986).* [**3] The van lines appeal that ruling, contending that the district court applied an incorrect legal standard in [*1144] examining only whether the Inspector General had statutory authority to issue the subpoenas rather than also inquiring into the propriety of the purpose for which they were issued, an inquiry that might justify discovery. We agree with the district court that appellants are not entitled to discovery, and we reject appellant Bekins Van Lines' ("Bekins") contention that the involvement of the military in the administration of the subpoenas transgresses a constitutional proscription of the use of the Armed Forces in domestic law enforcement. Consequently, we affirm the enforcement order.

**I**.

Because this case involves summary enforcement proceedings, the factual record is not fully developed. The contours of the dispute are, nevertheless, clear. For at least three years prior to the issuance of the district court's enforcement order, the Antitrust Division of the Justice Department had been investigating alleged anticompetitive practices in the moving and storage industry. This examination led to the return of five indictments and one prosecution by information [**4] of local moving and storage companies for price fixing. The Inspector General instituted his own investigation in September of 1985 into possible "anticompetitive activity in certain industries" that contract with the Defense Department. Sometime thereafter, the Inspector General targeted the moving and storage industry for further investigation.

In that same fall — although it is unclear whether before or after the Inspector General focused on the moving and storage industry — the Antitrust Division and the Federal Bureau of Investigation suggested to the Inspector General a cooperative investigation into the price-fixing allegations. Having agreed to that investigation, the Inspector General signed, on April 10, 1986, 377 subpoenas directed to interstate van lines and their local agents.

Appellant van lines informed the Inspector General that they would not comply with the subpoenas, and the government petitioned for summary enforcement on August 14, 1986. Appellants adduced several affidavits to show that the Inspector General had simply "rubber stamped" the subpoenas and thus improperly delegated his authority to the Justice Department. The affidavits recite that on numerous [**5] occasions recipients of the subpoenas who sought extensions of time or clarifications from Defense Department personnel were told that the latter had no independent authority so to act and were referred to the Justice Department. The affidavits further state that Justice Department personnel routinely exercised authority to modify the Inspector General's subpoenas and that the documents produced in response to the subpoenas and that the documents produced in response to the subpoenas were to be directly available to the Justice Department, without prior review by the Inspector General. Finally, it is claimed that the Inspector General's investigation was of unprecedented magnitude — suggesting that the Inspector General did not conceive the investigation alone. On the strength of this record, appellants argued below that the subpoenas should be quashed as having been issued for an improper purpose, and requested in the alternative that they be allowed limited discovery and an evidentiary hearing in order to prove that improper purpose by demonstrating that the Inspector General was acting as nothing more than a return agent or document repository for the Justice Department.

The [**6] district court declined to pass on the degree of independence exhibited by the Inspector General, ruling that "an agency need show only that the investigation is within the scope of its authority and that the requested documents are minimally relevant to that inquiry." *646 F. Supp. at 1472.* It also noted that the coordination of the agencies' efforts "is precisely the kind of cooperation that an efficient government should encourage." *Id. at 1471.* It is from that ruling that the van lines appeal.

**II**.

In 1978, Congress, out of concern over governmental inefficiency, created offices of Inspector General in a number of [*1145] departments and agencies. n1 The Report of the Senate Committee on Governmental Affairs on the legislation referred to "evidence [that] makes it clear that fraud, abuse and waste in the operations of Federal departments and agencies and in federally funded programs are reaching epidemic proportions." S. REP. NO. 1071, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2679. The Committee blamed these failures in large part on deficiencies in the organization and incentives of executive branch [**7] auditors and investigators. The Inspectors General were, therefore, to provide intra-agency cohesion and a sense of mission in the struggle against waste and mismanagement as well as to further important communication between agencies: "This type of coordination and leadership strengthens cooperation between the agency and the Department of Justice in investigating and prosecuting fraud cases." *Id.* at 6-7. In service of this end, the Act gives the Inspectors General both civil n2 and criminal n3 investigative authority and subpoena powers coextensive with that authority. n4

n1 The original Inspector General Act, Pub. L. No. 95-452, 92 Stat. 1101 (1978), did not include an Inspector General for the Defense Department. That office was added by amendment in the Department of Defense Authorization Act for 1983. Pub. L. No. 97-252, § 1117(a)(1), 96 Stat. 718, 750 (1982).

n2 *See, e.g., 5 U.S.C. app. § 2*(2) (1982). Such an investigation might lead, for instance, to a decision by an agency to prohibit certain contractors from bidding on agency contracts or a civil suit to recover sums improperly charged the agency.

[**8]

n3 In addition to Senate Report 95–1071, *supra*, which demonstrates that "fraud" was taken to encompass criminal fraud, there are provisions in the Act directing a report to the Attorney General whenever there are grounds to suspect violation of federal criminal law, *5 U.S.C. app. § 4* (d) (1982), and charging the Department of Defense Inspector General with guidance of all Defense Department activities relating to *criminal* investigations, *id.* § 8(c)(5). This latter provision applies only to the Department of Defense Inspector General and is apparently necessary because that office is distinct among Inspectors General in not holding *all* departmental investigative powers. *See* H.R. REP. NO. 749, 97th Cong., 2d Sess. 175–76, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1569, 1581.

n4 The Act appears at *5 U.S.C. app. §§ 1*–12 (1982 & Supps. I–III). In relevant part, it provides:

> In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized —
>
> . . . .
>
> (4) to require by subpena [sic passim] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: *Provided*, That procedures other than subpenas shall be used by the Inspector General to obtain documents and information from Federal agencies.

*5 U.S.C. app. § 6*(a)(4) (1982).

[**9]

As a general proposition, an investigative subpoena of a federal agency will be enforced if the "evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 87 L. Ed. 424, 63 S. Ct. 339 (1943); see also FTC v. Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 871–73* (D.C. Cir.) (*en banc*) (tracing development of this doctrine), *cert. denied, 431 U.S. 974, 97 S. Ct. 2940, 53 L. Ed. 2d 1072 (1977)*. However, a court may inquire into the agency's reasons for issuing the subpoena upon an adequate showing that the agency is acting in bad faith or for an improper purpose, such as harassment. *United States v. Powell, 379 U.S. 48, 58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964)*. Appellants contend that the Inspector General is acting in bad faith or for an improper purpose in this case because the information is actually sought for the Justice Department's Antitrust Division. Appellants rely on *United States v. LaSalle National Bank, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978)*, in which a closely divided [**10] Supreme Court held that the IRS could not use its summons authority solely for a criminal investigation: "The good faith standard will not permit the IRS to become an information–gathering agency for other departments, including the Department of Justice. . . ." *Id. at 317*. But the Court's opinion in *LaSalle* turns entirely on its examination of the IRS's [*1146] statutory summons authority. The Court was unable to find there congressional authorization to use IRS summonses solely for criminal investigations. *Id.* n.18. n5 By contrast, Congress in the statute before us has explicitly *directed* the Inspector General to engage in criminal investigations. *LaSalle* thus appears to us to be totally inapposite. *Cf. In re EEOC, 709 F.2d 392, 399 (5th Cir. 1983)* (refusing to import rule of *LaSalle* into EEOC subpoena enforcement proceeding).

n5 In the wake of *LaSalle*, Congress broadened the IRS's summons power to allow inquiry into any revenue–related offense. *See 26 U.S.C. § 7602*(b)–(c) (1982). Congress noted the costs of protracted litigation at the summons enforcement stage. S. REP. NO. 494, 87th Cong., 2d Sess. 285, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 781, 1031.

[**11]

Appellants also rely on *United States v. Westinghouse Electric Corp., 788 F.2d 164 (3d Cir. 1986)*. That case, however, is simply a variant of *LaSalle*. Westinghouse, a defense contractor, challenged an Inspector General subpoena because it was allegedly issued solely for the benefit of another component of the Defense Department, the Defense Contract Audit Agency. Although the Third Circuit did say that an inquiry into the Inspector General's "motive or intent" was appropriate, that statement is contained in the court's discussion of a Defense Department internal policy memorandum governing the issuance of Inspector General subpoenas at the request of other *Defense Department* audit or investigative units. The memorandum required the Inspector General to "deter-

mine[] the audit or investigation to be in furtherance" of *his* function. *Id. at 169.* The Third Circuit simply noted that the question whether the Inspector General had made this determination might involve examining his motive. In the present case, no such Defense Department policy memorandum or regulation dealing with the Inspector General's relations with the Justice Department [**12] has been brought to our attention. In other words, no body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority.

Nor is there a suggestion of any restriction on the Justice Department's power to obtain through the grand jury process all the information sought by the subpoenas here at issue. The Inspector General subpoenas clearly did not operate to circumvent statutory or other limitations on the Justice Department's investigative powers. The use of Inspector General subpoenas, instead of grand jury subpoenas, did, however, further an important Defense Department interest. Information obtained through a grand jury would not be readily available to the Defense Department in pursuing civil remedies against those who may have defrauded it. *See FED. R. CRIM. P. 6(e)*. The procedure followed by the two Departments of government was, therefore, reasonably calculated to serve the legitimate interests of both.

In sum, we can see no reason for discovery in this case because even if appellants' allegations are taken as true, the subpoenas [**13] were properly enforced. So long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial. n6 To be sure, "discovery may be available in some subpoena enforcement proceedings where the circumstances indicate that further information is necessary for the courts to discharge their duty." *SEC v. Dresser Indus., 202 U.S. App. D.C. 345, 628 F.2d 1368, 1388* (D.C. Cir.) (*en banc*) (upholding parallel investigations by Securities and Exchange Commission and Justice Department), *cert. denied, 449 U.S. 993, 101 S. Ct. 529, 66 L. Ed. 2d 289 (1980).* Those are the circumstances referred to by the Supreme Court in *Powell, 379 U.S. at 58,* where a government agency is acting without authority or where its purpose is [*1147] harassment of citizens. Faced with that (unlikely) situation, the district court has ample discretion to conduct an inquiry, but it "must be cautious in granting such discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of the regulatory [**14] agencies." *Dresser, 628 F.2d at 1388; see also Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975)* ("the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate").

> n6 Were we to conclude that the Inspector General must display an independent judgment as to the issuance of subpoenas, presumably he could now satisfy that test easily by reconsidering and then reissuing the subpoenas. Surely it cannot be argued that the Justice Department's role permanently taints this investigation.

**III**.

In a dictum in *Laird v. Tatum, 408 U.S. 1, 15–16, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972),* the Supreme Court stated that the "philosophical underpinnings" of the constitutional provisions for civilian control of the military and against the quartering of soldiers in private homes are consistent with our society's [**15] "traditional insistence on limitations on military operations in peacetime." The Court indicated that federal courts stand ready to consider claims arising from "military intrusion into the civilian sector." *Id. at 16; see also id. at 16–24* (Douglas, J., dissenting) (tracing in considerable detail the roots of the principle that the military not be used in civilian law enforcement).

Appellant Bekins asks us to employ this principle to strike down the Inspector General Act as it applies to the Defense Department as a violation of the constitutional right of civilians to be free of law enforcement efforts by the military. n7 Bekins emphasizes that recipients of Department of Defense Inspector General subpoenas may be required to appear with their documents at a military installation and forced to yield these documents to an Army Major General.

> n7 The Inspector General is not himself a member of the Armed Forces, *5 U.S.C. app. § 8*(a), but may employ members of the Armed Forces in executing his duties.
>
> Congress has excepted audits and investigations instituted by the Inspector General from the Posse Comitatus Act, *18 U.S.C. § 1385* (1982), which makes it unlawful to use parts of the Army or Air Force to execute the laws. *5 U.S.C. app. § 8*(g) (1982).

[**16]

Whatever the precise content of the constitutional prohibition on the use of the military in civilian law enforcement, this routine collection of subpoenaed materials does

not offend that proscription. The true concern underlying this principle — and we agree that it is a vitally important concern — is that the military not wield against ordinary citizens any of the special expertise and technology or extraordinary powers conferred upon it for use against our enemies. Even the threat of that force would be a grave matter. Here, however, the Major General behind the desk is perfectly interchangeable with any civilian clerical employee waiting to collect requested documents, and the desk behind which he sits is no more threatening than the average civilian desk. Nor is there a suggestion here that the statute authorizes the use of military force in the enforcement of Inspector General subpoenas; if that were the case, the action presumably would not have taken place in the district court. We believe that in situations where military personnel are fungible with civilian personnel — where the military has no special expertise and can exercise no special coercive power — constitutional [**17] concerns are not implicated.

For the foregoing reasons, the district court's order is

*Affirmed*.

LEXSEE 610 F2D 943

**UNITED STATES OF AMERICA AND J. KENNETH MANSFIELD, Inspector General of the Department of Energy, APPELLANTS v. JOHN IANNONE, American Petroleum Institute**

**No. 78-1779**

**UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT**

***198 U.S. App. D.C. 1; 610 F.2d 943; 1979 U.S. App. LEXIS 12139***

**February 28, 1979, Argued**
**August 31, 1979, Decided**

**SUBSEQUENT HISTORY:** [**1]

Rehearing denied December 19, 1979.

**PRIOR HISTORY:** Appeal from the United States District Court for the District of Columbia (D.C. Miscellaneous No. 78-0228).

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:**

Lynn R. Coleman, Gen. Counsel, Dept. of Energy, Washington, D. C., with whom Barbara Allen Babcock, Asst. Atty. Gen., Dept. of Justice, Earl J. Silbert, U. S. Atty., Robert E. Kopp, Neil H. Koslowe, Attys., Dept. of Justice and Henry A. Gill, Jr., Atty., Dept. of Energy, Washington, D. C., were on the brief for appellants.

Kenneth A. Lazarus, Washington, D. C., with whom James J. Bierbower, Washington, D. C., were on the brief for appellee.

Daniel Joseph and Harry R. Silver, Washington, D. C., were on the brief for Amicus Curiae urging affirmance.

John A. Terry and William H. Briggs, Jr., Asst. U. S. Attys., Washington, D. C., entered appearances for appellants.

**JUDGES:**

Before MacKINNON, ROBB and WILKEY, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROBB.

**OPINIONBY:**

ROBB

**OPINION:**

[*943]

The United States and J. Kenneth Mansfield, Inspector General of the Department of Energy (DOE), seek reversal of a District Court order denying enforcement of a subpoena Ad testificandum issued by the Inspector [*944] [**2] General. The subpoena was issued in the course of an investigation of alleged unauthorized disclosure of information by Department of Energy officials. It was directed to John Iannone, an employee of the American Petroleum Institute (API). When Iannone failed to comply with the subpoena the government filed its petition for enforcement in the District Court. The District Court declined to enforce the subpoena. We affirm the order denying enforcement.

I.

This case grew out of an investigation caused by news reports in the spring of 1978 that employees of DOE had "leaked" information to the American Petroleum Institute and Iannone. The news items were based upon Iannone's own report to his supervisors at API, which had indicated that he had received information and material from agency personnel, including drafts of DOE policy statements, drafts of congressional communications, and drafts of rules and regulations, prior to their promulgation or release to the public. The Iannone report also suggested that Iannone had influenced DOE action on several matters. Investigations into the alleged "leaks" followed. The Senate Committee on Energy and Natural Resources held hearings on the matter, [**3] and the Inspector General of DOE began an investigation.

In the course of his investigation the Inspector General issued three subpoenas Ad testificandum to Iannone. Citing other commitments Iannone failed to comply with any of them. The Inspector General and DOE then began this action in the District Court to enforce the third

subpoena which was issued and served July 6, 1978 and required Iannone to appear and testify on July 12, 1978. In opposing the petition for enforcement Iannone challenged the Inspector General's authority, either in his own capacity or in the exercise of authority delegated by the Secretary of Energy, to compel the appearance of a witness to give testimony.

The District Court held that there was no statutory authority "for the compulsion of oral testimony under oath in connection with the investigation of alleged misconduct on the part of an agency employee." *United States v. Iannone, 458 F. Supp. 41 at 42 (D.D.C. 1978).* On appeal the government contends that the Inspector General's authority to compel Iannone's appearance to give testimony derives from either of two sources in the Department of Energy Organization Act: (1) the Inspector General's special [**4] subpoena power conferred by *42 U.S.C. § 7138*(g)(2); and (2) delegation by the Secretary of Energy to the Inspector General, as the Secretary's agent, of the Secretary's general subpoena power under *42 U.S.C. § 7255*. We agree with the District Court that the subpoena served on Iannone cannot be sustained on either basis advanced by the government.

II.

The 1977 Department of Energy Organization Act (the Act) creates within the Department the Office of Inspector General, to be headed by an Inspector General appointed by the President by and with the advice and consent of the Senate. The statute provides that the appointment shall be "solely on the basis of integrity and demonstrated ability and without regard to political affiliation. The Inspector General shall report to, and be under the general supervision of, the Secretary or, to the extent such authority is delegated, the Deputy Secretary, but shall not be under the control of, or subject to supervision by, any other officer of that Department." *42 U.S.C. § 7138*(a)(1) (Supp. I 1977). The Inspector General's function, in part, is to "investigate activities relating to the promotion of economy and efficiency in the administration [**5] of, or the prevention or detection of fraud or abuse in, programs and operations of the Department." *42 U.S.C. § 7138*(b)(1). He is charged with broad responsibility to oversee and maintain the agency's integrity and efficiency, and to keep the Secretary of Energy and Congress informed concerning those matters. *42 U.S.C. § 7138*(a)–(g). The legislative history of the Act reflects [*945] the theme that the Inspector General, although subject to general supervision by the Secretary, is intended to act independently in fulfilling his duties. H.R.Rep.No.95–539, 95th Cong., 1st Sess. 63 (Joint Explanatory Statement of the Committee of Conference), Reprinted in (1977) U.S.Code Cong. & Admin.News, pp. 854, 934.

Section 208(g)(2) of the Act, *42 U.S.C. § 7138*(g)(2) authorizes the Inspector General:

> (T)o require by subpena (sic) the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this section . . . .

The Secretary's subpoena power is granted by section 645, *42 U.S.C. § 7255:*

> For the purpose of carrying out the provisions of this chapter, [**6] the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 49 of Title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

Section 642 of the Act, *42 U.S.C. § 7252* states:

> Except as otherwise expressly prohibited by law, and except as otherwise provided in this chapter, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate.

On June 16, 1978 the Secretary, purporting to act pursuant to *42 U.S.C. § 7252*, delegated to the Inspector General

> . . . all functions vested in me by law as the Secretary of Energy ("Secretary") relating to the issuance of subpoenas (as defined in Section 9 of the Federal Trade Commission Act, *15 U.S.C. 49)* with respect to the following matters:
>
> The alleged unauthorized disclosures of Department of Energy information to the American Petroleum Institute and John Iannone matters incidential [**7] (sic) thereto.

(J.A. 31)

The government in its brief on this appeal states that it "relies chiefly on the subpoena power which is delegated by the Secretary", and the government's brief does not discuss the authority of the Inspector General under section

7138(g)(2). We think however that the Secretary's authority to delegate cannot be considered in isolation from the provision whereby Congress granted specific subpoena power to the Inspector General, for that specific provision reflects the express congressional intent with respect to the subpoena power of the Inspector General. We therefore examine both possible statutory bases for the authority exercised.

III.

The words of *42 U.S.C. § 7138*(g)(2) negate the argument that in the exercise of his special subpoena power the Inspector General could compel Iannone to appear to give testimony. There is no reference in that section to a subpoena requiring the attendance of a witness to give oral testimony. On the contrary, the section refers only to "the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence." In short, the language is directed at the production [**8] of documentary evidence, as contrasted to oral testimony. The general word "information" is we think defined and limited by the language that follows, specifying written materials and documentary evidence. That language does not suggest that appearance to give oral testimony may be demanded. Applying the maxim that "a word is known by the company it keeps", *Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579, 1582, 6 L. Ed. 2d 859 (1961),* we conclude that "all information" means all information in the form of documents. See 2A. C. Sands, Sutherland Statutory Construction § 47.16 (4th ed. 1973).

[*946] That Congress in other statutes has explicitly provided for the power to subpoena the attendance and testimony of witnesses reinforces our conclusion that the subpoena authority under section 7138(g)(2) is restricted to documentary information. See, e.g., Defense Production Act of 1950, *50 U.S.C. App. § 2155* (1976); Federal Trade Commission Act, *15 U.S.C. § 49* (1976). The most striking example of such an explicit grant of power is found in the Federal Energy Administration Act, the predecessor of the Department of Energy Organization Act. In granting subpoena power [**9] to the Administrator the FEA Act expressly included the power to subpoena "the attendance and testimony of witnesses" in addition to the production of "all information, documents" and the like. *15 U.S.C. § 772*(e)(1) (1976). This we believe makes it plain that if Congress had intended to authorize the Inspector General to compel the attendance of witnesses it would have specified that power in section 7138(g) (2). We therefore hold that the District Court rightly concluded that the Inspector General's special subpoena powers do not encompass the authority to compel the attendance of witnesses.

IV.

As we have seen, section 645 of the Act, *42 U.S.C. § 7255,* expressly grants to the Secretary or his agent, in exercising the Secretary's functions under the Act, the same subpoena powers authorized for the Federal Trade Commission under *15 U.S.C. § 49.* The powers of the Federal Trade Commission under *15 U.S.C. § 49* include the authority to subpoena witnesses to testify. Acting pursuant to *42 U.S.C. § 7252* the Secretary purported to authorize the Inspector General to exercise the Secretary's subpoena powers with respect to the investigation of the alleged unauthorized disclosure of information [**10] to Iannone and API. The government contends that this delegation authorized the Inspector General by subpoena to require Iannone to appear as a witness. We do not agree.

In section 7138(g)(2) of the Act Congress granted specific subpoena powers to the Inspector General. Congress chose not to include among these powers the authority to issue a subpoena requiring a witness to appear and testify. As we have said, if Congress had intended to grant such power to the Inspector General it would have done so in specific language. If the government's theory is sound however the Secretary by delegating to the Inspector General the power to require the appearance of witnesses can thwart the congressional intent expressed in section 7138(g)(2). We cannot accept that theory; we hold that the Secretary cannot by delegation expand the limited powers expressly granted to the Inspector General by Congress.

Further analysis of the statute reinforces our opinion that the Secretary by delegation may not grant to the Inspector General power denied to him by the Congress. The Secretary is authorized by *42 U.S.C. § 7255* to issue subpoenas in carrying out the Secretary's functions under the Act, and this [**11] power he may delegate to one of his agents. The Secretary's functions however are distinct from those of the Inspector General. The Inspector General is not an agent of the Secretary, but is intended to be and is an independent officer. He is appointed by the President by and with the advice and consent of the Senate and may be removed only by the President who must communicate the reasons for any such removal to both houses of Congress. Although he reports to and is under the general supervision of the Secretary, there is no suggestion in the statute that he is subject to direction by the Secretary in carrying out his investigative functions. See *42 U.S.C. § 7138.* The Secretary's role on the other hand is generally to supervise and direct the administration of the Department. *42 U.S.C. § 7131.* His agents thus are the employees to whom he assigns the day–to–day operation of a regulatory agency. There is no suggestion that the Secretary can by delegation turn the Inspector General

into an agent of the Secretary.

[*947] Our decision finds further support in the recently enacted Inspector General Act of 1978, which establishes twelve new inspector general offices in twelve government [**12] agencies. 5 U.S.C.A. App. I (Supp.1979). The new act parallels the Department of Energy Organization Act provision creating the office of inspector general within that agency. n1 The subpoena powers of each inspector general are the same as those of the DOE Inspector General. The new inspectors general, like the inspector general in DOE, report to and serve under the general supervision of their respective agency heads, but their investigatory powers and responsibilities are separate from those of the agency head. 5 U.S.C.A. App. I §§ 2–5. The provisions for their appointment and removal follow the same pattern as that prescribed by the DOE Act appointment by the President based solely on merit, and removal by the President, who must inform Congress of the action taken and the underlying reasons therefor. Id., Sec. 3(a). The legislative history makes clear that the provision for removal n2 is an "unusual step" included to insure the independence of the Inspectors General.

n1. See 5 U.S.C.A. App. I § 6(a)(4) (Supp.1979); *42 U.S.C. § 7138*(g)(2) (Supp. I 1977). See also *42 U.S.C. § 3525*(a)(3) (1976) (same subpoena authority provided for Inspector General of Department of Health, Education and Welfare).

[**13]

n2. Sen.Rep. No. 95–1071, 95th Cong., 2d Sess. 9, Reprinted in (1978) U.S.Code Cong. & Admin.News, pp. 2676, 2684. The Inspector General Act spells out the independence of the inspectors general in more detail than the DOE Act provides, by expressly prohibiting an agency director from preventing an inspector general from conducting or completing an investigation. 5 U.S.C.A. App. I § 3(a). Prohibition of such action seems implicit in the concept of inspector general under the DOE Act as well.

It is apparent that in enacting the Inspector General Act Congress sought to create a system of independent investigators. In doing so it granted each inspector general the same subpoena powers as those given to the Inspector General of DOE. If the agency head may delegate his subpoena authority to the agency's inspector general, however, the congressional scheme is disrupted, for the various agency heads may not all have the same subpoena powers. As a result the authority that could be delegated to an inspector general would vary from agency to agency. n3 We think it follows that when Congress provided [**14] specific but limited subpoena power for the Inspector General of DOE in the 1978 statute it fully expressed its intention to grant such power to him.

n3. The Secretary of Commerce does not have authority to subpoena witnesses; See *15 U.S.C. §§ 1501*–1526 (1976); whereas, for example the Federal Trade Commission, like the Secretary of Energy, has that authority. *15 U.S.C. § 49* (1976).

The District Court rightly held that the Inspector General of DOE had no authority by subpoena to require the appearance of Iannone as a witness. Accordingly the District Court's order denying enforcement of the subpoena is

Affirmed.

LEXSEE 2003 USAPP LEXIS 21082

# THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY; THE COOPER HEALTH SYSTEM; UNIVERSITY PHYSICIAN ASSOCIATES OF NEW JERSEY, INC. v. DANA CORRIGAN, ACTING INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES * The University of Medicine and Dentistry of New Jersey; The Cooper Health System; University Physician Associates of New Jersey, Inc., Appellants

*** (Pursuant to Rule 43(c), F.R.A.P.)**

**No. 03-1268**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

*347 F.3d 57; 2003 U.S. App. LEXIS 21082*

**April 23, 2003, Argued**
**October 17, 2003, Filed**

**PRIOR HISTORY:** [**1] On Appeal from the United States District Court for the District of New Jersey D.C. Civil Action No. 99-cv-05046. Honorable Harold A. Ackerman.

**DISPOSITION:** Affirmed.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:** HERVE GOURAIGE, ESQUIRE (ARGUED) Epstein, Becker & Green, Newark, New Jersey.

GARY J. LESNESKI, ESQUIRE, Archer & Greiner, Haddonfield, New Jersey,

Attorneys for Appellants, The University of Medicine and Dentistry of New Jersey and The Cooper Health System.

KEVIN McNULTY, ESQUIRE, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey.

Attorney for Appellant, University Physician Associates of New Jersey, Inc.

DOUGLAS HALLWARD-DRIEMEIER, ESQUIRE (ARGUED), MICHAEL S. RAAB, ESQUIRE, United States Department of Justice Civil Division, Appellate Staff, Washington, D.C.

SUSAN C. CASSELL, ESQUIRE, Office of United States Attorney, Newark, New Jersey, Attorneys for Appellee.

**JUDGES:** Before: SCIRICA, Chief Judge,** AMBRO and WEIS, Circuit Judges.

** Judge Scirica began his term as Chief Judge on May 4, 2003.

**OPINIONBY:** SCIRICA

**OPINION:**

[*59] **OPINION OF THE COURT**

SCIRICA, *Chief Judge*.

This is an action seeking an injunction against a planned Medicare audit of New Jersey teaching hospitals [**2] by the inspector general of the Department of Health and Human Services. The District Court held that it did not have standing to consider plaintiffs' claims under the Administrative Procedures Act, *5 U.S.C. § 704*, and that plaintiffs failed to state a due process claim. The District Court also granted defendant's motion to enforce subpoenas related to the audit. We will affirm.

I.

A. *Medicare Billing.*

The underlying dispute in this case involves Medicare billing at teaching hospitals. The parties differ on when physicians could bill for work performed by interns and residents under Health and Human Services regulations in effect before July 1996. Plaintiffs contend defendant's planned audit of their billing records would use an improper standard and should be enjoined. n1

n1 Plaintiffs are the University of Medicine and Dentistry of New Jersey and two corporations associated with it: the Cooper Health System, a non–profit corporation that owns and operates a teaching hospital affiliated with the university; and University Physician Associates of New Jersey, Inc., a non–profit corporation that processes bills and Medicare payments for university faculty members. The claims of all parties are based on the proposed audit of the university's teaching hospitals.

[**3]

The Medicare program is the responsibility of the United States Department of Health and Human Services. Within the department, the program is administered by the Centers for Medicare and Medicaid Services, the successor to the Health Care Financing Administration. The processing of bills submitted by the healthcare providers for particular services rendered has been contracted out to several insurance companies known as "carriers." Because the carriers handle the billing and payment, they have initial responsibility for ensuring compliance with the statutes and regulations governing Medicare billing of individually billable services. n2

n2 Payments for other kinds of costs, i.e., not on a fee–for–service basis, are made by "intermediaries"—private entities contracted by HHS for processing payments under Medicare Part A. Like the carriers, their Part B analogues, intermediaries have a certain amount of responsibility for ensuring compliance with Medicare requirements. *42 U.S.C. § 1395h*.

[**4]

Medicare payments to healthcare providers fall under two categories. Medicare Part A covers general hospital expenses, including residents' and interns' salaries. Part B covers payments made on a fee–for–service basis, reimbursing direct care by physicians, among other services. Consequently, at teaching hospitals, most services performed by residents are covered under Part A, which reimburses the hospitals for residents' salaries, but does not reimburse them on the basis of particular services they provide. *42 U.S.C. § 1395x(b)(6)*. Physicians providing care to patients, by contrast, are reimbursed under Part B based on the service performed and in line with reimbursement paid to physicians for services outside of teaching hospitals.

But this distinction is not so easily drawn. Physicians can also bill Medicare for services in which residents and interns participate, so long as the physician is sufficiently involved in the provision of services. The appropriate standard for determining when physicians may bill under Part B for work performed by residents [*60] and interns is the subject of the underlying dispute in this case.

In 1968, HHS promulgated regulations [**5] for Part B reimbursement of services performed at teaching hospitals. The regulations authorized payment to an "attending physician" for services "of the same character, in terms of the responsibilities to the patient that are assumed and fulfilled, as the services he renders to his other paying patients" if the physician "provides personal and identifiable direction to interns or residents who are participating in the care of his patient." *20 C.F.R. § 405.521 (1968)*. Notwithstanding, "in the case of major surgical procedures and other complex and dangerous procedures or situations, such personal and identifiable direction must include supervision in person by the attending physician." *Id.*

In 1980, Congress amended the statute, largely adopting the standard HHS stated in its regulations, but omitting the specific references to surgery and other hazardous procedures. The statute now provides that if a physician "renders sufficient personal and identifiable physicians' services to the patient to exercise full, personal control over the management of the portion of the case for which the payment is sought, [and] the services are of the same character [**6] as the services the physician furnishes to patients not entitled to benefits under this subchapter," the physician may bill for the services under Part B. *42 U.S.C. § 1395u(b)(7)(A)(i)(I)*.

HHS's regulations were changed in 1992, but continued to authorize payment to a teaching physician only when the attending physician "furnishes personal and identifiable direction to interns or residents who are participating in the care of the patient." *42 C.F.R. § 405.521(b)(1) (1992)*. And the regulations continued to require that the physician "personally supervise" the residents and interns in the case of major surgery or other dangerous procedures.

Between 1992 and 1996, the Health Care Financing Administration began to interpret the phrase "furnishes personal and identifiable direction" as requiring the physician to be physically present when and where the resident or intern provides the billed service in order to be eligible for Part B payment. This interpretation led to widespread complaints from healthcare providers, many of whom claimed that it amounted to a change in the regulation. A physician could provide "personal and identifiable [**7] direction," it was claimed, without being physically present when the resident performed the billed care. The university contends that in response to these comments, the Health Care Financing Administration agreed

to refrain from imposing such a requirement until there was a new rule clarifying the agency's position.

In December 1995, HHS adopted a new rule governing physicians at teaching hospitals that took effect July 1, 1996. The rule now provides, "If a resident participates in a service furnished in a teaching setting, physician fee schedule payment is made only if a teaching physician is present during the key portion of any service or procedure for which payment is sought." *42 C.F.R. § 415.170*.

Because the carriers are initially responsible for enforcing the billing standards, the carriers themselves often issue clarifying instructions to the healthcare providers, furnishing a source of information about Medicare billing requirements in addition to the statute and regulations.

B. *The Inspector General*.

The Office of Inspector General of HHS, along with inspector generalships for other federal administrative agencies and departments, [*61] is governed [**8] by the *Inspector General Act of 1978, 5 U.S.C. App. 3*. n3 Offices of Inspector General are designed to be "independent and objective units" separate from their respective departments and agencies. *5 U.S.C. App. 3 § 2*. They are directed to "conduct and supervise audits and investigations relating to the programs and operations" of their respective agencies. *Id.* Their primary task is to prevent fraud and abuse within such programs and operations. The Office of Inspector General of HHS is thus an independent office with a primary function to investigate fraud and abuse within the Medicare program.

> n3 The inspector general for HHS (then the Department of Health, Education, and Welfare) was created by statute in 1976. Pub L. No. 94–505. The Inspector General Act is similar in relevant respects to the original statute.

The Inspector General Act grants inspectors general broad discretion to determine which investigations and audits are necessary to its mission, authorizing [**9] them "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable." *5 U.S.C. App. 3 § 2*.

C. *The PATH Audits.*

The HHS inspector general's auditing of teaching hospitals for overbilling began with an audit of the University of Pennsylvania Health System's Medicare billing records from 1989 to 1994. The audit disclosed three purported deficiencies in the University of Pennsylvania Health System's billing. First, the inspector general reported a substantial amount of billing by physicians for work performed by residents. Second, the audit revealed a certain amount of "upcoding"—billing for procedures more complex than were actually performed. And finally, the inspector general contended that documentation was inadequate for many of the billed items. The University of Pennsylvania Health System paid $30 million to settle any potential *False Claims Act* charges.

Following that audit, the inspector general (then June Gibbs Brown) decided to expand the investigation to determine if these practices were widespread. The [**10] result was the Physicians at Teaching Hospitals ("PATH") initiative, under which the inspector general selected a large number of teaching hospitals nationwide for audits looking for the alleged problems discovered in the University of Pennsylvania audit.

The PATH initiative was launched in 1996, the same year the new HHS regulations expressly adopted a physical presence requirement. PATH audits—including the one now challenged—were directed at billing in the years before the rule change. The operative rules for these audits, therefore, are primarily the rules as amended in 1992, which spoke of "personal and identifiable direction," but did not expressly state that a physician's presence was required. *42 C.F.R. § 405.521(b)(1) (1992)*.

PATH audits are of two types. "PATH I" audits are those performed by the Office of Inspector General at its expense. A healthcare provider can choose, however, to hire an independent auditor to perform the audit, reporting the results to the inspector general. This is a "PATH II" audit.

A number of healthcare providers and medical professional organizations objected to the initiative, claiming the PATH audits amounted to [**11] retroactive application of the 1996 rules. The inspector general contended instead that the rules had always required the physical presence of the [*62] physician for Part B payments, even though it was not stated as clearly as under the new rule.

HHS responded to the controversy by issuing the so–called "Rabb letter." Harriet Rabb, the general counsel of HHS, issued a letter clarifying her views concerning the PATH audits. Rabb, of course, worked for HHS, not the independent Office of Inspector General. Accordingly, her letter is not a policy statement from the Office of Inspector General. Rather, it expressed Rabb's understanding of the standards the Office of Inspector General would apply in determining when a PATH audit would be conducted.

In the letter, Rabb acknowledged that "the standards for paying teaching physicians under Part B of Medicare have not been consistently and clearly articulated by

[the Health Care Financing Administration, now the Centers for Medicine and Medicaid Services] over a period of decades." Letter of Harriet S. Rabb, HHS General Counsel, at 4 (July 11, 1997). Nevertheless, Rabb concluded that the inspector general's interpretation, even if not clearly [**12] stated before 1996, was the correct one. Because of the ambiguity, Rabb stated that clear statements by the carriers "would be controlling." *Id.* Thus, if the carriers had issued materials clearly stating a physical presence requirement, the providers would bound by it. Rabb concluded that many, though not all, carriers had expressly stated that physical presence was required for teaching physicians to receive compensation under Medicare Part B.

Given this, Rabb stated her understanding that carrier notification would be a necessary requirement for initiation of a PATH audit: "The OIG will undertake PATH audits only where carriers, before December 30, 1992, issued clear explanations" that Part B payments would be made only "when the teaching physicians either personally furnished services to Medicare beneficiaries or were physically present when the services were furnished by interns or residents." *Id.* at 5. An audit would go forward only after the Office of Inspector General had "obtained carrier materials showing that clear instructions on the need for teaching physicians to be physically present were given to the institutions or physicians served by that carrier." *Id.* [**13] at 5–6. If the Office of Inspector General obtained such materials, a hospital would "have the opportunity to show, as a matter of fact, that it or the teaching physicians at the institution received guidance from the carrier which the hospital views as contradictory to the standard referenced above." *Id.* at 6.

Importantly, the letter states, "The decision whether clear guidance was given by carriers to teaching hospitals and physicians will be made by OIG. That determination is, necessarily, a fact bound one and will have to be made particularly and in each instance." *Id.*

In short, Rabb—speaking on behalf of HHS, not the inspector general—stated the Office of Inspector General would begin a PATH audit only if it was convinced, after a hospital had an opportunity to respond, that the hospital had received clear instructions from its carrier of the physical presence requirement.

D. *This Case.*

When the Office of Inspector General informed of its intention to initiate a PATH audit, the University of Medicine and Dentistry of New Jersey initially elected to have a PATH II audit performed by an independent auditor at its expense. But it never went forward with the audits [**14] and instead filed this action to enjoin the audits.

[*63] The university contends the audits are unlawful for several reasons. First, it argues the inspector general lacks the power to conduct PATH audits, as they are properly the function of HHS. It also argues the Office of Inspector General did not comply with the terms of the Rabb letter, concluding the University of Medicine and Dentistry was auditable without its having received clear notice from its carrier. And because it lacked prior notice of the standard the Office of Inspector General intends to apply in its audit, the university contends the initiation of the audits is arbitrary and capricious and violates its due process rights.

Because of the university's refusal to go forward with the audit, the inspector general issued administrative subpoenas for the relevant records. The university refused to comply with the subpoenas. Consequently, the inspector general filed a motion to enforce the subpoenas in the District Court.

The District Court rejected the university's claims, primarily on the basis of its finding a lack of subject–matter jurisdiction for lack of finality and ripeness. It also granted the inspector general's [**15] motion to enforce the administrative subpoenas. The university appealed.

II.

The university's challenge to the PATH audits comes to us in two forms. First, because the university has resisted the administrative subpoenas issued by the inspector general, the inspector general brought an action seeking enforcement of those subpoenas. The university appeals the District Court's order enforcing the subpoenas. Second, the university seeks injunctive relief against the audits. Under both sets of claims, the university seeks to block the initiation of the PATH audits. But the audits themselves would appear to be an early stage in an investigation that may or may not lead to enforcement actions. Because of this, the District Court determined that review of most of the university's claims was premature. As we discuss, we hold that the District Court lacked jurisdiction to consider these claims at this stage in the proceedings, but that it had jurisdiction over the inspector general's motion to enforce the subpoenas.

A.

With respect to the subpoenas, the District Court found—correctly—that it had jurisdiction to enforce the subpoenas. Under the *Inspector General Act*, each inspector general [**16] "is authorized . . . to require by subpena [sic] the production of all . . . documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or

refusal to obey, shall be enforceable by order of any appropriate United States district court." *5 U.S.C. app. § 6(a)(4)*; *see also 28 U.S.C. § 1345* ("The district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.").

Although orders enforcing, or refusing to quash, subpoenas issued in the trial context are ordinarily not considered final orders subject to appeal (unless a contempt order is entered, which is itself a final order subject to appeal), orders enforcing administrative subpoenas are subject to appellate review. "These orders are considered 'final' for purposes of *28 U.S.C. § 1291* because there is no ongoing judicial proceeding that would be delayed by an appeal." *In re Subpoena Duces Tecum, 228 F.3d 341, 345–46 (4th Cir. 2000)*; see [**17] also *FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995)* (reviewing order enforcing [*64] administrative subpoena); *NLRB v. Frazier, 966 F.2d 812, 815 (3d Cir. 1992)* (reviewing quashal). "We will affirm an order enforcing an agency's subpoena unless we conclude that the district court has abused its discretion." *Wentz, 55 F.3d at 908*.

B.

As the Supreme Court has said of the Federal Trade Commission and Internal Revenue Service, an agency ordinarily "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964)* (*IRS); United States v. Morton Salt Co., 338 U.S. 632, 642–643, 94 L. Ed. 401, 70 S. Ct. 357, 46 F.T.C. 1436 (1950)* (FTC); *see also Wentz, 55 F.3d at 908 (FDIC)*. The power to effectively investigate HHS and the participants in the Medicare program is fundamental to the HHS inspector general's mission. *Cf. Fed. Maritime Comm'n v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975)* ("It is beyond cavil that the very backbone of an administrative agency's [**18] effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its subpoenas."). In the ordinary course, judicial proceedings are appropriate only after the investigation has led to enforcement, because "judicial supervision of agency decisions to investigate might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process." *SEC v. Wheeling–Pittsburgh Steel Corp., 648 F.2d 118, 127 n.12 (3d Cir. 1981)* (quoting *Dresser Industries, Inc. v. United States, 596 F.2d 1231, 1235 n.1 (5th Cir. 1979))*.

For these reasons, judicial review of administrative subpoenas is "strictly limited." *FTC v. Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 871–72 (D.C. Cir. 1997)* (en banc). "The ultimate inquiry . . . is whether the enforcement of the administrative subpoena would constitute an abuse of the court's process." *Wheeling–Pittsburgh, 648 F.2d at 125*. [**19] A district court should enforce a subpoena if the agency can show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed. The demand for information must not be unreasonably broad or burdensome." *Wentz, 55 F.3d at 908* (citing *Powell, 379 U.S. at 57–58*; *Morton Salt, 338 U.S. at 652*).

C.

The University of Medicine and Dentistry of New Jersey contends the subpoenas were not "issued pursuant to a legitimate purpose" because the inspector general lacks the authority to conduct PATH audits in the absence of evidence of fraud or abuse. And the university avers that the inspector general admitted to them that she had no evidence of Medicare fraud at the university hospitals.

As noted, the Inspector General Act creates Offices of Inspector General "to prevent and detect fraud and abuse in . . . programs and operations" of their respective departments and agencies. *5 U.S.C. App. 3 § 2*. To accomplish these ends, the statute [**20] specifically authorizes inspectors general "to conduct and supervise audits and investigations relating to [these] programs and operations." *Id.* Furthermore, the Act grants inspectors [*65] general a degree of discretion in determining when such audits and investigations are appropriate: "In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of the Act, is authorized . . . to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, in the judgment of the Inspector General, necessary or desirable." *Id. § 6, 6(a)(2)*.

Here, the inspector general determined that the PATH audits are necessary or desirable for the purposes of preventing and detecting fraud and abuse in teaching hospitals' Medicare Part B billing. Accordingly, at first blush, the PATH audits would seem to fall comfortably within the Inspector General Act's broad grant of authority.

That authority is subject to certain limitations, however. *Section 9 of the Act* contains a restriction on the ability of the inspectors general to perform program op-

erating responsibilities. n4 [**21] The Act permits the transfer of departmental functions that the head of the agency "may determine are properly related to the functions of the Office [of Inspector General] and would, if so transferred, further the purposes of this Act." The Act specifically provides, however, that no such transfer shall include "program operating responsibilities." *5 U.S.C. App. 3 § 9.*

n4 *The 1978 Act* contained a similar limitation.

The hospitals rely on this section in attempting to establish a distinction between "routine compliance audits" and "fraud investigations." The administration of the Medicare program is the responsibility of HHS (carried out by the Centers for Medicare and Medicaid Services, an agency within HHS). HHS's direct role with respect to Part B payments at teaching hospitals, however, is one of oversight. Most of the direct interaction with the healthcare providers is done by the carriers, who process the bills submitted by the healthcare providers. The carriers are responsible [**22] for ensuring, in the first instance, that the bills they receive comply with the statutory and regulatory requirements of the Medicare program, subject to the oversight of the Centers for Medicare and Medicaid Services. Indeed, *42 U.S.C. § 1395u(a)* provides that "the Secretary shall to the extent possible enter into . . . contracts [to] . . . make such audits of the records of providers of services as may be necessary to assure that proper payments are made under this part." Thus, HHS, through the carriers, is statutorily responsible for routine compliance audits, which are core "program operating responsibilities," according to the university. And because the PATH audits are routine compliance audits, the university contends the authority to conduct them cannot be transferred to the inspector general unless it is acting on a specific allegation of fraud or abuse.

The university does not challenge the inspector general's authority to investigate healthcare providers directly under the right circumstances. While a primary purpose of the inspectors general is to investigate the operations of their federal departments internally, they are charged with preventing [**23] fraud and abuse in the programs of their departments as well. The providers are participants in the Medicare program, and through that program they receive federal funds. Thus, they are not merely regulated by HHS, they are part of the Medicare program. As such, they are within the range of legitimate targets of the inspector general's efforts "to prevent and detect fraud and abuse" in the Medicare program. *Cf.* [*66] *Inspector Gen. of the U.S. Dept. of Agric. v. Glenn, 122 F.3d 1007, 1011 (11th Cir. 1997)* ("While we agree that the [Inspector General Act]'s main function is to detect abuse within agencies themselves, the IGA's legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations."). The university concedes this, but contends the inspector general's authority to investigate healthcare providers arises only after the inspector general has received a referral from a carrier, or is otherwise responding to a specific allegation of fraud.

If the carriers uncover any evidence that gives rise to a suspicion of fraud on the part of healthcare providers, they are directed to refer [**24] the case to the Office of Inspector General for a fraud investigation. Medicare Program Integrity Manual, ch. 3 § 10.1. ("Carriers . . . have a duty to identify cases of suspected fraud and to make referrals of all such cases to the OIG, regardless of dollar thresholds or subject matter."). But in the absence of a specific allegation of fraud, according to the university, an audit is simply a routine matter of ensuring compliance with the regulations, a responsibility central to the basic mission of HHS itself. HHS directs and oversees the carriers' routine auditing of healthcare providers. And because this is routine work performed by HHS (through the carriers), permitting the inspector general to perform such functions would amount to a transfer of "program operating responsibilities."

At bottom, the university contends the inspector general cannot perform such audits because HHS can and does n5 perform those audits in the ordinary course of business. But we see no basis for concluding that the inspector general's authority cannot overlap with that of the department. As the Court of Appeals for the Fifth Circuit stated, "*Section 9(a)(2)* prohibits the transfer of 'program operating [**25] responsibilities,' and not the duplication of functions or the copying of techniques. No transfer of operating responsibility occurs and the IG's independence and objectivity is not compromised when the IG mimics or adapts agency investigatory methods or functions in the course of an independent audit or investigation." *Winters Ranch Partnership v. Viadero, 123 F.3d 327, 334 (5th Cir. 1997)*. The inspector general's mandate to prevent and detect fraud and abuse is not limited by HHS's—or its agents'—own efforts to prevent and detect fraud and abuse.

n5. HHS itself does not appear to perform any compliance audits. According to plaintiffs, these are the responsibility of the carriers, acting as contractors for the department. We need not determine what effect, if any, the fact that these audits are not, strictly speaking, functions of the department itself may have on the analysis.

If the department fails to perform a function that is within its responsibilities, and the inspector general takes [**26] on those responsibilities, then it may be correct to speak of "transfer" of program operating responsibilities. *See, e.g., id. at 334*; *Burlington N. R.R. Co. v. Office of Inspector General, R.R. Retirement Bd., 983 F.2d 631 (5th Cir. 1993)* (finding impermissible transfer of authority where the inspector general audited railroad employers for tax compliance when the board had declined to do so). For in such a case, the department might be said to be abdicating its own responsibilities, which is arguably one of the concerns animating *§ 9(a)(2)*'s prohibition on transfers of program operating responsibilities. But this is not a concern here.

Furthermore, that HHS can and does perform routine compliance audits does not necessarily make them "program operating [*67] responsibilities." Routine compliance audits, routine as they be, are nonetheless investigatory in nature, and are directed at enforcing the rules under which the providers operate. They need not be seen as part of the "operation" of the Medicare program. In any event, the statute contemplates the transfer of any duties that may assist the inspector general in its mission, so long as they are [**27] not "program operating responsibilities." Presumably, this would include a range of responsibilities the department might perform, that do not constitute program operating responsibilities. Thus, the fact that the department can and does perform some of these tasks would not alone prevent their transfer to the Office of Inspector General.

The university relies on a seemingly contrary decision reached by the Court of Appeals for the District of Columbia Circuit. In *Truckers United for Safety v. Mead, 346 U.S. App. D.C. 122, 251 F.3d 183 (D.C. Cir. 2001)*, the court held the Office of Inspector General for the Department of Transportation had overstepped its statutory authority when it engaged in a joint operation with the Office of Motor Carriers (an office within DOT) to investigate trucking records. The program was designed "to create a greater deterrence to motor carrier violations of the Federal Motor Carrier Safety Regulations." *Id. at 187*. The inspector general subpoenaed a variety of records seeking, inter alia, to uncover falsification of hours of service logs.

The court viewed the investigation "as part of enforcing motor carrier safety regulations—a [**28] role which is central to the basic operations of the agency." *Id. at 189*. On the court's view, the inspector general was not engaged in an audit investigation, rather, he "merely lent his search and seizure authority to standard OMC enforcement investigations." *Id.* The court concluded that the "actions of the IG were ultra vires." *Id. at 190*.

Here, by contrast, there is no suggestion that the PATH audits are aimed at anything other than the inspector general's (admittedly broad) view of what constitutes fraud and abuse in the Medicare program. The inspector general is charged with preventing and detecting, by audit and investigation, fraud and abuse in the Medicare program. There is no statutory basis for imposing an additional requirement that the inspector general begin such an audit or investigation only after she has received a referral or other allegation of fraud. And this is especially true given the broad discretion the inspector general enjoys when determining audits and investigations are appropriate.

D.

In sum, the PATH audits are of a kind that is squarely within the broad authority of the inspector general to audit providers for [**29] the purpose of preventing fraud and abuse within the Medicare program. The PATH audits do not represent a "transfer" of "program operating responsibilities." The important issue here is not whether the inspector general is doing something that HHS itself (or its agents) might also do, but whether the PATH audits are within the authority granted the inspector general by the Inspector General Act. For the reasons discussed, we hold that they are.

There is no dispute that the subpoenas at issue are relevant to the inspector general's purpose, that the inspector general lacks the information it seeks, that statutory procedures have been followed, or that the demand for information is not unreasonably broad or burdensome. *See Wentz, 55 F.3d at 908*. Consequently, the subpoenas are lawful and we will affirm the District Court's order to enforce them.

[*68] III.

In addition to opposing the inspector general's motion to enforce its subpoenas, the University of Medicine and Dentistry of New Jersey seeks to enjoin the PATH audits for several reasons. The District Court declined to consider the merits of these claims, deciding it lacked jurisdiction over these claims. We agree. [**30]

The District Court found a lack of jurisdiction on two related grounds. First, it held it lacked jurisdiction to review the agency action under the Administrative Procedures Act, *5 U.S.C. § 704*, because the decision to initiate the audit was not "final." It also concluded, for similar reasons, that the case was not sufficiently "ripe" at this point to permit judicial review.

Ripeness and finality in this context are closely related. Finality is an element in the test for ripeness. *Nat'l Park Hospitality Assoc. v. Dept. of the Interior, 155 L. Ed. 2d 1017, 123 S. Ct. 2026, 2032 (2003)*; *Abbott Labs. v.*

*Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)*. And as we have noted, "the Court's treatment of the finality issue has involved an inquiry into the broader question of whether a given action is ripe for judicial review." *CEC Energy Co. v. Public Serv. Comm'n, 891 F.2d 1107, 1110 (3d Cir. 1989)*. We will address finality within the context of an assessment of ripeness.

A.

Determining whether a dispute over agency action is ripe involves a two-part inquiry. We must assess "(1) the fitness of [**31] the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Assoc., 123 S. Ct. at 2030*; *Abbott Labs., 387 U.S. at 149*. The fitness question, in turn, requires an assessment of whether the issues presented are "purely legal," whether the agency action is final for purposes of *section 10 of the Administrative Procedures Act*, n6 and whether "further factual development would 'significantly advance our ability to deal with the legal issues presented.' " *Nat'l Park Hospitality Assoc., 123 S. Ct. at 2028* (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978)*); *Abbott Labs., 387 U.S. at 149*.

n6. Under section 10(c) of the Administrative Procedures Act, federal courts have jurisdiction to review "final agency action for which there is no other adequate remedy," *5 U.S.C. § 704*, unless the action "is committed to agency discretion by law." *§ 701(a)(2)*.

[**32]

While there are some factual disputes in this case, the main issue—whether the inspector general has the authority to initiate audits of the providers under the announced standard—is primarily legal. Further factual development does not seem necessary to resolve these issues. But we believe the case is not sufficiently "fit" for judicial review, because the action of the inspector general was not a final one for these purposes.

No matter how decisive the inspector general's determination to initiate a PATH audit of the University of Medicine and Dentistry of New Jersey under its stated standard was, it was only a decision to initiate an investigation of the university's prior billing practices. Neither the university nor the other plaintiffs has been charged with fraud, nor has any kind of enforcement proceeding commenced. The hospitals are required neither to change their billing practices nor pay a penalty for past practices. All they are required to do [*69] is to cooperate with the audit—an audit the Office of Inspector General would perform at its expense if the university so chose.

Courts should hesitate to scrutinize decisions to initiate administrative audits and investigations [**33] for the same reasons they accord administrative entities broad leeway in issuing subpoenas. Subpoenas in this context are part of an investigation or audit, taken after the decision to investigate has been made, where there is a reason to believe the target of the subpoena may not cooperate without a legal requirement. It would be anomalous to demand a greater showing for the initiation of an investigation than is required for the issuance of subpoenas.

"An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action." *Assoc. of Am. Med. Colls. v. United States, 217 F.3d 770, 781 (9th Cir. 2000)*. In the ordinary course, an investigation is the beginning of a process that may or may not lead to an ultimate enforcement action. The decision to investigate is normally seen as a *preliminary* step—non-final by definition—leading toward the possibility of a "final action" in the form of an enforcement or other action. That path is highly uncertain. Here, as in most actions, the possibility that no enforcement action may be taken is real for several reasons, not least of which is that the inspector general may [**34] change her mind on one or more issues along the way. "Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise." *FTC v. Standard Oil Co., 449 U.S. 232, 242, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980)*.

B.

The university nevertheless contends that the initiation of the PATH audits is a final decision under the standards announced by the Supreme Court and this court. Even if the decision to *initiate* the audits is not deemed final, the hospitals argue the decision to employ a *standard* incorporating a physical-presence requirement was itself "final action" subject to judicial review.

We have listed several factors relevant to an assessment of finality in the administrative context, the most important of which for these purposes are "whether the decision represents the agency's definitive position on the question," "whether the decision has the status of law with the expectation of immediate compliance," and "whether the decision has immediate impact on the day-to-day operations of the party seeking review." n7 *CEC Energy, 891 F.2d at 1110* (citing *Standard Oil, 449 U.S. at 239-40*; [**35] *Solar Turbines, Inc. v. Seif, 879 F.2d 1073,1080 (3d Cir. 1989)*.

n7. In *CEC Energy*, we provided the following list of relevant factors:

> 1) whether the decision represents the agency's definitive position on the question; 2) whether the decision has the status of law with the expectation of immediate compliance; 3) whether the decision has immediate impact on the day–to–day operations of the party seeking review; 4) whether the decision involves a pure question of law that does not require further factual development; and 5) whether immediate judicial review would speed enforcement of the relevant act.

*891 F.2d at 1110*.

> We recognize the decision involves a pure question of law that may not require further factual development. We have doubts that immediate judicial review would speed enforcement, but would reach the same result even if we concluded it might.

The decision to initiate the PATH audit represents a "definitive position" of the inspector general [**36] only in the narrowest sense. The decision is not likely to be [*70] reopened, but it is a decision only to investigate, which is by nature a preliminary one. It is the initiation of a process designed to make a determination as to plaintiffs' potential fraud and abuse in the Medicare program. Intermediate decisions made in the course of determining what position will ultimately be taken are not "determinative" in the appropriate sense. As the Court of Appeals for the Ninth Circuit stated:

> On the facts before this court it is an open question whether the PATH audits will actually result in findings of abuse or fraud. . . . OIG could still modify its rather draconian view of the Act's requirements for Part B billing, and, for any number of reasons, the PATH audits may not reveal significant violations. Even if violations are found there are a panoply of administrative and judicial remedies open to the Secretary and DOJ, at least some of which we might be without jurisdiction review under *42 U.S.C. § 405(h)* and *Shalala v. Illinois Council on Long Term Care, Inc. , 529 U.S. 1, 146 L. Ed. 2d 1, 120 S. Ct. 1084, (2000)*.

[**37] *Assoc. of Am. Med. Colls., 217 F.3d at 781*.

The University of Medicine and Dentistry of New Jersey also contends the decision to initiate the audits "has the status of law with the expectation of immediate compliance," and "has immediate impact on the day–to–day operations of the party seeking review." *CEC Energy, 891 F.2d at 1110*. Instead of focusing on potential enforcement measures, the university contends the burdens of compliance with the audits themselves constitute the relevant effects. The university avers the decision requires that they immediately comply with the audits—a disruptive process it alleges would detract from providing healthcare and would cost over one million dollars. n8

> n8. This figure appears to be based on an assessment of a PATH II audit, which would be performed by a third party at the university's expense. A PATH I audit, which the university could have chosen, would be performed by the Office of Inspector General at its cost. Accordingly, it appears the university could choose a course substantially less costly than the one it selected.

[**38]

These burdens, however, are not the kind of burdens that support a finding of finality. In *Standard Oil*, the Supreme Court held the FTC's issuance of a complaint was not a final order in the face of a similar contention. The Court noted that the only legal effect of filing the complaint on defendant was the requirement that it participate in the proceeding by responding to the charges against it. The Court stated, "Although this burden certainly is substantial, it is different in kind and legal effect from the burdens attending what heretofore has been considered to be a final action." *449 U.S. at 242*. The Court noted that "the expense and annoyance of litigation is part of the social burden of living under government." *Id. at 244*. There is no basis for treating the expense and annoyance of administrative audits and investigations any differently. *See CEC Energy, 891 F.2d at 1110* (following *Standard Oil* and stating that the obligation to respond to the FTC's inquiries, even if substantial, is not a basis for finding finality). And because the audit at issue here is directed only at past conduct, the only effects plaintiffs will [**39] encounter are related to their participation in the investigatory process and actions that might be taken as a result—there is no direct effect on plaintiffs' "primary conduct." *See Nat'l Park Hospitality Assoc., 123 S. Ct. at 2031*; *Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 164, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967)*.

[*71] We are cognizant of the special responsibilities entrusted to healthcare providers and the obstacles they face. The economics of healthcare are at a precarious juncture. Placing additional burdens—financial and otherwise—on already taxed hospitals may have serious

consequences for access to healthcare, either by increasing its cost or by diminishing its availability. It is to be hoped that a decision to initiate a PATH audit will be made only after consideration of these consequences. But these considerations are, in the first instance, ones for the inspector general, who has been charged with uncovering fraud and has been given the authority to determine when audits are appropriate to that end.

Focusing not on the decision to initiate the audit, but to initiate the audit under a particular standard, the lack of finality [**40] is even more clear. For it seems unlikely that the choice of which standard would be applied in assessing the billing data compiled would have a significant effect on the university during the audit. The relevant costs would seem to be associated with collecting the data, not applying any particular standard in interpreting it. The only apparent effect from that choice would come if and when it resulted in a conclusion about plaintiffs' compliance with the applicable standards. And as we have seen, we are not now in a position to assess what might or might not happen at the end of this process.

C.

For the foregoing reasons, the present dispute is not sufficiently "fit" for review at this time. Nor have the hospitals shown sufficient "hardship" to support a determination that the case is ripe for judicial consideration. Again, the only significant hardships resulting from the challenged decision are those related to compliance with a request for information reasonably directed at a legitimate purpose of the inspector general. This is a cost that plaintiffs—recipients of Medicare funding—must face as a "burden of living under government." *Standard Oil, 449 U.S. at 244.* [**41]

While the hospitals have raised profoundly serious questions about the wisdom and fairness of the PATH audits, the audits are within the broad authority of the inspector general, and any challenges are properly made when they have led to action against the hospitals and their employees, if any. Accordingly, we will affirm the judgment of the District Court.

AMBRO, Circuit Judge, *Concurring*:

The majority decides (1) generally that the Inspector General ("IG") of the federal Department of Health and Human Services ("HHS") has the authority to issue subpoenas in furtherance of an audit of appellants' teaching hospitals in determining compliance with certain Medicare requirements, and (2) specifically that the District Court lacks jurisdiction to enjoin the audit at issue here because the IG's decision merely to investigate by issuing subpoenas was neither final nor ripe for review. I agree as to (1) and concur in the result as to (2).

At the outset is a paradox. If there is no jurisdiction to consider appellants' attempt to block the Medicare audit, how does jurisdiction exist to enforce subpoenas to turn over documents for the audit? Stated conversely, if there is jurisdiction [**42] to review the enforcement of administrative subpoenas like those of the IG, should not jurisdiction also exist to review whether an audit (which the subpoenas attempt to implement) is allowed in appellants' case?

The majority handles this conundrum deftly. The IG has the power under the *Inspector General Act of 1978 to* investigate [*72] fraud and abuse involving Medicare. Inherent within its investigatory power is the authority to issue subpoenas. But a subpoena to an entity operating within the Medicare program merely begins an investigation lacking both the finality and ripeness of an enforcement action that may result from the investigation. Thus the general authority for the IG to issue subpoenas is not, for any particular entity, an action alleging noncompliance with Medicare.

But rather than deciding that specific enforcement of the IG's auditing powers is not final nor ripe for review, I simply would rely on *5 U.S.C. § 701(a)(2)* of the Administrative Procedures Act ("APA"), which exempts from judicial review "agency action . . . committed to agency discretion by law." As *§ 6(a)(2)* [*5 U.S.C. app. 3, § 6(a)(2)*] of the Inspector General [**43] Act authorizes the IG "to make such investigations . . . relating to the administration of the programs and operations of [HHS] as are, in the judgment of the [IG], necessary or desirable," *§ 701(a)(2)* applies. *Cf. Webster v. Doe, 486 U.S. 592, 600, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988).*

LEXSEE 186 F3D 644

**UNITED STATES OF AMERICA, Plaintiff–Appellee, versus CHEVRON U.S.A., INCORPORATED; CHEVRON CORPORATION, Defendants–Appellants.**

**No. 98–40364**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***186 F.3d 644; 1999 U.S. App. LEXIS 20159; 143 Oil & Gas Rep. 380***

**August 24, 1999, Decided**
**August 24, 1999, Filed**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the Eastern District of Texas. 9:97–CV–99. John H Hannah, Jr, US District Judge.

**DISPOSITION:** AFFIRMED.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** For UNITED STATES OF AMERICA, Plaintiff – Appellee: Barbara C Biddle, Jeffrey A Clair, US Department of Justice, Washington, DC.

For CHEVRON USA, INCORPORATED, CHEVRON CORPORATION, Defendants – Appellants: Stephen Richard Ward, Patricia Dunmire Bragg, Gardere & Wynne, Tulsa, OK. Robert E Meadows, Gardere, Wynne, Sewell & Riggs, Houston, TX.

**JUDGES:** Before JONES, DUHE, and BARKSDALE, Circuit Judges.

**OPINIONBY:** RHESA HAWKINS BARKSDALE

**OPINION:** [*646] RHESA HAWKINS BARKSDALE, Circuit Judge:

Concerning the alleged underpayment of royalties to the Government for production under federal oil and gas leases, chiefly at issue is the authority of the Inspector General (IG) for the Department of the Interior to subpoena documents from Chevron (pursuant to a district court enforcement order; Chevron has complied), Chevron having provided many of the same documents in other contexts not only to the Department of the Interior, but also to the Department of Justice. We **AFFIRM.**

I.

As an oil and gas lessee on federal and Indian lands, Chevron (Chevron [**2] USA, Inc., and Chevron Corporation) pays the United States royalties on its production. Chevron must report monthly production value to the Minerals Management Service of the Department of the Interior (MMS).

In 1996, the Interior *and* Justice Departments began investigations after private *qui tam* plaintiffs under the False Claims Act (FCA), *31 U.S.C. § 3730*(b), alleged that Chevron, among others, had misrepresented the value of their federal lease production. The Department of the Interior IG issued administrative subpoenas to Chevron for documents related to the federal leases since 1986. The documents concerned both the value Chevron derived from the leases and the methods it used to calculate royalties.

Chevron objected to the subpoenas' scope and concomitant threat to confidential and proprietary information. In March 1997, the IG sought enforcement by the district court. Pursuant to an agreed order staying enforcement, the parties attempted to agree on a protective order. Negotiations having failed, the district court in January 1998 ordered the subpoenas enforced, but subject to an IG–drafted protective order. (As discussed *infra* in parts [**3] II.A. and C., Chevron challenges the protective order, especially its provisions [*647] concerning confidentiality/disclosure to third parties.)

The district court and this court denied stays pending appeal. Thereafter, Chevron complied with the subpoena.

Meanwhile, in the FCA case, and shortly before the January 1998 subpoena enforcement order, the Department of Justice issued Civil Investigative Demands (CIDs) for documents pertaining to Chevron's federal leases. The documents called for by the DOJ CIDs and the IG administrative subpoenas were similar, but not identical. For example, the CID called for documents dating back to 1990; the administrative subpoenas, to 1986.

II.

A.

Because Chevron has produced the documents in response to the IG subpoenas and DOJ CIDs, we face a threshold question of mootness, which we must address *sua sponte* if necessary. *E.g.*, ***Dailey v. Vought Aircraft Co.***, *141 F.3d 224, 227 (5th Cir. 1998).* "The mootness doctrine requires that the controversy posed by the plaintiff's complaint be 'live' not only at the time the plaintiff files the complaint but also throughout the litigation process." ***Rocky v. King***, *900 F.2d 864, 866 (5th Cir. 1990).* [**4]

Among other things, the continuing dispute regarding the protective order, discussed *infra*, keeps this a "live" controversy. The subpoenas and CIDs cover distinct sets of documents and offer different protections. Were we to vacate the enforcement order on any of the grounds Chevron advances, MMS would be required to return documents produced in response to the subpoenas, alleviating Chevron's concern. *See* ***In re Grand Jury Subpoena***, *148 F.3d 487, 490 (5th Cir. 1998), cert. denied, 119 S. Ct. 1336 (1999)* (case not moot where court can still grant some relief by ordering documents returned or destroyed) (citing ***Church of Scientology of California v. United States***, *506 U.S. 9, 13, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992)).*

B.

A subpoena enforcement order is reviewed for abuse of discretion. *E.g.*, ***N.L.R.B. v. G.H.R. Energy Corp.***, *707 F.2d 110, 113 (5th Cir. 1982).* "It is settled that the requirements for judicial enforcement of an administrative subpoena are minimal." ***Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board***, *983 F.2d 631, 637 (5th Cir. 1993).* [**5] Courts will enforce an administrative subpoena if it (1) is within the agency's statutory authority; (2) seeks information reasonably relevant to the inquiry; (3) is not unreasonably broad or burdensome; and (4) is not issued for an improper purpose, such as harassment. *See, e.g.,* ***id.***, *983 F.2d at 638.*

Pursuant to the first and third of these prongs, Chevron claims the subpoenas are outside the IG's authority and are unduly burdensome.

1.

Inspectors General were placed in various federal agencies and programs by the Inspector General Act of 1978 (IGA), *5 U.S.C. app. 3. See* ***Burlington Northern***, *983 F.2d at 634.* Amendments to the Act have added them to other agencies and programs. Interior was one of the original departments with an IG. *5 U.S.C. app. 3* § 11(2). Section 4(a) states his broad authority:

> It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established—
>
> (1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [**6] such establishment;
>
> ...
>
> [*648] (3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, *or preventing and detecting fraud and abuse in*, its programs and operations.

(Emphasis added.) Section 6(a)(4) of the IGA authorizes an IG

> to require by subpena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act...

a.

As discussed in ***Burlington Northern***, *983 F.2d at 634*, concern about fraud in federal programs was one of Congress' primary reasons for enacting the IGA. In the light of Inspectors General being tasked by the IGA, as quoted above, with an anti–fraud mission, Chevron attempts to distinguish underpayment of royalties from "fraud and abuse" in MMS programs and operations. In this regard, it contends that only recipients of federal funds are subject to IG oversight.

Obviously, Chevron's receiving a federal *lease* (and the concomitant [**7] oil and gas production), rather than federal *funds*, makes its alleged fraud no less "fraud ... in" MMS' program. Needless to say, both an underpaying lessee *and* an overcharging contractor extract a benefit fraudulently disproportionate to what is received by the Government; both fall squarely within the IG's statutory authority. The IGA legislative history Chevron cites referring to government–funded projects, *e.g.*, S. REP. NO. 95–1071, at 27, 34, *reprinted in* 1978 U.S.C.C.A.N. 2676, 2702, 2709 (referring to "the way in which Federal tax dollars are spent" and "the way federal funds are ex-

pended") sets out a central, but *not* exclusive, concern; it does *not* suggest a limit to such IG activities.

b.

***Burlington Northern*** construed the IGA, *5 U.S.C. app. 3* § 9(a)(2) ("there shall not be transferred to an Inspector General ... program operating responsibilities") to bar IG investigations which, "as part of a long–term, continuing plan", perform "those investigations or audits which are most appropriately viewed as being within the authority of the agency itself". ***Burlington Northern,*** *983 F.2d at 642*. There, based [**8] on the district court's finding that the IG investigation had such an improper purpose, our court affirmed the district court's refusal to enforce an IG subpoena. ***Id.*** *at 640–41*.

Chevron claims that, as did the tax audits in ***Burlington Northern***, the subpoenas usurp MMS "program operating responsibilities". But, unlike the situation in ***Burlington Northern***, the subpoenas do not assume MMS program operating responsibilities, because MMS continues to keep the relevant records. The subpoenas do not displace any agency responsibilities; therefore, no agency functions have been "transferred" to the IG. As our court noted recently in distinguishing ***Burlington Northern***,

> Section 9(a)(2) prohibits the transfer of 'program operating responsibilities,' and not the duplication of functions or copying of techniques. ... In order for a transfer of function to occur, the agency would have to relinquish its own performance of that function.

***Winters Ranch Partnership v. Viadero***, *123 F.3d 327, 334 (5th Cir. 1997)*. Performance of functions has not been relinquished by MMS; accordingly, the ***Burlington Northern***/ § 9(a) [**9] limit is not implicated.

c.

Chevron maintains that IG subpoenas connected with an action under the FCA must be subject to the restrictions imposed upon DOJ CIDs. It invites us to infer an implicit limit on the IG flowing [*649] from the authority granted to DOJ by the FCA.

The 1986 FCA amendments, Pub. L. No. 99–562, 100 Stat. 3153 (1986), empower DOJ to issue CIDs for material or information relevant to a false claims law investigation. *See 31 U.S.C. § 3733*. CIDs differ from IG subpoenas in several ways. In some ways, they provide greater protection to the recipient than does a subpoena. For example, § 3733(a)(2)(G) makes the Attorney General's CID authority nondelegable; § 3733(i)(1) requires a single designated custodian for CID–obtained materials; § 3733(k) exempts CID materials from the Freedom of Information Act, *5 U.S.C. § 552;* and § 3733(i)(2)(C) allows disclosure to other agencies or Congress only upon application to a district court and notice to the CID recipient. In other ways, CIDs are broader than a subpoena. For example, § 3733(a)(1)(B) & (C) allow CIDs to seek types of information (such as oral testimony and answers [**10] to interrogatories) beyond that permitted an administrative subpoena.

Chevron's claim that the FCA limits the IG is belied by the silence in the FCA and IGA on the matter and by FCA legislative history, which plainly contemplates cooperation in FCA cases between an IG and DOJ. *See, e.g.*, S. REP. NO. 99–345, at 33 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5298 (noting that, in FCA cases, DOJ had historically relied on information from IGs and criminal grand juries, and that proposed CID authority would "*supplement*[] the investigative powers of the IGs" in the face of judicial limits on DOJ use of grand jury materials) (emphasis added).

Acknowledging this legislative history (but pointing to no other), Chevron claims that the FCA amendment confirms prior IG inability to investigate false claims; that, by "supplementing" IG investigative authority, the CIDs filled a void in IG authority. To say the least, this is a quite strained reading of "supplement", one belied by the explicit statement that, before the amendment, an IG's FCA material was available to DOJ. Chevron's further claim that IG authority to investigate FCA claims would render superfluous and senseless [**11] the DOJ's CID authority ignores both the ways in which CIDs exceed IG subpoenas in scope and the usefulness to the DOJ of an independent investigative authority exercisable without IG participation.

The FCA empowers DOJ to investigate false claims against the Government, and the IGA empowers an IG to investigate fraud and abuse in government programs. Obviously, investigative authority granted by each Act overlaps. Obviously, if an IG investigation is within statutory authority, the fact that it also involves matters relevant to an FCA claim does not alter the propriety of the investigation.

2.

In the last of its challenges to two of the four bases that must be satisfied before a district court will enforce on administrative subpoena, Chevron claims that the subpoenas are overbroad *and* unduly burdensome. In the main, these contentions restate the complaints about the lack of CID–type protections. Chevron contends that the subpoenas are broader than a CID could be, for instance, because they cover years outside the FCA limitations period, or

for which FCA claims are otherwise barred. (Chevron thus ironically asserts that the subpoena is invalid both because it covers documents [**12] *not* relevant to an FCA case, and also because it covers documents which *are*.)

However, "a subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business". ***F. T. C. v. Jim Walter Corp.**, 651 F.2d 251, 258 (5th Cir. 1981)* (quotation omitted). While the time and effort required to comply with the subpoena are obviously extensive (as is the alleged fraud), Chevron offers no explanation independent of its [*650] CID–related arguments why, relative to Chevron's size, the compliance cost and effort "unduly disrupted or seriously hindered normal operations".

Chevron also contends that, because it has already provided many of the same documents to MMS for regulatory audits, the IG should not have been able to obtain them again. *See **United States v. Powell**, 379 U.S. 48, 57–58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964)* (agency seeking documents must not already have them in its possession). However, it is undisputed that MMS has not retained those documents. Chevron's producing them again may have been duplicative, but this is, in part, necessary for an independently–operating [**13] IG, consistent with the IGA and required by ***Burlington Northern***.

C.

Regarding the protective order, Chevron keys especially on the confidentiality/disclosure provisions. As part of the enforcement order, the district court found that the protective order "affords [Chevron] adequate protection". We review for abuse of discretion. *See **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, 28 F.3d 1388, 1394 (5th Cir. 1994)* (protective order under *FED. R. CIV. P. 26*). (Of course, an abuse of discretion regarding the protective order would not alone compel vacating the enforcement order, the *only* relief Chevron seeks.)

The protective order, supplemented by the Government's post–argument stipulation in our court, proscribes disclosure of any confidential material, as designated pursuant to the protective order, to any other person except in accordance with the procedures set by the protective order; requires a court order for disclosure to a private party, with the IG being required to resist, to the extent permitted by law, such parties' attempts to obtain documents (for instance, under the Freedom of Information Act), with [**14] notice to be given pre–disclosure to Chevron; permits disclosure to other agencies of the United States (subject to their maintaining the protections accorded confidential materal); and, concerning a request from Congress, permits disclosure, but Congress is to be advised about the protective order and Chevron is to be notified, unless Congress objects.

As with its claims of undue burden and overbreadth, Chevron's contentions largely restate its position regarding CIDs; it asserts that the confidentiality provisions are less than those provided by a CID, but points to no authority for this claimed entitlement to greater protections. We find no abuse of discretion.

Along this line, we agree with the D.C. Circuit that an agency's determinations on the protections required for confidential information are not to be lightly disregarded. *See **U.S. International Trade Com'n v. Tenneco West**, 261 U.S. App. D.C. 341, 822 F.2d 73, 79 (D.C. Cir. 1987)* ("deference [is] due an agency in choosing its own procedures for guarding confidentiality"); ***F. T. C. v. Texaco, Inc.**, 180 U.S. App. D.C. 390, 555 F.2d 862, 884 n.62 (D.C. Cir. 1977)* ("it is the [**15] agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality") (citing ***FCC v. Schreiber**, 381 U.S. 279, 290–1, 295–6, 14 L. Ed. 2d 383, 85 S. Ct. 1459 (1965)).*

Chevron's primary concern is, under the protective order as written, not being permitted to object to disclosure to third parties (*not* including Congress or any agency of the United States). But, the Government's post–argument *stipulation* has greatly deflated, *if not mooted*, this sub–issue. Under protective order P1, "Protected Competitive Material" (designated pursuant to protective order–procedures) is *not* to "be disclosed to any other person except in accord with [the protective order] or as may otherwise be required by law". As we directed at oral argument, the Government's post–argument submittal covers its "obligations to preserve the confidentiality [*651] of documents obtained through [the IG's] subpoenas".

Concerning the above quoted disclosure–proscription, the Government has *stipulated* that it "will *not* disclose Protected Competitive Material to any private party unless compelled to do so by a judicial order entered [**16] by a court of competent jurisdiction". (Emphasis added.) In explaining why it has so stipulated, even though a disclosure–order is *not* explicitly required by the protective order, the Government states in its post–argument submittal that it "construes these [protective order P1] provisions as barring voluntary governmental disclosure of Protected Confidential Material to Chevron's business competitors or to any other private party". In that the Government has *stipulated* to no non–order disclosure, and in that, pursuant to protective order P10, Chevron must be given pre–disclosure notice, it may well be that the court considering disclosure *vel non* will allow Chevron to first

object. In any event, as noted, prior to such disclosure, the Government is to resist to the extent permitted by law and "Chevron [is to] be given as much notice as practical", offering it opportunity to intervene and, *inter alia*, make a reverse Freedom of Information Act claim. *See* ***Chrysler Corp. v. Brown****, 441 U.S. 281, 317–18, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979)* (allowing "reverse FOIA" challenge under Administrative Procedures Act to disclosure of documents). [**17]

Regarding disclosure to agencies of the United States, Chevron concedes that sharing of information between the IG and other agencies, such as DOJ, is contemplated in the legislative history of CID provisions cited above, the legislative history of the IGA, and other cases. *See, e.g.*, S. REP. NO. 95–1071, at 6–7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2681–82 (recommending "inspector general concept" because it would "strengthen[] cooperation between the agency and [DOJ] in investigating and prosecuting fraud cases"); ***U.S. v. Educational Development Network Corp.****, 884 F.2d 737, 743 n.10 (3rd Cir. 1989)* ("Congress expected cooperation between the IG and [DOJ] in investigating and prosecuting fraud cases."); ***U.S. v. Aero Mayflower Transit Co., Inc.****, 265 U.S. App. D.C. 383, 831 F.2d 1142, 1146 (D.C. Cir. 1987)* ("So long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial."). And, for disclosure to such agencies and Congress, the former are to maintain the confidentiality provisions and the [**18] latter is to be notified about those provisions (with Chevron being notified, unless Congress objects).

Again, there was no abuse of discretion concerning the protective order. This is all the more so in the light of the Government's post–argument stipulation.

III.

For the foregoing reasons, the enforcement order is

***AFFIRMED.***

LEXSEE 123 F.3D 327

**WINTERS RANCH PARTNERSHIP, a Texas partnership; David W. Winters; Sara F. Winters; Thomas D. Winters; John C. Winters, Plaintiffs–Counter Defendants–Appellees, v. Roger C. VIADERO, Inspector General, U.S. Department of Agriculture, Defendant–Counter Claimant–Appellant.**

**No. 95–50902.**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***123 F.3d 327; 1997 U.S. App. LEXIS 27742***

**October 1, 1997, Decided**

**SUBSEQUENT HISTORY:** [**1] As Amended October 15, 1997.

Rehearing and Suggestion for Rehearing En Banc Denied December 2, 1997, Reported at: *1997 U.S. App. LEXIS 36800.*

**PRIOR HISTORY:** Appeal from the United States District Court for the Western District of Texas.

**DISPOSITION:** Judgment of the district court REVERSED, summary judgment granted in favor of the IG ordering that the subpoenas issued by the IG shall be enforced, and the case REMANDED.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**JUDGES:** Before GARWOOD, BARKSDALE and DENNIS, Circuit Judges.

**OPINIONBY:** DENNIS

**OPINION:**

[*328] DENNIS, Circuit Judge:

Appellant, the Inspector General (of the United States Department of Agriculture (USDA)) ("IG"), seeks summary enforcement of administrative subpoenas *duces tecum* issued to Appellees, Winters Ranch Partnership and its individual partners (collectively, "the WRP group"). The WRP group contends that the subpoenas were issued pursuant to an investigation which exceeds the IG's statutory authority under the Inspector General Act and are, therefore, unenforceable. The district court granted WRP's motion for summary judgment and denied the IG's motion for summary judgment, holding that the subpoenas were not issued for a purpose within the statutory authority of the IG and denying the enforcement of the subpoenas. *Winters Ranch Partnership v. Viadero, 901 F. Supp. 237, 242 (W.D.Tex.1995).* We determine [**2] that the IG issued the subpoenas for a purpose within the IG's statutory authority, *viz,* to test the efficiency of the Consolidated Farm Service Agency's implementation of payment limitations in the wool and mohair price support programs. Accordingly, we reverse the district court's judgment and render summary judgment ordering enforcement of the subpoenas.

I. Factual Background

Plaintiffs–Appellees, Winters Ranch Partnership ("WRP") and its individual partners, David W. Winters, his wife Sarah R. Winters, and their children Thomas D. Winters and John C. Winters (collectively, "the WRP group") have interests in a sheep and goat ranch that produces wool and mohair. Based on their representations that each partner was an active producer of wool and mohair, all of the WRP partners received price support [*329] payments under the federal wool and mohair price support programs for marketing years 1991, 1992, and 1993. The Consolidated Farm Service Agency ("CFSA") is the federal agency statutorily authorized to administer the price support program. In 1993, the Inspector General formulated a plan to investigate and audit the CFSA's implementation of the payment limitation and eligibility [**3] requirements for participation in federal wool and mohair support programs. In connection with this investigation, the IG selected a sample of six price support recipients out of the total number of recipients and proceeded to investigate these subjects to test whether the agency's administration of the program effectively prevented violations of payment limitation and eligibility requirements. The WRP group was one of the six producer–recipients selected for the investigation. The IG began by requesting information to determine whether the WRP group's farming operation was carried out in 1991 and 1992 as represented to the CFSA. The WRP group cooperated for

several months by producing the documents requested. The IG's review of the documents submitted by the WRP group revealed that the partners actual participation in the farming operations for marketing years 1991, 1992, and 1993 were different from that represented to the CFSA. The IG notified the CFSA of these discrepancies and recommended that the CFSA initiate its own investigation. On December 16, 1994, the CFSA began its own review to determine if WRP farming operations were as represented to the CFSA for program payment limitation [**4] and payment eligibility requirements. On January 4, 1995, the WRP group informed the IG that it would no longer respond to the IG's requests for information and instead would cooperate only with the CFSA. On February 1, 1995, the IG issued administrative subpoenas seeking information relating to the WRP group's eligibility for price support payments in 1991 through 1993.

The WRP group refused to comply with the subpoenas and filed this action for declaratory judgment that the subpoenas were not issued for a purpose within the IG's statutory authority. The IG filed a counterclaim seeking enforcement of the subpoenas. Subsequently, the adverse parties filed cross motions for summary judgment. The district court granted summary judgment in favor of the WRP group and denied the IG's motion for summary judgment. The IG appealed from the district court's judgment.

II. Legal Principles

A. Administrative Subpoenas

When called upon to enforce an administrative subpoena, a court's role is limited to evaluating whether (1) the subpoena was issued for a lawful purpose within the statutory authority of the issuing agency; (2) the documents requested are relevant to that purpose; and (3) [**5] the subpoena demand is reasonable and not unduly burdensome. *See, e.g., Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 209, 66 S. Ct. 494, 506, 90 L. Ed. 614 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 63 S. Ct. 339, 343, 87 L. Ed. 424 (1942); Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd., 983 F.2d 631, 637 (5th Cir.1993)* (citing *United States v. Morton Salt Co., 338 U.S. 632, 652, 70 S. Ct. 357, 368–69, 94 L. Ed. 401 (1950); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir.1986); Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281, 1284 (11th Cir.1982); United States v. Powell, 379 U.S. 48, 58, 85 S. Ct. 248, 255, 13 L. Ed. 2d 112 (1964)); United States v. Security State Bank & Trust, 473 F.2d 638, 641 (5th Cir.1973); see also RTC v. Walde, 305 U.S. App. D.C. 183, 18 F.3d 943, 946 (D.C.Cir.1994); Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC, 303 U.S. App. D.C. 316, 5 F.3d 1508, 1513 (D.C.Cir.1993); F.T.C. v. Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 872 (D.C.Cir.1977)* (en banc) (citations omitted). The WRP group principally contends that the subpoenas were not issued for a purpose within the IG's authority. The WRP [**6] group did not vigorously raise or address the issues of whether the subpoenas sought irrelevant information or were unduly broad or burdensome. n1 The district court's [*330] ruling was restricted to the authority of the IG to issue the subpoenas.

n1 In the final pages of its brief, the WRP group raises, in a cursory fashion, arguments that the administrative subpoenas are unenforceable because they are irrelevant and burdensome. *See* Appellee's Brief p. 36–37. No summary judgment evidence supports a finding that the information sought by the IG was either irrelevant or burdensome. *See* infra at III (discussing the undisputed facts). In fact the information directly relates to the purpose of the audit and encompasses documents not requested by the CFSA.

B. Inspector General Act

The Office of Inspector General of the United States Department of Agriculture was established by the Inspector General Act. Inspector General Act of 1978, Pub.L. No. 95–452 (codified in *5 U.S.C. app. 3* §§ 1–12). Congress created the [**7] Office of Inspector General for the express purpose of combating "fraud, waste, abuse, and mismanagement in the programs and operations of the federal government." S.REP. NO. 95–1071, at 1, *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676. An office of Inspector General is established in executive departments and executive agencies to act as an independent and objective unit "(1) to conduct and supervise audits and investigations relating to the programs and operations of [the agency]," (2) to recommend policies for "activities designed (A) to promote economy, efficiency, and effectiveness" in the agency's programs and operations, and "(B) to prevent and detect fraud and abuse" therein, and (3) to provide a means to keep the agency head and Congress informed of problems and deficiencies in the agency's programs and operations and to recommend corrective action. *5 U.S.C. app. 3* § 2. Each Inspector General, in carrying out the provisions of the Act, is authorized "to make such investigations and reports relating to the administration of the programs and operations of [the agency] as are, in the judgment of the Inspector General, necessary or desirable," and "to require by subpena [sic] [**8] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the

functions assigned" by the Act. *Id.* § 6(a)(2), (4).

In short, Congress conferred very broad audit, investigatory, and subpoena powers on each Inspector General, as an independent and objective unit of the department or agency, to help promote efficiency and prevent fraud, waste, abuse, and mismanagement in federal government programs; Congress also prohibited any government agency from transferring its program operating responsibilities to an Inspector General. *See Burlington N. R.R. Co., 983 F.2d at 634–35.*

C. Wool and Mohair Act

The National Wool Act of 1954 created price support programs for the production of wool and mohair and designated the Secretary of Agriculture to administer the programs. *7 U.S.C.S. §§ 1782*–1785 (Supp.1996). Beginning in the 1991 marketing year, the Food, Agriculture, Conservation, and Trade Act of 1990 imposed ceilings on the amount of price support payments received by any one "person". *7 U.S.C.S. § 1783*(b) (Supp.1996) (repealed 1996). Payments to any "person" were limited [**9] to (a) $200,000 for the 1991 marketing year; (b) $175,000 for the 1992 marketing year, and (c) $150,000 for the 1993 marketing year. *7 U.S.C.S. § 1783*(b) (Supp.1996) (repealed 1996). For payment limitation purposes, a "person" is any individual or organizational entity actively participating in farming operations, provided they have a separate and distinct interest in the land or crop involved, exercise separate responsibility for their interests, and maintain separate funds or accounts. *7 C.F.R. §§ 1497.7*, 1497.9 (1990).

USDA regulations charge the CFSA with determining program eligibility, payment limitation compliance, and participants' general compliance with all program requirements. *See 7 C.F.R. §§ 1468.102*, 1472.1502 (1990). According to the USDA handbook on payment limitation enforcement, the CFSA is responsible for conducting compliance reviews, termed "end–of–year reviews," as part of its program administration responsibilities. U.S. DEPT. OF AGRICULTURE, ASCS HANDBOOK, PAYMENT LIMITATION FOR STATE AND COUNTY OFFICES 1–PL (Revision 1), P. 7–1 (Jan. 23, 1992). The purpose of end–of–year reviews is "to maintain the integrity of payment limitation and payment eligibility [**10] provisions" and to "ascertain that farming operations were [*331] carried out as represented when initial determinations were made." *Id.*

D. Appellate Review Standards

An appellate court applies the same standard in reviewing the grant or denial of a summary judgment motion as that used by the trial court initially. *Melton v. Teachers Ins. & Annuity Ass'n of Am., 114 F.3d 557, 559 (5th Cir.1997); Dawkins v. Sears Roebuck and Co., 109 F.3d 241, 242 (5th Cir.1997)* (citing *Cockerham v. Kerr–McGee Chem. Corp., 23 F.3d 101, 104 (5th Cir.1995)); Waymire v. Harris County, Tex., 86 F.3d 424, 427 (5th Cir.1996)* (citing *Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 950 (5th Cir.1994)); Jurgens v. E.E.O.C., 903 F.2d 386, 388 (5th Cir.1990)* (citing *Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir.1989)); McCrae v. Hankins, 720 F.2d 863, 865 (5th Cir.1983)* (citations omitted). Under Rule 56(c), a summary judgment is proper when it appears that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *FED.R.CIV.P. 56(c).*

III. Discussion

A. There is no dispute as [**11] to any material fact.

In support of the IG's motion for summary judgment to enforce the subpoenas, the IG filed numerous exhibits including: (1) a declaration under penalty of perjury by Melinda S. Wenzl, Auditor, Office of the IG of the U.S. Dept. of Ag., Auditor–in–Charge of the audit of the Wool and Mohair Payment Limitations; (2) the IG's Survey Program providing instructions and guidance for conducting a survey of the 1991 and 1992 wool and mohair payment limitations administered by the Agricultural Stabilization and Conservations Service [predecessor of the CFSA], dated July 15, 1993; (3) copies of correspondence between the office of the IG and the WRP group; (4) copies of the subpoenas duces tecum issued to the WRP group; (5) a copy of IG's correspondence to the CFSA recommending a review of WRP operations; and (6) a copy of the CFSA's letter to WRP announcing its end–of–year review of WRP.

In support of its motion for summary judgment, the WRP group submitted a number of exhibits primarily including: (1) a July 9, 1994 fax transmittal from Melinda Wenzl, IG Auditor, to David Winters of WRP requesting certain documents necessary for the IG's review of WRP's 1991 and 1992 [**12] payment limitations; and (2) copies of correspondence between the IG and the WRP group, the CFSA and the WRP group, and the IG and the WRP group's attorney.

The exhibits submitted by the WRP group are consistent with and partially duplicate the IG's filings. A review of the parties' exhibits reveals that the following material facts are undisputed.

Wool and mohair producers are eligible under the National Wool Act of 1954 for price support payments when the yearly average price received for wool or mohair

is below the established support price. The USDA makes price support payments through its component agencies, one of which is the CFSA. The CFSA is responsible for determining producers' eligibility for payments and compliance with program requirements. To enforce these eligibility and program requirements, the CFSA is charged with the responsibility of conducting end–of–the–year reviews to ascertain that participation in farming operations are carried out as represented.

Beginning with the 1991 marketing year, price support payments to federal producer recipients were subject to limits. The payment limitations restrict the total amount of price support that each person may receive [**13] for a particular marketing year. The payment limitations per person were $200,000 for the 1991 marketing year; $175,000 for 1992; $150,000 for 1993; and $125,000 for 1994. For payment limitations purposes, a "person" is an individual or entity who has a separate and distinct interest in the land or crop involved, exercises separate responsibility for such interest, and maintains funds or accounts separate from that of any other individual or entity. Any person who participates in a scheme or device to evade the payment limitations is not eligible for CFSA program payments.

[*332] The IG decided to test the efficiency of the CFSA's administration of the wool and mohair price support programs to determine whether payments for the 1991, 1992, and 1993 marketing years were properly made to a sample of producers who had represented that they met eligibility requirements, or whether producers had developed schemes or devices to evade payment limitations. After studying payment limitations records for 1989 and 1990 and comparing them with records for 1991, 1992, and 1993, the IG determined to select for independent IG investigation those producers who had received payments in excess of $200,000 [**14] in 1989 and 1990 and new producers who had received more than $50,000 in 1991. WRP was one of the six producers who fell into this category because: prior to 1991, only plaintiff David Winters of the WRP group participated in the programs and he received $424,715.27 for 1989 and $595,689.61 for 1990. David Winters, his wife Sara Winters, and their two children formed WRP after payment limitations were imposed effective in the 1991 marketing year. Based on representations by the WRP group, the CFSA approved their classification as four "persons" actively engaged in farming during the 1991, 1992, and 1993 marketing years. The combined wool and mohair payments to the WRP group for 1991, 1992, and 1993 were $670,200.62, $755,687.71 and $695,120.32, respectively. The IG examined operations and financial transactions of the WRP group and five other producers to determine the incidence, if any, of misrepresentation or non–compliance with program eligibility and limitation requirements.

At first the WRP group responded to the IG's request for information and documents. The IG's preliminary review uncovered discrepancies between the WRP group's actual farming operations and financial [**15] records and those represented to the CFSA as meeting the requirements of eligibility for price support payments. As required by the Act, the IG reported these findings to the CFSA and recommended an end–of–year review of the WRP group. The CFSA, on December 16, 1994, notified the WRP group that it was conducting an end–of–year review of WRP's operations and payment eligibility for 1991, 1992, and 1993. On January 4, 1995, the WRP group's counsel notified the IG that they would no longer respond to the IG's request for information, but that they would cooperate only with the CFSA.

The IG renewed the request for additional documentation pointing out that the IG's authority to conduct independent, objective audits is separate and distinct from the CFSA's authority to conduct end–of–year reviews. The WRP group again refused to respond.

The IG determined that the information requested was essential to a complete review of the enforcement of laws and regulations with respect to the WRP group's operations and the completion of the IG's survey program. Accordingly, the IG issued administrative subpoenas to the WRP group seeking the data on February 1, 1995. The WRP group responded by filing [**16] the instant action on February 21, 1995.

Although the CFSA has provided the IG with information and documents it recovered in its end–of–year review, the IG still has not received all of the information which it sought. Based on the partial information, the IG has determined, in conjunction with the CFSA, that the WRP group received payments for which they were ineligible in each of the marketing years 1991 through 1993. The remainder of the information that the IG requested, however, is indispensable to the IG's audit and investigation of the enforcement of program requirements with respect to the WRP group and to its survey testing of USDA price support programs. The following information was requested by the IG but has not been supplied: (1) explanations of abbreviations and codes contained in WRP's ledgers and account books; (2) loan documents, including promissory notes, security agreements, and transaction histories; (3) copies of David Winters's 1991 through 1993 accounting records; (4) information relating to offsets noted in WRP's general ledgers; (5) employer identification numbers for livestock or ranching operations in which David Winters had an interest; and (6) copies [**17] of sales documents for mohair sales records on WRP's general ledgers for 1992.

[*333] From the undisputed material evidentiary facts, we find that the IG issued the administrative subpoenas for two purposes. The immediate purpose was to obtain information relevant to whether each member of the WRP group met program eligibility requirements; whether any member of the group had received support payments in excess of that for which he or she was eligible; and whether the group or any of its members had participated in a scheme or device to evade price support limitations. The ultimate purpose of the subpoenas was to obtain information to complete the IG's survey program designed to determine whether the agency's procedures for detecting and preventing fraud and abuse were effective and whether deficiencies were prevalent in the agency's price support programs, and, if so, to determine the scope, patterns, and possible antidotes for the problem, and to enable the IG to make recommendations as to necessary or desirable remedial measures to the head of the agency and to Congress.

B. The Inspector General is entitled to judgment as a matter of law.

The subpoenas were issued for a lawful purpose [**18] within the statutory authority of the IG as the issuing agency. The Inspector General Act clearly authorizes an IG to require by subpoena information from persons who receive federal funds in connection with a federal agency program or operation for the purpose of evaluating the agency's programs in terms of their management, efficiency, rate of error, and vulnerability to fraud, abuses, and other problems.

The purpose of the Act in establishing an IG office in each agency is to effect independent and objective audits and investigations of the programs and operations of each agency, to promote economy, efficiency, and effectiveness and to prevent fraud and abuse in the agency's programs, and to keep the agency head and Congress apprised of problems and deficiencies in the programs. *5 U.S.C. app. 3* § 2(1)–(3).

To achieve this purpose, the Act imposes duties and responsibilities on each IG to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the agency. *Id.* § 4(a)(1). The Act also charges the IG to keep the agency and Congress informed of fraud, abuses, and serious problems in programs financed or administered by the agency. [**19] *Id.* § 4(a)(5).

To fulfill these duties, the Act gives the IG additional powers. The IG is authorized "to make such investigations and reports relating to the administration of the programs and operations of the agency as are, in the judgment of the [IG], necessary or desirable." *Id.* § 6(a)(2). The IG is authorized "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to [the agency] which relate to programs and operations with respect to which that [IG] has responsibilities." *Id.* § 6(a)(1). The IG is authorized "to request such information or assistance" necessary "to carrying out the [IG's] duties and responsibilities from any Federal, State, or local government agency." *Id.* The IG is authorized to require by subpoena from any person or entity, except federal agencies, "the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary" to its functions. *Id.* § 6(a)(4). "Procedures other than subpoenas shall be used by the IG to obtain documents and information from federal agencies." *Id.* The IG is authorized [**20] "to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance" of the IG's functions. *Id.* § 6(a)(5).

In the present case the district court concluded the following about the purpose of the IG's investigation: that it was "of a regulatory, rather than oversight, nature;" that it was not " "to promote economy, efficiency and effectiveness in the administration of and to prevent and detect fraud and abuse in and relating to the programs and operations of' " the CFSA; and that it was "a payment limitation compliance review to be conducted pursuant to a long–term regulatory plan." *Winters Ranch Partnership, 901 F. Supp. at 241*. In reaching these conclusions, the district court fell into error, evidently because it applied an incorrect interpretation of the provisions of the Inspector General Act to a clearly erroneous inference from the undisputed evidentiary facts of record.

[*334] The district court erred in concluding that the Act prevents the IG from using investigative techniques similar to the agency's end–of–year reviews as a means of executing the IG's functions. The Act establishes and protects the IG's independent, objective [**21] judgment in designing the scope, methodology, and focus of audits and investigations of the administration of agency programs and operations. The IG is specifically authorized to make such investigations as are, in the judgment of the IG, necessary or desirable. *Id.* §§ 2, 6(a)(2); *see also Burlington Northern, 983 F.2d at 641*. Although the IG is under the general supervision of the head of the agency, neither the head officer nor any other person may "prevent or prohibit [the IG] from initiating, carrying out, or completing any audit or investigation, or from issuing" any investigative subpoena. *Id.* § 3(a). The independence and objectivity of the IG is enhanced because the IG is appointed by the President, by and with the advice and consent of the Senate, and may be removed only by the President, who is required to explain the removal to both Houses of Congress. *Id.* § 3(a), (b).

The district court evidently based its decision in part on a misinterpretation of § 9(a) of the Inspector General Act. That Section provides:

> § 9. Transfer of functions.
>
> (a) There shall be transferred—
>
> (1) to the Office of Inspector General—[subsections (A) through [**22] (V) list pre-existing internal audit and investigative units of various agencies that shall be transferred]
>
> (2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the [agency] involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,
>
> except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

Section 9(a)(2) authorizes the head of an agency to transfer agency offices, functions, powers, or duties to the Office of the Inspector General if they are properly related to the functions of the IG and their transfer would further the purposes of the Inspector General Act. Correlatively, Section 9(a)(2) adds that program operating responsibilities shall not be transferred to an IG. Thus, the agency head cannot convey to the IG any of the agency's congressionally-delegated program operating responsibility. *See Burlington Northern, 983 F.2d at 642.* The transfer of such responsibility would not be properly related to or compatible with the function of the IG as an independent, objective inspector [**23] of the agency's operations; and such a transfer would thwart, not further, the statutory design to establish the IG as a separate, independent, and objective auditor and investigator of agency operations. *See id.*

The district court's apparent interpretation of Section 9(a)(2) as prohibiting an IG from using the agency's investigatory techniques in conducting an independent IG investigation is simply incorrect. Section 9(a)(2) prohibits the transfer of "program operating responsibilities," and not the duplication of functions or the copying of techniques. No transfer of operating responsibility occurs and the IG's independence and objectivity is not compromised when the IG mimics or adapts agency investigatory methods or functions in the course of an independent audit or investigation. In fact, no transfer of function can occur simply because the IG emulates a function normally performed by the agency as part of the IG's own independent investigation. In order for a transfer of function to occur, the agency would have to relinquish its own performance of that function. See, e.g., *Burlington Northern, 983 F.2d at 642.*

As we have explained, the Act authorizes and enables the [**24] IG to make independent decisions as to how and when to investigate the agency's operation of its programs; it does not withdraw any legitimate investigatory technique from the IG's repertoire, and it does not dictate any particular manner in which the IG must deploy or orchestrate the available devices of inquiry. *See 5 U.S.C. app. 3* § 6(a)(2); *see also Burlington Northern, 983 F.2d at 641* (noting that the Inspector General Act gives Inspectors General "broad—not limited—investigatory and subpoena powers"); *United States v. Newport News Shipbuilding & Dry Dock Co., 837 F.2d 162, 170 (4th Cir.1988)* ("Where the interests of the government require broad [*335] *investigations* into the efficiency and honesty of a defense contractor, the Inspector General is equipped for this task."). As a practical matter, it is difficult to see how the IG could evaluate the accuracy and effectiveness of the agency's eligibility and compliance procedures without performing some of the same or similar procedures in at least a sample or limited number of cases and comparing the IG's findings and evaluations with that of the agency.

There is no justification in the undisputed factual record for [**25] the district court's inference that the IG's investigation is a "long-term regulatory plan," rather than an independent IG investigation " "to prevent and detect fraud and abuse in and relating to the programs and operations of the' " agency. The IG, based on reasonable criteria, selected a sample of six wool and mohair producers for a survey to determine to what extent, if any, fraud, misrepresentation, and evasion schemes had circumvented price support limitations during three marketing years. The WRP group was one of the producers selected because the previous history and subsequent characteristics of their support payments met or fell within reasonable and objective investigatory criteria. The IG used, as part of its investigation, methods similar to those that the agency uses at times to determine whether a producer misrepresented any material facts in demonstrating the producer's eligibility for price support payments during a particular marketing year. When the IG detected discrepancies between the WRP group's representations of facts to the agency and the true facts uncovered by the IG's investigation, the IG turned this information over to the agency, which promptly conducted [**26] its own investigation and found that the group was, in fact, not eligible for all of the support payments received. The record plainly does not support the district court's inferences that the IG's

investigation usurped the agency's program operating responsibilities, was long–term, or was not being conducted for legitimate purposes under the Act as represented by the IG.

Our decision in *Burlington Northern v. Office of Inspector General, 983 F.2d 631 (5th Cir.1993)*, supports the conclusion that the subpoenas here were issued for a purpose within the IG's statutory authority and should be enforced. *Burlington Northern* recognized and applied the same principles we do but reached the opposite result on crucially different facts.

In *Burlington Northern* the agency, the Railroad Retirement Board (RRB), had never exercised its statutory duty to investigate whether railroad companies' properly paid taxes to the Railroad Unemployment Insurance Account. The IG assumed the agency's primary duty, formed an alliance with the IRS, and was conducting regular tax collection audits of substantially all major railroads on a continuing, long–term basis. The IG was not merely conducting [**27] "spot checks" of railroads' records to test the effectiveness of the RRB's duty to investigate and audit railroad employers—the RRB had never performed this duty. The IG issued subpoenas to the Burlington Northern Railroad for payroll records pursuant to the IG's assumption of the RRB's statutory duty. The district court denied enforcement. We affirmed, holding that the IG lacked statutory authority to assume the agency's primary operating responsibilities by conducting, as part of a long–term, continuing plan, regular tax collection audits of the railroad companies' records. *983 F.2d at 642*. Under the Railroad Unemployment Insurance Act, this court stated, the RRB, not the IG, is charged with ensuring that railroad employers are accurately reporting taxable compensation and properly paying taxes. *983 F.2d at 643*. Further, and highly significant to the present case, this court added:

> We are *not* holding that, under all circumstances, the Inspector General of the RRB lacks statutory authority to investigate or audit railroad employers' compensation reporting. *The Inspector General of the RRB may well be able to do so as part of a plan to test the effectiveness of the RRB's* [**28] *summary reconciliation procedures or where he suspects fraud and abuse on the part of such employers.* We hold only that, based on the district court's findings concerning the *nature* of this particular audit of Burlington Northern, the Inspector General exceeded his statutory authority.

*983 F.2d at 643* (italics original) (underscoring added).

[*336] In the present case, the IG did not assume, and the CFSA did not cede, any of the agency's program operating responsibilities. The IG adopted a survey plan to "spot check" the records of six producers for three marketing years. The IG did not adopt a long–term, continuing plan to fill a void left by the CFSA in primary agency program administration. The purpose of the IG's investigation was to test the effectiveness of the agency's discharge of a program operating responsibility as the Act authorizes and as this court clearly indicated an IG may do in *Burlington Northern*. *See id.*

For the reasons assigned, the judgment of the district court is REVERSED, summary judgment is granted in favor of the IG ordering that the subpoenas issued by the IG shall be enforced, and the case is REMANDED to the district court for further proceedings [**29] consistent with this opinion.

LEXSEE 983 F.2D 631

**BURLINGTON NORTHERN RAILROAD CO., Plaintiff–Appellee, v. OFFICE OF INSPECTOR GENERAL, RAILROAD RETIREMENT BOARD, Attorney General of the United States, and the United States of America, Defendants–Appellants.**

**No. 91–7006.**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

***983 F.2d 631; 1993 U.S. App. LEXIS 2274***

**February 16, 1993, Decided**

**SUBSEQUENT HISTORY:** As Corrected.

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the Northern District of Texas. D.C. DOCKET NUMBER CA4–90–676–A c/w CA4–90–702–A. JUDGE John McBryde

**DISPOSITION:** The district court's decision denying enforcement of the subpoena duces tecum is AFFIRMED.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** For Defendants–Appellants: Marvin Collins, USA, 310 U.S. Courthouse, Ft. Worth, TX 76102, FTS 334–3291. Stuart K. Gerson, AAG, U.S. D. of J., 10th & Constitution Ave., Rm. 3143, WA, DC 20530, FTS 368–3301. John C. Hoyle, Atty., USDOJ, Barbara C. Biddle, Asst. Dir., 10th & PA Ave., N.W., Appellate Staff, Rm. 7417, WA/DC 20530, FTS: 368–3547.

For Plaintiff–Appellee: Th0omas J. Knapp, Burlington Northern Railroad Co., Continental Plaza, Ste. 380, 777 Main St., Ft. Worth, TX 76102, (817/878–2380). STEPTOE & JOHNSON, Richard K. Willard, David A. Price, 1330 Connecticut Ave., N.W., WA/DC 20036, (202) 429–3000.

For AMICUS – ASSOCIATION OF AMERICAN RAILROADS: MCDONALD SANDERS, William L. Latham, Robert L. Ginsburg, 1300 Continental Plaza, 777 Main St., Forth Worth, TX 76102–5305, (817) 336–8651.

**JUDGES:** Before VAN GRAAFEILAND, * * KING, and EMIO M. GARZA, Circuit Judges.

* Senior Circuit Judge for the Second Circuit, sitting by designation.

.

**OPINIONBY:** KING

**OPINION:**

[*633] KING, Circuit Judge:

This appeal concerns the enforceability of a subpoena duces tecum issued by the Inspector General of the Railroad Retirement Board to Burlington Northern Railroad Company. The district court refused to summarily enforce the subpoena, concluding that the Inspector General issued it in aid of an ultra vires regulatory compliance audit. Because (i) the district court did not clearly err in determining that the Inspector General in fact issued the subpoena in aid of a regularly scheduled, tax compliance audit, and (ii) the Inspector General lacks statutory authority to conduct such tax compliance audits, we affirm the district court's decision denying summary enforcement of the subpoena.

I. BACKGROUND

A. The Administrative Structure: The Functions of the Railroad Retirement Board and the Office of Inspector General

Before describing the events surrounding the Inspector General's decision to issue a subpoena to Burlington Northern, [**2] we outline the administrative functions of the Railroad Retirement Board (RRB) and the Office of Inspector General (OIG). An understanding of their administrative functions is important to the disposition of this appeal because of the potential for their functions to overlap. That is, under the existing administrative structure, the Inspector General, in attempting to perform his statutory oversight duties, could effectively assume the RRB's tax enforcement duties.

1. *The Railroad Retirement Board's Mission*

The RRB is responsible, under separate federal statutes,

for distributing two types of benefits. First, the RRB administers retirement and survivor benefits to railroad workers and their families pursuant to the Railroad Retirement Act, *45 U.S.C. § 231,* et seq. These retirement–survivor benefits are paid from the Railroad Retirement Account, which is in turn funded by taxes paid by railroad employers under the Railroad Retirement Tax Act, *26 U.S.C. § 3201,* et seq. Second, the RRB administers unemployment and sickness benefits to railroad workers under the Railroad Unemployment Insurance Act, *45 U.S.C. § 351,* [**3] et seq. The unemployment–sickness benefits are paid from the Railroad Unemployment Insurance Account, an account which, again, is funded by taxes collected from railroad employers. The taxes that railroad employers must pay under the Railroad Retirement Tax Act and the Railroad Unemployment Insurance Act are calculated, in part, on the basis of creditable compensation the railroad pays to its employees.

The RRB is also responsible, to some extent, for ensuring that railroad employers are properly paying the taxes that fund the retirement–survivor and unemployment–sickness benefit programs. With respect to the retirement–survivor benefit program, the Internal Revenue Service (IRS) is the agency assigned the responsibility of collecting revenues under the Railroad Retirement Tax Act; however, the RRB, under the Railroad Retirement Act, has the "power to require all employers ... to furnish such information and records as shall be necessary for the administration of this [Act]." *45 U.S.C. § 231f*(b)(6). In addition, the RRB may require employers to file compensation reports under the Railroad Retirement Act. *See 45 U.S.C. § 231h.* [**4] With respect to the unemployment–sickness benefit program, the RRB is more directly responsible for enforcing railroad employer tax contributions. Specifically, under the Railroad Unemployment Insurance Act, it is the RRB, not the IRS, which has the responsibility for collecting railroad employer contributions to the Railroad Unemployment Insurance Account. Among other things, the RRB may assess deficiencies with respect to employer contributions, may assess interest and penalties for deficiencies, and may impose liens for unpaid amounts. *See 45 U.S.C. §§ 358,* 359; *see also 20 C.F.R. §§ 345.14–345*.19 (1992).

Thus, it is undisputed that, at least under the Railroad Unemployment Insurance Act, the RRB has the power to investigate or [*634] audit railroad employers to determine if they are accurately reporting creditable compensation and properly paying taxes. *See 45 U.S.C. § 362*. The problem, at least as far as the Office of Inspector General is concerned, is that the RRB has never exercised this power. Instead, the RRB has historically relied on the IRS's auditing of railroad employers' reports under the Railroad [**5] Retirement Tax Act. In other words, the RRB, rather than independently inspecting railroad employers' payroll and accounting records to ascertain whether they are filing accurate compensation reports and paying the correct amount of taxes under the Railroad Unemployment Insurance Act, uses a summary reconciliation procedure. Under this procedure, the RRB compares the compensation reported to it with the compensation reported to the IRS under the Railroad Retirement Tax Act.

2. *The Office of Inspector General's Mission*

According to legislative history, the Inspector General Act of 1978, *5 U.S.C.App. 3,* was enacted "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies." S.Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676. Congress was particularly concerned, it seems, with evidence indicating that fraud, waste, and abuse in federal departments and agencies were "reaching epidemic proportions." S.Rep. No. 1071 at 4. Accordingly, Congress established [**6] fifteen "independent and objective" n1 Offices of Inspector General:

> n1 To accomplish its purpose of making the OIG an independent and objective office, Congress provided that Inspectors General "shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." *5 U.S.C.App. 3* § 3(a). To further ensure the independence of Inspectors General, Congress provided that "each Inspector General shall report to and be under the general supervision of the head of the [department or agency] involved...." *Id.*

> (1) to conduct and supervise audits and investigations relating to the programs and operations of the [specified departments and agencies];
>
> (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, [**7] efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and
>
> (3) to provide a means for keeping the

> head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

*5 U.S.C.App. 3* § 2.

In order that the Inspectors General could carry out their oversight mission, Congress gave them audit and investigative authority. Under the terms of the Act, Inspectors General are specifically authorized, among other things,

> (2) to make such investigations and reports relating to the administration of the programs and operations of the applicable [department or agency] as are, in the judgment of the Inspector General, necessary or desirable; [and]
>
> (4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal [**8] to obey, shall be enforceable by order of any appropriate United States district court: *Provided,* That procedures other than subpenas shall be used by the Inspector General to obtain documents from Federal agencies.

*5 U.S.C.App. 3* § 6(a). The Act also authorizes the head of the federal department or [*635] agency to transfer to its Inspector General other powers or duties that the department or agency head determines "are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act." *5 U.S.C.App. 3* § 9(a)(2). The only limit in this regard is the command that no "program operating responsibilities" of the department or agency shall be transferred to an Inspector General. *Id.*

Although the Inspector General Act of 1978 did not create a separate OIG for the RRB, Congress created such an office in 1983. See Pub.L. No. 98–76, Title IV, § 418, 97 Stat. 437 (codified at *45 U.S.C. § 231v).* And, the Inspector General for the RRB has all the investigatory and auditing powers originally provided for in the Inspector General Act of 1978. [**9] *See 5 U.S.C.App. 3* § 9(a)(1)(S). Thus, the Inspector General of the RRB has the authority (a) "to make such investigations and reports relating to the administration of the programs and operations of the [RRB] as are, in the judgment of the Inspector General, necessary or desirable," and (b) "to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by [the Inspector General] Act." *5 U.S.C.App. 3* § 6(a)(2), 6(a)(4).

### B. The Inspector General's Railroad Audit Program

Sometime in 1988 or 1989, the Inspector General of the RRB became concerned about the RRB's procedures for determining the accuracy of railroad employers' contributions to the Railroad Retirement Account and the Railroad Unemployment Insurance Account. The Inspector General apparently believed that the IRS's periodic audits of railroad employers—which checked the accuracy of their reporting under the Railroad Retirement Tax Act—even when coupled with the RRB's summary reconciliation procedures, [**10] were not adequate for detecting the underpayment of taxes. Accordingly, in September 1988, the Inspector General began auditing the railroad companies himself.

The results of the Inspector General's initial audits disclosed that each of the railroads audited "had incorrectly reported compensation and had underpaid their taxes and contributions for the covered period." The Inspector General understandably became more concerned. Thus, he decided to conduct additional railroad audits.

In late 1989, after several railroad audits had already taken place, the Inspector General of the RRB entered into a memorandum of understanding with the IRS. The stated purpose of the memorandum was "to establish policy for the IRS and the OIG [of the] RRB, with regard to referral and audit of matters of mutual interest." The memorandum specifically recognized that "the cooperative efforts of both the IRS and the OIG will be directed at examining/reviewing employment taxes of railroad employers." Further, under the terms of the memorandum of understanding, the Inspector General of the RRB agreed to conduct reviews relating to railroad employers' compensation reports, to furnish the IRS with copies of each [**11] final report resulting from such reviews, and to "annually" provide the IRS with a copy of its "work plan including the names and addresses of the railroad employers to be reviewed." Finally, in this memorandum of understanding, the IRS and Inspector General of the RRB agreed that the two agencies could "enter into joint examination/reviews in appropriate circumstances."

Soon after entering the memorandum of understanding with the IRS, in March 1990, the Inspector General of the RRB notified Burlington Northern of its intent to

audit the company. The audit, according to the Inspector General's notification letter, was part of "a program to audit tax contributions and compensation reported under the Railroad Unemployment Insurance and Railroad Retirement Acts." The letter to Burlington Northern further stated that "it is important that each railroad know [*636] the others are properly paying their share."

After having an entry conference with the Inspector General concerning the nature and purpose of the audit, Burlington Northern sought clarification "as to the authority, scope, objectives and procedures in regard to the current Inspector General audit." In response to Burlington Northern's [**12] request, the Inspector General explained that (1) it had entered into an agreement with the IRS to conduct reviews relating to railroad employers' compensation reports and tax returns; (2) its primary objectives were to determine proper and timely payment of tax contributions and the accuracy of compensation and service reports; and (3) its final report would be distributed to the RRB and the IRS for tax assessments or adjustments.

### C. The Subpoena Duces Tecum Issued to Burlington Northern

Burlington Northern was not satisfied with the Inspector General's response to its request for clarification. In June 1990, Burlington Northern sent a letter to the Inspector General disputing his authority to conduct the audit. Specifically, Burlington Northern expressed its concern that the audit program being conducted by the Inspector General was "a classic exercise of regulatory authority rather than oversight authority" and was "not within the statutory authority of the Office of Inspector General." Burlington Northern therefore declined "to entertain the proposed audit."

In an effort to proceed with the proposed audit of Burlington Northern, the Inspector General issued a subpoena [**13] duces tecum to the railroad company. The subpoena directed the "Keeper of Records" of Burlington Northern to appear before the Inspector General on August 14, 1990 and bring with him numerous records—including various payroll records. The face of the subpoena indicates that it was issued in aid of an audit "to determine the accuracy of compensation and creditable service reports for coverage under the Railroad Retirement Tax Act and the Railroad Unemployment Insurance Act."

### D. The Subpoena Enforcement Proceeding

Still disputing the Inspector General's authority to conduct the proposed audit, Burlington Northern filed an action in federal district court in September 1990, seeking declaratory and injunctive relief against the enforcement of the subpoena duces tecum. In response to Burlington Northern's suit, the Inspector General filed a petition for summary enforcement of its subpoena. The district court thereafter consolidated the two cases, and both sides filed motions for summary judgment with respect to the Inspector General's action to enforce the subpoena.

While the motions for summary judgment were pending, Burlington Northern served interrogatories, requests for production [**14] of documents, and notices of deposition on the Inspector General's office. The Inspector General, in turn, filed a motion for a protective order prohibiting all discovery in the action, arguing that Burlington Northern had not made the required showing for such discovery. The Inspector General specifically contended that Burlington Northern had not made a substantial showing—as required for obtaining discovery from the agency in a subpoena enforcement proceeding—that the court's process would be abused by the enforcement of the subpoena. The district court disagreed and, on April 2, 1991, directed the Inspector General to comply with Burlington Northern's broad discovery requests.

The Inspector General sought and obtained a writ of mandamus from this court directing the district court to vacate the discovery order and promptly address the enforceability of the subpoena. *See In re Office of Inspector General, 933 F.2d 276 (5th Cir.1991).* In granting the Inspector General's petition for writ of mandamus, we stated:

> In the case at bar Burlington Northern asserts that the administrative subpoena should not be enforced because the Inspector General [**15] lacks the statutory authority [*637] to conduct the planned audit of the railroad. Such a defense to the enforcement action requires that the court interpret the relevant statutes; little if any discovery should be required in that endeavor.

*Id. at 278.* We recognized the possibility, however, that on return to the district court a "limited, measured amount of discovery" might be appropriate.

Instead of allowing any measure of discovery on our return of the case, the district court promptly addressed the enforceability of the Inspector General's subpoena. *See Burlington Northern Railroad Co. v. Office of Inspector General, 767 F. Supp. 1379 (N.D.Tex.1991).* After reviewing the events leading up to the Inspector General's decision to issue the subpoena to Burlington Northern, the stated reasons for the audit, and other statements made by the Inspector General himself, the district court found that

the proposed audit of Burlington Northern was of a regulatory, rather than an oversight, nature. *See id. at 1381–87.* And, further concluding that the Inspector General lacks the statutory authority to conduct [**16] a regulatory tax compliance audit, the district court denied enforcement of the subpoena. *See id. at 1387–91.* The Inspector General now appeals the decision denying enforcement of its subpoena.

II. ANALYSIS

This court has consistently recognized the summary nature of administrative subpoena enforcement proceedings. *See, e.g., In re Office of Inspector General, 933 F.2d at 277; In re E.E.O.C., 709 F.2d 392, 397–400 (5th Cir.1983).* Although the test for enforcement has been phrased in various ways, n2 it is settled that the requirements for judicial enforcement of an administrative subpoena are minimal. *See, e.g., Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 66 S. Ct. 494, 509, 90 L. Ed. 614 (1945)* (when administrator of agency issues subpoena in connection with his investigative function, the only limits "are that he shall not act arbitrarily or in excess of his statutory authority"); [*638] *United States v. Security State Bank & Trust, 473 F.2d 638, 641 (5th Cir.1973)* (holding that administrative [**17] subpoena is enforceable if issued in aid of a lawful investigation and if the materials sought are relevant to that investigation). As a general rule, courts will enforce an administrative subpoena if: (1) the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome. *See United States v. Morton Salt Co., 338 U.S. 632, 652, 70 S. Ct. 357, 368, 94 L. Ed. 401 (1950); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir.1986); Federal Election Comm'n v. Florida for Kennedy Comm., 681 F.2d 1281, 1284 (11th Cir.1982).* Courts will not enforce an administrative subpoena, however, if the above requirements are not met or if the subpoena was issued for an improper purpose, such as harassment. *See United States v. Powell, 379 U.S. 48, 58, 85 S. Ct. 248, 255, 13 L. Ed. 2d 112 (1964); Westinghouse, 788 F.2d at 166–67.*

> n2 The Supreme Court has set forth various tests for determining the enforceability of administrative subpoenas. In *Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209, 66 S. Ct. 494, 505, 90 L. Ed. 614 (1946),* the Court indicated that an administrative subpoena issued in aid of an investigation would be enforced if (1) the investigation is authorized by Congress and (2) the documents sought are relevant to the inquiry. In *United States v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964),* however, the Court phrased the enforceability test in a slightly different way. There, the Court held that, to obtain enforcement of a subpoena, the administrative agency must show that: (1) the investigation is being conducted pursuant to a legitimate purpose; (2) the information sought is relevant to the inquiry; (3) the information sought is not already within the agency's possession; and (4) the required administrative steps have been followed. *Id. at 57–58, 85 S. Ct. at 255.* The Court further recognized in *Powell* that an administrative agency cannot, in seeking enforcement of a subpoena, abuse the court's process by issuing the subpoena for an improper purpose like harassment. *Id. at 58, 85 S. Ct. at 255.* Finally, in *United States v. La Salle, 437 U.S. 298, 307, 98 S. Ct. 2357, 2362, 57 L. Ed. 2d 221 (1978),* the Court stated that as long as an administrative subpoena or summons is "issued in good–faith pursuit of [a] congressionally authorized purpose[ ]," it is enforceable.
>
> The Courts of Appeals have also phrased the requirements for enforcing an administrative subpoena in varying ways. The Ninth Circuit, for example, has indicated that, in an administrative subpoena enforcement proceeding, the agency must first show that (1) Congress has granted the authority to investigate; (2) procedural requirements have been followed; and (3) the evidence sought is relevant and material to the investigation. "If these factors are shown by the agency, the subpoena should be enforced unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *E.E.O.C. v. Children's Hosp. Medical Center, 719 F.2d 1426, 1428 (9th Cir.1983)* (en banc); *accord E.E.O.C. v. Maryland Cup Corp., 785 F.2d 471, 475–76* (4th Cir.), *cert. denied, 479 U.S. 815, 107 S. Ct. 68, 93 L. Ed. 2d 26 (1986).* The Eighth Circuit, by contrast, has determined that an administrative subpoena will be enforced if: (1) the subpoena was issued pursuant to lawful authority; (2) the subpoena was issued for a lawful purpose; (3) the subpoena requests information which is relevant to the lawful purpose; and (4) the disclosure sought is not unreasonable. Finally, this court

> has stated that the inquiry regarding the enforceability of a subpoena "is limited to two questions: (1) whether the investigation is for a proper statutory purpose and (2) whether the documents the agency seeks are relevant to the investigation." *Sandsend Fin. Consultants, Ltd., v. Federal Home Loan Bank Bd., 878 F.2d 875, 879 (5th Cir.1989).*

[**18]

This appeal concerns only the first requirement for enforcement—namely, whether the subpoena issued to Burlington Northern is within the statutory authority of the Inspector General of the RRB. The district court concluded that the subpoena in question was not within the Inspector General's power. In reaching this conclusion however, the district court made certain fact findings about the nature of the audit for which the subpoena was issued. Thus, in reviewing the district court's ultimate determination that the Inspector General lacked statutory authority to issue the subpoena to Burlington Northern, we must review: (a) the district court's factual findings concerning the nature of the proposed audit of Burlington Northern and (b) the district court's legal conclusion which was based on those findings.

> A. The District Court's Fact Findings Concerning the Nature of the Inspector General's Proposed Audit

As noted above, before the district court concluded that the Inspector General was without authority to issue the subpoena to Burlington Northern, it made certain fact findings concerning the nature of the proposed audit. The district court first found that, at its inception, [**19] the proposed audit of Burlington Northern was regulatory in nature. The district court stated that the Inspector General's initial explanations for the audit "did not include any oversight element but, rather, made quite clear that the audit was a regulatory audit that had as its goal the carrying out of program responsibilities of the [RRB] and IRS." *767 F. Supp. at 1383.* The district court then found that the Inspector General's oversight justifications for the audit, which were offered only after the dispute with Burlington Northern arose, were "not credible" based on the entire evidentiary record. *Id. at 1385.* The district court further determined that the detection of fraud and abuse in the RRB's programs would have only been a by–product of the proposed regulatory audit. *See id. at 1386.* Ultimately, the district court determined that the proposed audit of Burlington Northern was in the nature of a regulatory tax compliance audit.

On appeal, the Inspector General challenges the district court's findings about the nature of the proposed audit of Burlington Northern. The Inspector General argues [**20] specifically that the proposed audit was part of a plan to evaluate the effectiveness of the RRB's summary reconciliation procedures. The Inspector General also contends that the proposed audit would have furthered the goal of detecting fraud and abuse in the RRB's programs. For the following reasons, we reject the Inspector General's challenges to the district courts fact findings concerning the nature of the proposed audit.

We review the district court's fact findings concerning the nature of the proposed audit under the clearly erroneous standard of review. n3 Under this standard, we will not set aside the district court's [*639] fact findings unless, based upon the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985)* (quoting *United States v. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)).* "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," [**21] we will not set it aside as clearly erroneous—even if convinced that, had we "been sitting as trier of fact, [we] would have weighed the evidence differently." *Anderson, 470 U.S. at 573–74, 105 S. Ct. at 1511.*

> n3 The district court apparently made the challenged fact findings concerning the nature of the proposed audit while cross–motions for summary judgment were still pending. Thus, it is at least arguable that the district court's decision denying summary enforcement of the subpoena amounted to an entry of summary judgment in favor of Burlington Northern. If the district court's decision is viewed as a summary judgment, then it is clear that, in order to make its decision, the district court resolved what were disputed fact issues concerning the nature of the audit.
>
> However, on appeal, the Inspector General—for reasons best known to him—has not chosen to attack the district court's decision as an improperly–granted summary judgment. At no point in his brief does the Inspector General cite the summary judgment standard set forth in *Federal Rule of Civil Procedure 56(c).* Nor does the Inspector General argue that the district court improperly resolved dis-

> puted fact issues. Rather, the Inspector General expressly attacks the district court's findings regarding the nature of the proposed audit under the clearly erroneous standard of review. Accordingly, we review the district court's fact findings on this issue under the clearly erroneous standard. *See Matter of HECI Exploration Co., 862 F.2d 513, 518–20 (5th Cir.1988)* (recognizing, in context of preemption case, that standard of review may be waived); *Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir.1988)* ("Issues not briefed, or set forth in the issues presented, are waived."), *cert. denied, 489 U.S. 1079, 109 S. Ct. 1531, 103 L. Ed. 2d 836 (1989).*

[**22]

We first review the district court's finding that, at its inception, the proposed audit of Burlington Northern was in the nature of a tax compliance audit. This finding is amply supported by the record. The Inspector General initially informed Burlington Northern that (1) the audit was being conducted as part of "a program to audit tax contributions and compensation reported under the Railroad Unemployment Insurance and Railroad Retirement Acts"; (2) the primary objectives of the audit were the "proper and timely payment of tax contributions" and "the accuracy of compensation and service reports"; and (3) the goal of the audit was to identify "tax non–compliance as it relates to the RRTA and the RUIA." Moreover, when the Inspector General testified at a congressional hearing that was held only two weeks after Burlington Northern was notified about the proposed audit, he made the following statements:

> Our audit plan includes *continuing reviews* of the nation's 18 largest railroads.... To date, we have reported on widespread non–compliance of payroll taxes...
>
> With the resources we have right now in the last year, utilizing all of the auditors we have on the auditing of [**23] railroads, we have audited 13 railroads out of that universe. We would hope that we would be able to get—especially the Class I railroads down to a *cycle of six years,* best guess, *five years on a routine basis,* we would be able to do that...
>
> One of the things that we are recommending that would maybe give the record [sic] more control over taxes and not losing money is that *we collect taxes ourselves.* We already do it. We have some experience.
>
> Office of Inspector General efforts will be heightened in the [area of]... *railroad tax compliance audits.*

*Appropriations for 1991 (Part 7): Hearings Before the Subcomm. on Labor, Health, and Human Services, House Comm. on Appropriations,* 101st Cong., 1st Sess. 1242, 1249, 1263, 1268 (1990) (testimony of William J. Doyle III) (emphasis added). This testimony indicates that the Inspector General's plan was not to conduct "spot checks" of railroads like Burlington Northern, but rather, to assume a regular auditing function to detect tax non–compliance and to perhaps assume a tax collecting function. Based on this testimony [*640] and the explanations initially given to Burlington Northern by the Inspector General, [**24] we conclude that the district court did not clearly err in determining that the proposed audit of Burlington Northern was, as originally conceived, a tax compliance audit.

We next review the district court's finding that the "oversight justifications" proffered by the Inspector General were not credible. Again, this finding is plausible in light of the record. The record reveals that the Inspector General did not attempt to justify the audit as being a "spot check" necessary to evaluate the RRB's summary reconciliation procedures until being prompted to do so by the Department of Justice. In particular, the record reveals that: (1) when Burlington Northern first questioned the Inspector General's authority to conduct the proposed audit, the Inspector General sought advice from the Department of Justice; (2) the Department of Justice advised the Inspector General that the proposed audit would be authorized "as an oversight audit of the [RRB's] operations and as an evaluation of specific instances in which the efficacy of those operations is being assessed"; and (3) although the Inspector General began arguing—in letters to Burlington Northern and in court documents—that the proposed [**25] audit was only a "spot check" of the RRB's summary reconciliation procedures, the Inspector General also continued to maintain that "the purpose of the audit is to determine if compensation reports are accurate and determine if taxes have been properly paid." Based on the evidence in the record, then, there is some question regarding the Inspector General's sudden adoption of the suggested oversight justification. Accordingly, we will not set aside the district court's finding that the oversight justification was a post–hoc ratio-

nalization as clearly erroneous.

We also conclude, based on our review of the record, that the district court did not clearly err in finding that the detection of fraud and abuse would have only been a by-product of the proposed tax compliance audit. The Inspector General never suggested that he had any reason to suspect that Burlington Northern was engaged in fraudulent or abusive reporting. Moreover, the only evidence even mentioning the detection of fraud and abuse is the Inspector General's Audit Guide, which states:

> Although the primary purpose of this audit is not the detection of fraud and abuse, the auditor should constantly be on the alert for [**26] indications of fraud and abuse and should undertake tests of transactions with this in mind. Any instances of potential fraud should be brought to the attention of the Assistant Inspector General for Audit and no further work should be initiated until so instructed.

Based on this statement, the district court could reasonably determine that the proposed audit of Burlington Northern was not designed to detect fraud and abuse, but rather, was designed to ensure tax compliance, with the detection of fraud and abuse being only a by-product. In any event, we are not left with a definite and firm conviction that the district court was mistaken in this finding. n4

> n4 By determining that the detection of fraud and abuse would only be a by-product of the proposed audit and that the only credible explanations for the audit were those initially given by the Inspector General, the district court effectively determined that the sole purpose of the audit was to ensure tax compliance. Because we have concluded that these findings are not clearly erroneous, we reject the Inspector General's argument that, under *Lynn v. Biderman, 536 F.2d 820* (9th Cir.), *cert. denied, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976),* the subpoena is enforceable. This is not a case in which the district court found that there were two purposes for the proposed audit—one statutorily authorized and one not. Thus, *Biderman* has no application to this case.

[**27]

Finally, we review the district court's ultimate finding regarding the regulatory nature of the proposed audit of Burlington Northern. This finding, in our view, is also plausible in light of the record. There is evidence that, at its inception, the audit was designed to detect tax noncompliance. There is also evidence that the [*641] proffered oversight justifications were merely post-hoc rationalizations designed to save the proposed audit. And, there is little, if any, evidence suggesting that the audit was designed to detect fraud or abuse by Burlington Northern. Accordingly, we hold that the district court did not clearly err in finding that the proposed audit of Burlington Northern was essentially a tax compliance audit to be conducted pursuant to a long-term, regulatory plan.

### B. The District Court's Legal Conclusion Concerning the Inspector General's Lack of Statutory Authority

Having accepted the district court finding concerning the nature of the proposed audit of Burlington Northern, we must now address the district court's legal conclusion. That is, we must determine whether, as a matter of law, the Inspector General is statutorily authorized to issue a subpoena in aid [**28] of a regularly scheduled, tax compliance audit of a railroad company. *See Peters v. United States, 853 F.2d 692, 695 (9th Cir.1988)* (scope of an agency's subpoena power is question of law which is reviewed de novo). We conclude, for the following reasons, that the Inspector General is not authorized to conduct such an audit and that, therefore, the Inspector General lacked statutory authority to issue the subpoena duces tecum to Burlington Northern.

Initially, we note that, contrary to the district court's suggestions, the Inspector General Act of 1978 gives Inspectors General *broad*—not limited—investigatory and subpoena powers. *See generally* Kurt W. Muellenberg & Harvey J. Volzer, *Inspector General Act of 1978, 53 Temp. L.Q. 473 (1985);* Herbert L. Fenster & Darryl J. Lee, *The Expanding Audit and Investigative Powers of the Federal Government, 12 Pub. Cont. L.J. 193, 199-200, 208-11 (1982).* With respect to investigatory powers, Congress specifically authorized Inspectors General "to make such investigations and reports *relating to* the administration of the programs and operations [**29] of the applicable [department or agency] as are, *in the judgment of the Inspector General,* necessary or desirable." *5 U.S.C.App. 3* § 6(a)(2) (emphasis added); *see also United States v. Newport News Shipbuilding & Dry Dock Co., 837 F.2d 162, 170 (4th Cir.1988)* ("Where the interests of the government require *broad investigations* into the efficiency and honesty of a defense contractor, the Inspector General is equipped for this task.") (emphasis added); *United States v. Blue Cross & Blue Shield of Michigan, 726 F. Supp. 1523, 1525 (E.D.Mich.1989)* (recognizing that Inspectors General are given broad statutory powers to conduct audits and investigations of the

programs and operations of their respective agencies). And, with respect to the authority to subpoena information, Congress empowered Inspectors General "to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence *necessary in the performance of the functions assigned by this Act....*" *5 U.S.C.App. 3* § [**30] 6(a)(4) (emphasis added). Thus, we agree with Third Circuit's conclusion that "Congress gave the Inspector General *broad* subpoena power." *United States v. Westinghouse Electric Corp., 788 F.2d 164, 165 (3d Cir.1986)* (emphasis added); *see also United States v. Medic House, Inc., 736 F. Supp. 1531, 1535 (W.D.Mo.1989)* (recognizing Inspector General's power to issue subpoena to party suspected of fraud in connection with criminal investigation).

The Inspector General's investigatory and subpoena powers are not, however, without limits. *See* S.Rep. No. 1071, *supra*, at 28, 1978 U.S.Code Cong. & Ad.News at 2703 ("Broad as it is, the Inspector and Auditor General's mandate is not unlimited."). For example, an Inspector General's subpoena powers do not encompass the authority to compel the attendance of a witness. *See United States v. Iannone, 198 U.S. App. D.C. 1, 610 F.2d 943, 946 (D.C.Cir.1979).* Nor do an Inspector General's investigatory powers generally extend to matters that do not concern fraud, inefficiency, or waste within a federal agency. *See United States v. Montgomery County Crisis Center, 676 F. Supp. 98, 99 (D.Md.1987)* [**31] (refusing to enforce [*642] subpoena issued by Inspector General where the underlying investigation concerned a national security matter).

Today we recognize an additional, narrow limit on the Inspector General's broad investigatory and subpoena powers. In particular, we hold that an Inspector General lacks statutory authority to conduct, as part of a long–term, continuing plan, regulatory compliance investigations or audits. By "regulatory compliance investigations or audits," we mean those investigations or audits which are most appropriately viewed as being within the authority of the agency itself. Thus, as a general rule, when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly.

Our holding recognizing this limit to the authority of Inspectors General is supported by the language and purpose of the Inspector General Act of 1978. The purpose of the Act, as we have already stated, *see supra* Part I.A.2., was to create independent and objective units that would be responsible for [**32] combatting fraud, abuse, waste, and mismanagement in federal agencies and departments. If an Inspector General were to assume an agency's regulatory compliance function, his independence and objectiveness—qualities that Congress has expressly recognized are essential to the function of combatting fraud, abuse, waste, and mismanagement—would, in our view, be compromised. In addition, although Congress granted Inspectors General broad investigative and subpoena authority, Congress also expressed its intent that Inspectors General should not be allowed to conduct "program operating responsibilities" of an agency. *See 5 U.S.C.App. 3* § 9(a)(2) (head of an agency may transfer to an Inspector General other functions, powers, and duties that he determines "are properly related to the functions of the [OIG] and would, if so transferred, further the purposes of this Act, *except that there shall not be transferred to an Inspector General ... program operating responsibilities*") (emphasis added).

Our holding is also supported by the legislative history of the Inspector General Act of 1978. It finds direct support in the House Report accompanying the [**33] Act, which states:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, *they would not have such responsibility for audits and investigations constituting an integral part of the programs involved.*

H.R.Rep. No. 584, 95th Cong., 1st Sess. 12–13 (1978) (emphasis added). And, our holding finds indirect support in certain statements made by Congressman Levitas, one of the co–sponsors of the 1978 Act. He explained:

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and *have no program responsibilities to divide allegiances.* The Inspectors General will be responsible for audits and investigations only... Moreover, the offices of Inspector General would not be a new "layer of bureaucracy' to plague the public. *They would deal exclusively with the internal operations of the departments and agencies.* Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with [**34] agency administration and in the investigation of fraud and abuse by

> those persons who are misusing or stealing taxpayer dollars.

124 Cong.Rec. 10,405 (1978) (emphasis added); *see also* S.Rep. No. 1071, *supra*, at 27–28 (discussing duties and responsibilities of Inspectors General in terms suggesting that they would have only an "oversight" role).

Finally, our holding finds support in the March 9, 1989 memorandum prepared by the Department of Justice's Office of Legal [*643] Counsel. In this memorandum, the Office of Legal Counsel addressed the specific question of "whether the authority granted the Inspector General includes the authority to conduct investigations pursuant to statutes that provide the Department [of Labor] with regulatory jurisdiction over private individuals and entities that do not receive federal funds." Based on its review of the language, structure, purpose, and legislative history of the Inspector General Act of 1978, the Office of Legal Counsel concluded that the Act does not generally vest authority in the Inspector General to conduct regulatory investigations, which it defined as investigations that "have as their objective regulatory compliance by private [**35] parties." The Office of Legal Counsel stated: "Thus, the Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself." *But see also* 136 Cong.Rec. E2551–01 (daily ed. July 30, 1990) (statement of Rep. Conte) (questioning the Office of Legal Counsel's interpretation of Inspector General's investigative authority); James R. Richards & William S. Fields, *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs*, 12 Geo. Mason U.L.Rev. 227, 242–48 (while recognizing that Office of Legal Counsel's conclusion may be "legally defensible," nonetheless pointing out its potential for confusion and questioning the premises on which the conclusion is based).

Accordingly, we conclude that the Inspector General of the RRB is without statutory authority to conduct the proposed tax compliance audit of Burlington Northern. As we already outlined, *see supra* Part I.A.1., under the terms of the Railroad Unemployment Insurance Act, the RRB itself is charged with ensuring that railroad [**36] employers are accurately reporting taxable compensation and properly paying taxes. And, under the Railroad Retirement Tax Act, it is the IRS who has the responsibility for ensuring tax compliance. The Inspector General of the RRB, when it attempted to assume the regulatory compliance functions of the RRB and the IRS, exceeded its statutory "oversight" authority. If the Inspector General were allowed to conduct regularly–scheduled, tax–compliance audits, there would be no one, so to speak, to "watch the watchdog." The district court, therefore, correctly denied enforcement of the subpoena.

## III. CONCLUSION

We emphasize the limited nature of our decision in this case: We are *not* holding that, under all circumstances, the Inspector General of the RRB lacks statutory authority to investigate or audit railroad employers' compensation reporting. The Inspector General of the RRB may well be able to do so as part of a plan to test the effectiveness of the RRB's summary reconciliation procedures or where he suspects fraud and abuse on the part of such employers. We hold only that, based on the district court's findings concerning the *nature* of this particular audit of Burlington Northern, [**37] the Inspector General exceeded his statutory authority. Moreover, we again note that the RRB clearly has the authority to conduct regularly scheduled, tax–compliance audits of railroad employers. Thus, while Burlington Northern has prevailed in this skirmish, the Inspector General, the RRB, and the IRS have a decided advantage in the war against tax non–compliance, waste, and fraud.

The district court's decision denying enforcement of the subpoena duces tecum is AFFIRMED.

LEXSEE 4 F3D 749

# UNITED STATES OF AMERICA, ex rel, James R. Richards, Inspector General, U.S. Department of the Interior, Petitioner-Appellee, v. LORENZO DE LEON GUERRERO, Governor and Custodian of Records for the Department of Finance, Commonwealth of the Northern Mariana Islands, Respondent. HERMAN S. SABLAN, et al., Applicants-Appellants. UNITED STATES OF AMERICA, ex rel, James R. Richards, Inspector General, U.S. Department of the Interior, Plaintiff-Appellee, v. LORENZO DE LEON GUERRERO, Governor and Custodian of Records for the Department of Finance, Commonwealth of the Northern Mariana Islands, Defendant-Appellant.

**No. 92-15884, No. 92-16372**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

***4 F.3d 749; 1993 U.S. App. LEXIS 22024; 26 Fed. R. Serv. 3d (Callaghan) 1162; 93 Cal. Daily Op. Service 6582; 93 Daily Journal DAR 11268***

**January 14, 1993, Argued, Submitted, San Francisco, California**
**September 1, 1993, Filed**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the Northern Mariana Islands. D.C. No. MC-92-00001-ALM. Alex R. Munson, District Judge, Presiding.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:** Howard P. Willens, Wilmer, Cutler & Pickering, Washington, D.C., for the respondent-defendant-appellant De Leon Guerrero.

Michael W. Dotts, Law Office of Robert J. O'Connor, Saipan, MP, for the applicants-appellants Sablan and Salas.

Douglas Letter and Joan E. Hartman, United States Department of Justice, Washington, D.C., for the petitioner-plaintiff-appellee.

**JUDGES:** Before: Ruggero J. Aldisert, * Alfred T. Goodwin, and Betty B. Fletcher, Circuit Judges.

* Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Opinion by Judge Goodwin.

**OPINIONBY:** GOODWIN

**OPINION:** [*750] OPINION

GOODWIN, Circuit Judge:

Lorenzo de Leon Guerrero, Governor and Custodian of Records for the Department of Finance of the Commonwealth of the Northern Mariana Islands ("CNMI" or "Commonwealth"), appeals the district court's enforcement of an administrative subpoena mandating the release to the Inspector General of the United States Interior Department of tax [*751] records necessary to conduct an audit of the CNMI pursuant to the Insular [**2] Areas Act, *48 U.S.C. § 1681b.* The Governor challenges the district court's determination that enforcement of the subpoena does not offend the Commonwealth's right of local self-government as defined under Sections 103 and 105 of the Covenant. In addition, taxpayers Herman S. Sablan and Antonio T. Salas appeal the district court's denial of their motion to intervene in the proceedings. We affirm.

I. *Background*

Rota, Tinian and Saipan, the most populated islands of the Northern Marianas, lie directly north of Guam. For over three hundred years, the Northern Marianas and Guam were Spanish colonies sharing common languages, religion, and culture. The political ties between the Northern Marianas and Guam were eventually broken by the Spanish-American War of 1898, with Guam becoming a territory of the United States and the Northern Marianas coming under German, and then Japanese, rule.

After World War II, the United Nations established the Trust Territory of the Pacific Islands encompassing most of the islands of Micronesia, among them the Northern

Mariana Islands, to be administered by the United States pursuant to a Trusteeship Agreement with [**3] the United Nations Security Council. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3. The Trusteeship Agreement imposed on the United States an obligation to "promote the development of the inhabitants of the trust territory toward self-government or independence." *Id.* art. 6, § 1.

In October 1969, the United States entered into negotiations with the Congress of Micronesia to determine Micronesia's future political status. Efforts to establish a unified Micronesian state, however, were undermined by a lack of consensus about the region's political future. Cultural, linguistic, and geographic differences among the populations of the Micronesian island groups led to several proposed solutions to the end of the Trusteeship. The Congress of Micronesia, for instance, was in favor of establishing a freely associated state, independent of the United States. The Northern Mariana Islands, on the other hand, sought a close and permanent association with the United States. Proximity and a shared history with Guam gave the people of the Northern Mariana Islands some familiarity with the United States, making it the least alien [**4] major power with whom negotiations might be initiated. Representatives of the Northern Marianas thus pursued separate political status talks with the United States over a period of years.

In 1972, the United States entered into formal negotiations with the Northern Marianas. Meanwhile, the residents of the eastern Caroline Islands, Pohnpei, and Kosrae, together with Chuuk and Yap in the west, began to form the Federated States of Micronesia. The Federated States and the Marshall Islands became independent, sovereign nations in 1985. Palau went its own way, and is now more or less an independent republic with some residual trust relations with the United States.

Negotiations between the United States and the Northern Marianas culminated on February 15, 1975 with the signing of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"). The Covenant was unanimously endorsed by the NMI legislature, approved by 78.8% of NMI plebiscite voters, and enacted into law by Congress. Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *reprinted in 48 U.S.C. § 1681* [**5] note. The Covenant was implemented in three phases between March 24, 1976 and November 3, 1986. Covenant § 1003. On November 3, 1986, with the Covenant in full effect, the United States terminated the Trusteeship Agreement with respect to the CNMI by Presidential Proclamation. Proclamation No. 5564, *51 Fed. Reg. 40,399 (1986), reprinted in 48 U.S.C. § 1681* note, at 222. n1

n1 The United Nations Security Council formally dissolved the Trusteeship in 1990. S.C. Res. 683, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/683 (1990).

[*752] The Covenant is comprised of ten articles governing the political relationship between the Northern Marianas and the United States. This case continues an ongoing debate about whether the Commonwealth's right of local self-government as defined in the Covenant under Section 103 substantially limits Congress' legislative powers over the Commonwealth under Section 105. This question has been implicated in one way or another in a number [**6] of our cases. *See, e.g., Hillblom v. United States, 896 F.2d 426 (9th Cir. 1990); A & E Pac. Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68 (9th Cir. 1989).* Indeed, the legal question we now face was previously before the district court when the CNMI government resisted an audit by the Inspector General in 1989. The Inspector General issued a subpoena which was summarily enforced by the district court. The appeal, however, was eventually dismissed as moot when the CNMI complied with the district court order. *See United States ex rel. Richards v. Sablan, Misc. No. 89-008, 1989 U.S. Dist. LEXIS 16786* (D.N.M.I. Oct. 27, 1989), *appeal dismissed as moot,* No. 89-16404 (9th Cir. 1991).

Not surprisingly, the issue was revived when the Assistant Inspector General informed the Governor on May 29, 1991 that the Office of Inspector General intended to conduct an audit of the CNMI's Department of Finance. The CNMI government refused to grant the Inspector General access to the records necessary to conduct the audit, expressing concern that the intended audit would violate the CNMI's right of self-government [**7] and the privacy rights of CNMI taxpayers.

Meanwhile, two taxpayers, Herman S. Sablan and Antonio T. Salas, went to the CNMI courts seeking an injunction to prevent the CNMI from disclosing confidential taxpayer information to the Inspector General. On August 20, 1991, the CNMI Supreme Court issued a temporary injunction prohibiting the release of tax information to "any person not authorized by CNMI statute." *Sablan v. Inos,* No. 91-003, slip. op. at 3-4 (N.M.I. filed Aug. 20, 1991).

On December 11, 1991, the Inspector General served a subpoena duces tecum on the Governor, ordering him to produce all information pertaining to (1) the administration and operation of the CNMI income tax system, (2) Department of Finance personnel, and (3) enforcement of

the CNMI income tax laws during 1989–91, including, but not limited to, all accounting records, reports, and tax returns. Then, on December 26, 1991, the CNMI Supreme Court issued its opinion in *Sablan v. Inos,* holding that the audit would impermissibly intrude on the taxpayers' privacy rights under the CNMI Constitution and under the CNMI tax confidentiality provision, 4 CMC § 1701(d)(1). *Sablan v. Inos,* No. 91–018, slip [**8] op. at 4–5 (N.M.I. filed Dec. 26, 1991). The court also held that the Insular Areas Act, *48 U.S.C. § 1681b,* authorizing the Inspector General to audit the accounts of the Commonwealth was inconsistent with the self–governance provisions of the Covenant, and therefore that the statute "has no force and effect in the CNMI." [Slip op.] at 8.

Citing the decision in *Sablan v. Inos,* the Governor refused to comply with the subpoena, and the Inspector General petitioned for its enforcement in the district court. The district court enforced the administrative subpoena, finding that the Inspector General had statutory authority to exercise subpoena powers, and that exercise of such authority did not offend the right of self–government provisions of the Covenant.

The Governor challenges the decision of the district court on the following grounds: (1) that the enforcement of the subpoena violates the CNMI's right to local self–government, in contravention of both the plain meaning and the negotiating history of Sections 103 and 105 of the Covenant; (2) that the Inspector General lacks the statutory authority to exercise subpoena power under the Insular Areas [**9] Act; (3) that the confidentiality provisions of *26 U.S.C. § 6103* prohibit the disclosure of confidential tax return information to the Inspector General; and (4) that the district court erroneously invalidated Section 502 of the Covenant.

Consolidated with the Governor's case is the appeal of taxpayers Herman S. Sablan and Antonio T. Salas challenging the district court's denial of their motion to intervene in [*753] the enforcement proceedings. Although the district court denied intervention, it did allow Sablan and Salas to present briefs and to argue before the court as *amicus curiae* to the Governor. Sablan and Salas nonetheless contend that they had a right to intervene under *Federal Rule of Civil Procedure 24(a)* because the Governor could not fully represent their interests.

II. *Statutory Authority for Subpoena Power*

"The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute." *Peters v. United States, 853 F.2d 692, 696 (9th Cir. 1988).* Accordingly, the threshold issue we must address is whether Congress has authorized the Inspector General to exercise [**10] subpoena powers in furtherance of his audit function under the Insular Areas Act, *48 U.S.C. § 1681b.*

The Insular Areas Act unambiguously provides the authority for the Inspector General to conduct an audit of the CNMI. n2 But, the statute is silent with regard to the question of subpoena power. We do not, however, accept the Governor's contention that this silence is dispositive.

> n2 Initially, it was the government comptroller for Guam who was responsible for exercising supervisory audit authority over the Trust Territory. *See 48 U.S.C. § 1681b* (Supp. III 1973). Then, to ensure "a satisfactory level of independent audit oversight of the governments of the Marshall Islands, the Federated States of Micronesia, Palau, and the Northern Mariana Islands," Congress transferred the audit authority to the Inspector General of the Department of Interior in 1982. *48 U.S.C. § 1681b*(a).

The audit power granted by [**11] the Insular Areas Act was "*in addition* to the authority conferred upon the Inspector General by the Inspector General Act of 1978." *48 U.S.C. 1681b*(b) (emphasis added). The Inspector General Act of 1978 specifies that the Inspector General has the authority to require by subpoena all the information necessary to carry out his duties. *5 U.S.C. app. 3* § 6(a)(4). This discretion to exercise subpoena authority extends to the audit functions assigned to the Inspector General under the Insular Areas Act. *Cf. Territorial Court of the Virgin Islands v. Richards, 847 F.2d 108 (3d Cir. 1988)* (enforcing Inspector General's subpoena in support of audit of Virgin Islands court). The district court was therefore correct in holding that the Inspector General has the full range of authority provided by the Inspector General Act of 1978 at his disposal in implementing the Insular Areas Act.

III. *Right of Local Self–Government*

We now turn to the central question in this case: whether the Insular Areas Act conflicts with the self–governance provisions of the Covenant. The relevant sections of [**12] the Covenant provide as follows:

*Section 101*

The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self–governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands," in political union with and under the sovereignty of the United States of America.

*Section 102*

The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

*Section 103*

The people of the Northern Mariana Islands will have the right of local self–government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

*Section 105*

The United States may enact legislation in accordance with its constitutional process which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective [**13] in the Northern Mariana Islands. In order to respect the right of self–government guaranteed by this Covenant [*754] the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

The Governor contends that a federal audit of Commonwealth finances intrudes upon the Commonwealth's right of local self–government reserved under Section 103 of the Covenant. He argues further that because of this alleged conflict between the Insular Areas Act and Section 103, the enactment of § 1681b exceeds the scope of congressional lawmaking authority permitted by Section 105 of the Covenant. We disagree.

At the outset, we emphasize that "the authority of the United States towards the CNMI arises solely under the Covenant." *Hillblom v. United States, 896 F.2d 426, 429 (9th Cir. 1990).* The Covenant has created a "unique" relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations. *Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 687 (9th Cir. 1984).* [**14] For this reason, we find unpersuasive the Inspector General's reliance on the Territorial Clause, U.S. Const. art. IV, § 3, cl. 2, as support for enforcement of the federal audit. He argues that because the CNMI is governed through Congress' power under the Territorial Clause, Congress has plenary legislative authority over the CNMI. *See Simms v. Simms, 175 U.S. 162, 168, 44 L. Ed. 115, 20 S. Ct. 58 (1899)* (explaining that under the Territorial Clause, Congress "has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state"). The applicability of the Territorial Clause to the CNMI, however, is not dispositive of this dispute. Even if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of Congress' legislative power.

Congress' legislative authority over the Commonwealth derives from Section 105. The first sentence of Section 105 provides that the United States may legislate with respect to the CNMI, "but if such legislation cannot [**15] also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands." That Congress has the power to pass legislation with respect to the CNMI that it would not pass with respect to the states is plain. Having recognized that the potential scope of power over the CNMI would be greater than that over the states, Section 105 requires that Congress specifically identify the CNMI in cases where such legislation is not equally applicable to the states. As the Marianas Political Status Commission ("MPSC") explained in its contemporaneous analysis of the Covenant, this requirement is to ensure that Congress will exercise its legislative powers "purposefully, after taking into account the particular circumstances existing in the Northern Marianas." Marianas Political Status Commission, *Section–by–Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* 15 (1975). The United States took a similar view: the "purpose of this provision is to prevent any inadvertent interference by Congress with the internal affairs of the Northern Mariana Islands to a greater [**16] extent than with those of the several States." Department of Interior, *Section–by–Section Analysis of the Covenant, reprinted in To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands," and for Other Purposes: Hearing Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 385 (1975). In light of these concerns, we interpret the first sentence of Section 105 to mean that the United States must have an identifiable federal interest that will be served by the relevant legislation.

At the center of this dispute, however, is the second sentence of Section 105 limiting the United States' legislative authority "so that the fundamental provisions of this Covenant . . . may be modified only with the con-

sent of the Government of the United [*755] States and the Government of the Northern Mariana Islands." The Governor asks us to read this provision, in conjunction with the self–government provision of Section 103, as carving out an area of "local affairs" immune from federal legislation. We decline to adopt such an expansive interpretation of the Section 105's mutual consent provision. Particularly [**17] when viewed against the backdrop of Section 101 establishing the sovereignty of the United States and Section 102 making the Covenant and all federal laws applicable to the CNMI the supreme law of the CNMI, the Governor's position is untenable. The mutual consent provision states that Congress may not override or alter the fundamental provisions of the Covenant, among them the right of self–government guaranteed by Section 103. This does not mean that Congress may not pass any legislation "affecting" the internal affairs of the CNMI.

To give due consideration to the interests of the United States and the interests of the Commonwealth as reflected in Section 105, we think it appropriate to balance the federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI. Performing that balance here, we find that the Insular Areas Act satisfies Section 105.

There is no question that the United States has a substantial federal interest in monitoring the CNMI's collection of taxes. To date, the United States has provided the CNMI with over $420 million in direct assistance in accordance with Sections 701 and 702 of the Covenant. [**18] Moreover, to help the CNMI raise funds, the United States agreed not to collect any federal income tax on income earned by island residents in the Commonwealth. Instead, Section 601 enables the local government to collect what would otherwise be federal taxes as a local income tax. The United States therefore has a significant interest in ensuring that federal funds are being used properly and in determining the efficacy of the CNMI's revenue collection to assess future amounts of assistance.

The other consideration in our analysis is the degree of intrusion into the internal affairs of the CNMI. Although the Governor would like to characterize this case as one involving unwarranted federal interference with the CNMI's internal fiscal affairs, the fact is that the financial assistance provided by the United States inextricably links federal and CNMI interests. This financial support was deemed to be such an integral part of the relationship and so essential to the economic development of the CNMI that it was embodied in the Covenant itself rather than in separate legislation. *See* Articles VI, VII. In view of the fact that a substantial portion of the CNMI budget is comprised of [**19] direct and indirect federal financial assistance, we cannot say that a federal audit impermissibly intrudes on the internal affairs of the CNMI.

We therefore affirm the district court's enforcement of the administrative subpoena pursuant to the Insular Areas Act.

IV. *Confidentiality Provisions*

The Governor also argues that enforcement of the administrative subpoena violates the confidentiality provisions of *Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103.* Section 6103 generally prohibits state officials from disclosing confidential tax return information except to those specifically authorized. This provision has been made applicable to the CNMI. *See 26 U.S.C. § 6103*(b)(5)(A). Because the Inspector General is not expressly enumerated in the list of exceptions to § 6103's prohibition against disclosure, the Governor argues that § 6103 prevents him from complying with the Inspector General's subpoena.

The district court properly held that the Insular Areas Act, *48 U.S.C. § 1681b,* by authorizing an audit of the CNMI, implicitly amended the confidentiality [**20] provisions of *26 U.S.C. § 6103* to authorize disclosure of confidential tax information to the Inspector General. Under the Insular Areas Act, the Inspector General is required "to report to the Secretary of the Interior . . . all failures to collect amounts due" the CNMI government. To comply with this duty, the Inspector General must have access to individual tax return information.

Although we do not construe § 6103 to bar disclosure of income tax return information [*756] to the Inspector General, we expect him to comply with the district court's order to provide internal safeguards ensuring strict measures of confidentiality throughout the course of the audit.

V. *Section 502*

The Governor also challenges dicta in the district court's opinion regarding Covenant Section 502, the mechanism through which a body of federal law was brought into effect upon the establishment of the Commonwealth government in January 1978.

The district court found that "Section 502 was an interim formula, valid until the assumption of full sovereignty by the United States when all United States laws applicable to the several States would be in effect of their own force, [**21] unless elsewhere excluded by the Covenant or by Congress." *Richards v. Guerrero*, No. 92–00001, slip op. at 55, *1992 U.S. Dist. LEXIS 12936* (D.N.M.I. July 24, 1992). Therefore, concluded the district court, "Covenant § 502 is no longer in effect. All federal laws applicable to the several States apply to the CNMI, unless excluded by Congress." [Slip op.] at 56.

The Governor thus asserts that the district court erroneously invalidated Section 502. We need only clarify that Section 502 governs the application to the CNMI of federal laws existing prior to January 9, 1978, and that Section 105 governs the application of federal laws enacted after that date.

VI. *Motion to Intervene*

Taxpayers Sablan and Salas ("Intervenors") assert that the district court erred by denying their motion to intervene in the enforcement proceedings pursuant to *Fed. R. Civ. Proc. 24(a)*. The district court instead assigned them the status of *amicus curiae* and allowed them to file briefs and present oral argument. The district court's decision to deny the motion for intervention may be reversed only if there has been an abuse of discretion. *Garrett v. United States, 511 F.2d 1037, 1038 (9th Cir. 1975).* [**22]

Intervenors assert voting and privacy interests that they maintain will remain unprotected if they are denied intervention. Briefly, they argue that enforcement of the subpoena violates the right of local self–government of the people of the CNMI, and concomitantly, dilutes their right to vote for the CNMI officials who govern internal affairs. In addition, they maintain that enforcement infringes their constitutionally protected privacy interests in individual tax return information as recognized by the CNMI Supreme Court in *Sablan v. Inos*, No. 91–018 (N.M.I. filed Dec. 26, 1991). We disagree.

The United States Supreme Court has held that there is no intervention as a matter of right for taxpayers in subpoena enforcement proceedings against a third party. *Donaldson v. United States, 400 U.S. 517, 531, 27 L. Ed. 2d 580, 91 S. Ct. 534 (1971).* Thus, intervention is permissive only. *See Garrett v. United States, 511 F.2d at 1038.* To succeed on their motion, Intervenors must demonstrate that they have a "significantly protectable interest" in the tax records. *Id.* The district court correctly concluded that Intervenors' "voting rights" argument is essentially [**23] the same as the right of self–government argument presented by the Governor. In addition, we agree that the privacy interests asserted by Intervenors were adequately represented by the position of the Governor and were insufficient to warrant intervention. *See United States v. Miller, 425 U.S. 435, 444–46, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976)* (bank depositor lacked sufficient 4th Amendment interest to challenge subpoenas issued to bank). The denial of the motion to intervene therefore does not constitute an abuse of discretion.

For the foregoing reasons, the judgment of the district court is *AFFIRMED.*

LEXSEE 122 F3D 1007

**INSPECTOR GENERAL OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, Petitioner-Appellee, v. Ann G. GLENN, as personal representative of J.C. Griffin, Jr., Faye Collins, Draffin & Tucker, C.P.A., Griffin Farms, Inc., B & J Company, Inc., Griffin Oil Company, Inc., Griffin Aviation Inc., Griffin Gin and Supply Co., Ann Glenn, J.C. Griffin, Sr., Respondents-Appellants.**

**No. 96-8686**

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

***122 F.3d 1007; 1997 U.S. App. LEXIS 25185; 11 Fla. L. Weekly Fed. C 535***

**September 18, 1997, Decided**

**PRIOR HISTORY:** [**1] Appeals from the United States District Court for the Middle District of Georgia. (No. 1:94-MC-28-1WLS). W. Louis Sands, Judge.

**DISPOSITION:** AFFIRMED.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:**

For Griffin, et al., Appellant(s): Alexander J. Pires, Jr., Conlon, Frantz, Phelan & Pires, Washington, DC.

For Appellant(s): Timothy O. Davis, Albany, GA.

For Draffin & Tucker, Appellant(s): James H. Moore, III, Moore, Clarke, DuVall & Rodgers, P.C., Albany, GA. David Garland, Moore, Clarke, Albany, GA.

For Appellee(s): William David Gifford, Macon, GA. Katherine R. Shanabrook, US Dept of Agriculture, Washington, DC. Jeffrey Clair, U.S.D.O.J., Civil Division/Appellate Staff, Washington, DC.

**JUDGES:** Before CARNES, Circuit Judge, and HENDERSON and GIBSON, * Senior Circuit Judges.

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

**OPINIONBY:** FLOYD R. GIBSON

**OPINION:**

[*1008] GIBSON, Senior Circuit Judge:

In this case, the appellants challenge the scope of the Inspector General's subpoena powers under the Inspector General Act of 1978 ("IGA"), *5 U.S.C. app. §§ 1*-12 (1994). The Inspector General of the United States Department of Agriculture subpoenaed, *inter alia*, records, documents, and reports relating to appellants' participation in a federal disaster program. When appellants refused to produce the requested information, the Inspector General sought summary enforcement of the subpoena in the United States District Court for the Middle District of Georgia. Appellants argued that the subpoenas exceeded the Inspector General's statutory authority and were unduly burdensome. The district court disagreed with appellants' [*1009] contentions and entered an order enforcing the subpoenas. The [**2] district court agreed to stay enforcement pending appeal because several issues would be mooted on appeal if appellants were required to produce the subpoenaed information immediately. The appellants now appear before us challenging the scope of the Inspector General's subpoena powers. Because the district court n1 correctly determined that the Inspector General did not exceed his statutory authority in issuing the subpoenas and that the subpoenas did not create an undue burden upon appellants, we affirm.

n1 The HONORABLE W. LOUIS SANDS, United States District Judge for the Middle District of Georgia.

I. BACKGROUND

In 1993, in response to a hotline complaint alleging questionable disaster program payments to program participants in Mitchell County, Georgia, the United States Department of Agriculture's ("USDA") Inspector General audited the Consolidated Farm Service Agency's ("CFSA") n2 Mitchell County disaster program. The Inspector General sought to determine whether CFSA program participants were complying [**3] with regulatory payment limitations. As a result of the audit,

the Inspector General determined that $1.3 million in questionable disaster payments were awarded to Mitchell County program participants. As part of the audit, the Inspector General requested various information from appellants to determine their compliance with the payment limitations. When appellants repeatedly refused to provide the requested information, the Inspector General issued subpoenas to require production of the information. The Inspector General sought summary enforcement of the subpoenas in the United States District Court for the Middle District of Georgia. The district court ordered enforcement, and appellants challenge that order on appeal.

> n2 At the time of the audit, the Agriculture Stabilization and Conservation Service ("ASCS") coordinated the disaster program. In 1994, Congress merged the ASCS with several other agencies to form the CFSA. *See 7 U.S.C. § 6932* (1994). For clarity, we will refer to the ASCS by the name of its successor agency, the CFSA.

[**4]

II. DISCUSSION

Due to a concern that fraud and abuse in federal programs was "reaching epidemic proportions," S.Rep. No. 95–1071, at 4 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 2676, 2679, Congress created Offices of Inspectors General in several governmental departments "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of those departments and agencies," *id.* at 2676; *see also 5 U.S.C. app. §§ 1*–12 (1994). The Inspector General Act of 1978, *5 U.S.C. app. §§ 1*–12, enables Inspectors General to combat such fraud and abuse by allowing "audits of Federal establishments, organizations, programs, activities, and functions," *id.* § 4(b)(1)(A), and by authorizing broad subpoena powers, *see id.* § 6(a)(4). We will enforce a subpoena issued by the Inspector General so long as (1) the Inspector General's investigation is within its authority; (2) the subpoena's demand is not too indefinite or overly burdensome; (3) and the information sought is reasonably relevant. *See E.E.O.C. v. Tire Kingdom, Inc., 80 F.3d 449, 450 (11th Cir.1996); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir.1986).*

Although [**5] appellants recognize that the scope of the Inspector General's subpoena power is broad, they contend that the USDA's Inspector General exceeded the scope of this power when he subpoenaed information as part of a payment limitation review. Appellants argue that a payment limitation review is a "program operating responsibility" which section 9(a)(2) of the IGA prohibits agencies from transferring to the Inspector General.

Appellants' argument relies heavily upon a Fifth Circuit case, *see Burlington N. R.R. Co. v. Office of Inspector General, 983 F.2d 631 (5th Cir.1993).* In *Burlington Northern,* the court reviewed the appropriateness of the Inspector General of the Railroad Retirement Board's (RRB) decision to investigate the accuracy of railroad employers' tax reporting. The RRB had been delegated the authority to examine whether railroad employers [*1010] were accurately reporting tax information. The RRB's Inspector General, acting upon a belief that the RRB had not adequately exercised this power, began investigating the accuracy of the railroad employers' tax reporting methods. When the Inspector General initially discovered reporting abuses, he entered into an understanding with [**6] the Internal Revenue Service that the two agencies would jointly examine reporting accuracy on an ongoing basis. When the Inspector General subpoenaed information from Burlington Northern, the railroad company challenged the subpoena, claiming that it exceeded the Inspector General's authority. The Fifth Circuit determined that the Inspector General's plan was to "assume a regular auditing function to detect tax noncompliance and to perhaps assume a tax collecting function," *id. at 639,* and "that the detection of fraud and abuse would have only been a by–product of the proposed tax compliance audit," *id. at 640.* The court thus determined that the district court did not commit clear error in finding "that the proposed audit of Burlington Northern was essentially a tax compliance audit to be conducted pursuant to a long–term, regulatory plan." *Id. at 641.* The Fifth Circuit additionally concluded that Inspectors General do not have authority to conduct regulatory compliance audits "which are most appropriately viewed as being within the authority of the agency itself." *Id. at 642.*

In this case, appellants contend that the Inspector General's payment limitation review [**7] was a regulatory compliance audit which was solely within the authority of the CFSA to conduct; therefore, under the rule set forth in *Burlington Northern,* the Inspector General acted beyond the scope of his authority when he subpoenaed information from appellants. We note, however, a significant difference between the audit at issue in the case *sub judice* and the audit at issue in *Burlington Northern*—the Inspector General in this case began its investigation in response to a specific allegation of fraud and abuse in the Mitchell County disaster program. Thus, even were we to adopt the standard set forth in *Burlington Northern,* which we decline to do as it is not necessary to decide the outcome of this case, the subpoenas issued by the Inspector General would be enforceable because they were not issued as part of a regulatory compliance audit which is solely within the authority of the CFSA to conduct. n3

n3 In *Adair v. Rose Law Firm, 867 F. Supp. 1111 (D.D.C.1994)*, the United States District Court for the District of Columbia strongly criticized the Fifth Circuit's decision in *Burlington Northern, id. 867 F. Supp. at 1117*. The court concluded that "*Burlington Northern* imposed limits on the authority of Inspectors General that do not appear on the face of the statute or in its legislative history." *Id.* As stated above, we need not establish definite boundaries of the Inspector General's subpoena power because, in this case, the USDA's Inspector General acted well within his authority when he issued the subpoenas in question.

[**8]

The IGA specifically directs the Inspector General to coordinate "activities designed ... to prevent and detect fraud and abuse" in departmental programs. *5 U.S.C. app § 2*(2)(B). To enable the Inspector General to carry out this function, the IGA authorizes the Inspector General to conduct "audits," *see id.* § 4(b)(1)(A), for the purpose of promoting "efficiency" and detecting "fraud and abuse," *see id.* § 2(2)(A)(B). The IGA's legislative history suggests that such audits are to have three basic areas of inquiry:

> (1) examinations of financial transactions, accounts, and reports and reviews of compliance with applicable laws and regulations, (2) reviews of efficiency and economy to determine whether the audited entity is giving due consideration to economical and efficient management, utilization, and conservation of its resources and to minimum expenditure of effort, and (3) reviews of program results to determine whether programs or activities meet the objectives established by Congress or the establishment.

S.Rep. No. 95–1071, at 30 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 2676, 2703–04. To enable the Inspector General to conduct such audits in an effective [**9] manner, the IGA provides the Inspector General with broad subpoena power which is "absolutely essential to the discharge of the Inspector ... General's functions," for "without the power necessary [*1011] to conduct a comprehensive audit ..., the Inspector ... General could have no serious impact on the way federal funds are expended." *Id.* at 2709.

This case illustrates the necessity of the Inspector General's auditing and subpoena powers. The Inspector General received a hotline complaint regarding questionable payments in the CFSA's Mitchell County disaster program. The Inspector General appropriately began an investigation of the program to detect possible abuse. As part of the audit, the Inspector General requested information from program participants to determine whether the payments they received were warranted. When appellants, who were program participants, refused to produce the requested information, the Inspector General utilized its subpoena powers to acquire the necessary information. Without this ability to issue subpoenas, the Inspector General would be largely unable to determine whether the program and its benefit recipients were operating in an appropriate manner. Thus, [**10] an abuse of the system, which the Inspector General was specifically created to combat, could possibly go undetected, and government waste and abuse could continue unchecked. The subpoena power, which the Inspector General appropriately invoked in this case, is vital to the Inspector General's function of investigating fraud and abuse in federal programs.

Appellants contend that the Inspector General is only authorized to detect fraud and abuse within government programs, and that program administrators are responsible for detecting abuse among program participants. While we agree that IGA's main function is to detect abuse within agencies themselves, the IGA's legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations. Congressman Levitas, a co–sponsor of the IGA, stated that the Inspector General's "public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars." 124 Cong. Rec. 10,405 (1978). From this statement, [**11] we conclude that the Inspector General's public contact in this case was appropriate because it occurred during the course of an investigation into alleged misuse of taxpayer dollars. n4 In sum, we conclude that the subpoenas issued by the Inspector General did not exceed the statutory authority granted under the IGA.

> n4 Appellants also argue that, by requiring their compliance with the Inspector General's subpoenas, the court essentially deprives them of their right to have a hearing regarding payment limitation determinations. The general procedure for appealing CFSA county and state committee decisions is set forth at *7 C.F.R. § 780.1–11* (1997). These provisions apply to "decisions made under programs and by agencies, as set forth [within the regulations]." *7 C.F.R. § 780.2* (1997). The provisions do not apply to an independent review by the Inspector General.

Appellants also claim that the subpoenas were too indefinite and were unduly burdensome. CFSA regulations require program participants to retain [**12] records for a period of two years following the close of the program year. *See 7 C.F.R. § 708.1* (1997). Appellants argue that the Inspector General cannot subpoena records which predate the required retention period. We do not agree with appellants' argument. While appellants are not required to retain records beyond the two–year period, no indication exists that records created prior to the retention period should be free from the Inspector General's subpoena powers. *Cf. Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 260 (10th Cir.1991)* ("Plaintiff's duty to disclose records is not limited to records which plaintiff could have lawfully destroyed but, instead, has retained."); *United States v. Frowein, 727 F.2d 227, 234 (2d Cir.1984)* ("The only purpose for the five–year time limit was to prevent the record retention burden from becoming unreasonable... This concern is not applicable herein since appellants have, in fact, retained the records sought.").

Appellants further contend that the subpoenas are unduly burdensome because the 1990 and 1991 records sought by the Inspector General "were maintained and controlled by [appellant] J.C. Griffin, Sr., who has no mental [**13] capacity to explain the recordkeeping [*1012] system utilized in 1990 and 1991 nor his dealings with the USDA during [that] time period." Appellants' Br. at 18. We do not believe that Mr. Griffin's mental incapacity has any bearing on the enforceability of the Inspector General's subpoenas. At this stage, the Inspector General is merely requesting information from appellants as part of a large investigation involving many program participants in Mitchell County. The Inspector General has not requested that Mr. Griffin explain the contents of his records or his system for maintaining them. Consequently, we are unable to conclude that the subpoenas create an undue burden upon Mr. Griffin or any of the other appellants.

Finally, appellant Draffin & Tucker, C.P.A. ("Draffin"), n5 contends that Georgia's accountant–client privilege prevents the Inspector General from obtaining records which could eventually be used against appellants under a state law theory of fraud. "No confidential accountant–client privilege exists under federal law, and no state–created privilege has been recognized in federal cases." *See Couch v. United States, 409 U.S. 322, 335, 93 S. Ct. 611, 619, 34 L. Ed. 2d 548* [**14] *(1973); accord In re Int'l Horizons, 689 F.2d 996, 1004 (11th Cir.1982).* Nonetheless, Draffin adduces that if the Inspector General's "investigation is an effort to establish a theory of fraud applying Georgia law," Draffin Br. at 6, Georgia's accountant–client privilege prevents the Inspector General from acquiring information which relates to that theory. Draffin's argument is without merit because, even if we were to recognize a state–created accountant–client privilege, at this stage of the Inspector General's investigation, specific claims involving questions of state law have not arisen. *See Int'l Horizons, 689 F.2d at 1003.*

> n5 Draffin performs accounting work for the other appellants involved in the case. As such, many of appellants' records were subpoenaed from Draffin directly.

## III. CONCLUSION

For the reasons set forth in this opinion, we AFFIRM the district court's decision to enforce the Inspector General's subpoenas.

LEXSEE 2002 US DIST LEXIS 14674

**BRONX LEGAL SERVICES and QUEENS LEGAL SERVICES CORP., Plaintiffs,– against–LEGAL SERVICES CORPORATION, LEGAL SERVICES FOR NEW YORK CITY, and LEONARD KOCZUR, Acting Inspector General of the Legal Services Corporation, Defendants.**

**00 Civ. 3423(GBD)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

***2002 U.S. Dist. LEXIS 14674***

**August 7, 2002, Decided**
**August 8, 2002, Filed**

**SUBSEQUENT HISTORY:** *Affirmed by Bronx Legal Servs. v. Legal Servs. Corp., 2003 U.S. App. LEXIS 10299* (2d Cir. N.Y., May 22, 2003)

**PRIOR HISTORY:** *Bronx Legal Servs. v. Legal Servs. Corp., 2000 U.S. Dist. LEXIS 10952* (S.D.N.Y., Aug. 3, 2000)

**DISPOSITION:** [*1] Defendants' motions for summary judgment granted and plaintiff's cross–motion for summary judgment denied.

**LexisNexis (TM) HEADNOTES– Core Concepts:**

**COUNSEL:** For Bronx Legal Services, Queens Legal Services Corp, PLAINTIFFS: Robert M Kelly, John V Tait, White & Case, LLP, New York, NY USA.

For Legal Services for New York City, DEFENDANT: John S Kiernan, Carl Riehl, Debevoise & Plimpton, New York, NY USA.

**JUDGES:** GEORGE B. DANIELS, United States District Judge.

**OPINIONBY:** GEORGE B. DANIELS

**OPINION:**

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, DISTRICT JUDGE:

The parties in this action have made cross–motions for summary judgment. For the reasons set forth below, defendants' motions for summary judgment are granted and plaintiffs' cross–motion for summary judgment is denied. As a result, the other motions pending in this action are moot. n1

n1 The other motions pending in this action are the Inspector General's Motion to Dismiss or Stay, Plaintiff's Motion for a Preliminary Injunction, and Legal Services for New York City's Motion for Retention of the Inspector General as a Party.

[*2]

*Background*

Defendant Legal Services Corporation ("LSC"), which is headquartered in Washington, D.C., is a non–profit corporation created by Congress in the Legal Services Corporation Act of 1974, *42 U.S.C. §§ 2996* et seq ("LSC Act"). LSC was established "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *42 U.S.C. § 2996b*(a). Pursuant to this statute, LSC contracts to provide funding to various grantee organizations throughout the United States, among them defendant Legal Services for New York City ("LSNY"). LSNY does not provide any direct legal services to clients, but distributes the funding it receives to various subgrantee organizations in New York City. Plaintiffs, Bronx Legal Services and Queens Legal Services Corporation, are non–profit organizations that receive funding from LSNY to provide legal services to eligible low income individuals in New York City. n2 LSNY provides funding to plaintiffs pursuant to contracts ("the Contracts") negotiated and executed in New York and governed by New York law.

n2 Legal Services for the Elderly ("LSE") was formerly a plaintiff in this action. Pursuant to a stip-

ulation between the parties, this Court dismissed LSE's claims as moot on December 3, 2001.

[*3]

In 1999, the Office of the Inspector General of LSC ("OIG") decided to audit the accuracy of the reporting data provided to LSC. OIG made two separate requests or "data calls" to a sample of LSC grantees chosen at random, including LSNY. In data call number one, the OIG requested that LSNY, and plaintiffs through LSNY, produce information which included case numbers and problem codes without client names. In data call number two, the OIG requested client names and case numbers for each closed case. Plaintiffs refused to provide to LSNY, and LSNY refused to provide to the OIG, the full name of each client. Plaintiffs and LSNY maintained that production of this information, coupled with the problem codes previously produced, would require disclosure of privileged information and would violate the Code of Professional Responsibility of the New York State Bar Association and the Disciplinary Rules of the Appellate Division of the New York Supreme Court.

On or about March 22, 2000, the OIG issued an administrative subpoena requiring LSNY to produce the client names at the OIG in Washington, D.C.. On April 25, 2000, the OIG filed a petition in the United States District Court for the District [*4] of Columbia for summary enforcement of the administrative subpoena ("the D.C. Action"). Plaintiffs were neither served with the subpoena, nor named as respondents in the summary enforcement proceeding in the District of Columbia. However, they feared that LSC would terminate LSNY's funding for failure to provide the information required by the subpoena and LSNY might, in turn, terminate plaintiffs' funding for the same reason. Therefore, on May 4, 2000, plaintiffs commenced this action requesting that this Court declare that defendants have no right to demand from plaintiffs, and plaintiffs have no obligation to provide to defendants, the additional information that the OIG subpoenaed from LSNY. They also request that this Court enjoin defendants from depriving plaintiffs of funding, and from terminating and debarring plaintiffs from any future funding, as a result of their refusal to provide the additional information.

On June 14, 2000, the D.C. District Court issued a decision in favor of OIG on the petition for summary enforcement of the administrative subpoena. See *United States v. Legal Services for New York City, 100 F. Supp. 2d 42 (D.D.C. 2000).* The court rejected [*5] LSNY's blanket assertion of attorney–client privilege, while not foreclosing specific claims regarding individual clients. That court also held that the requirement under section 509(h) of the 1996 Omnibus Appropriations Act that recipients of LSC funds produce client names to auditors (1) was unambiguous in its requirement that LSC grantees make available client names, irrespective of their context, and (2) provided a legal basis for lawyers under subpoena to disclose client names without breaching their obligations under New York's rules of ethics. Id. That decision was affirmed on appeal and remanded to the district court to allow LSNY to make any specific privilege claims. *United States v. Legal Services for New York City, 346 U.S. App. D.C. 83, 249 F.3d 1077 (D.C. Cir. 2001).*

After the decisions in the DC Action, LSNY requested that plaintiffs provide the requested information to LSNY and the OIG pursuant to the Contracts. Plaintiffs continued to refuse to provide such information to LSNY.

OIG and LSC now move for summary judgment. LSNY moves for partial summary judgment with the exception of plaintiff's claims, if any, of attorney–client privilege with [*6] regard to any individual clients. Plaintiffs have indicated that they "are not asserting attorney–client privilege as a basis for refusing to provide the information." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross–Motion for Summary Judgment ("Pls.' Mem.") at 5.) Thus, a decision in LSNY's favor is also dispositive of this action. Plaintiffs oppose these motions and makes a cross–motion for summary judgment.

*Discussion*

Under Rule 56, summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c).* A genuine issue of material fact for trial exists if, based on the record as a whole, a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A district court must view the record in the light most favorable to the nonmoving party by resolving all ambiguities and drawing all reasonable inferences in favor of that party. *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587–88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986);* [*7] *Anderson, 477 U.S. at 255; Tomka v. Seiler Corp., 66 F.3d 1295, 1304 (2d Cir. 1995).* The moving party bears the burden of demonstrating that no genuine issue of material fact exists. *Anderson, 477 U.S. at 256; Tomka, 66 F.3d at 1304.*

Plaintiffs argue that they are prohibited from producing the client names requested by the OIG because, when coupled with the problem codes that were previously disclosed, the information constitutes a client se-

cret. Section 1200.19 of New York's Disciplinary Rules, 22 N.Y.C.R.R. 1200.19, states that "except when permitted under 1200.19(c) of this Part, a lawyer shall not knowingly: (1) reveal a . . . secret of a client." Section 1200.19(c)(2) provides that "[a] lawyer may reveal . . . secrets when . . . required by law or court order." Id. A "secret" is defined as "other information gained in the professional relationship [besides information protected by the attorney–client privilege] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Id.

Plaintiffs assert that the requested [*8] information is a client secret for two reasons. First, plaintiffs asserts that disclosure of the fact of plaintiffs' representation of individual clients is embarrassing to the clients because it reveals that the clients are indigent. (Pls.' Mem. at 11–12.) Second, plaintiffs assert that they represent their clients on "personal, sensitive matters" and their clients would be embarrassed by disclosure of the nature of the representation. (Pls.' Mem. at 12.) Plaintiffs do not cite any caselaw that supports these assertions. As legal support for their position, plaintiffs cite ethical opinions issued by the American Bar Association and the opinions of the legal ethics experts that they have consulted on this matter. (Pls.' Mem. at 9–10 & 12–13.) As an initial matter, none of the ABA ethical opinions cited by plaintiffs present a situation such as this one where the OIG has requested information pursuant to statutory authority. Furthermore, the opinions offered by plaintiffs do not have the force of law and this Court is not bound by them. See *Grievance Committee for Southern Dist. Of New York v. Simels, 48 F.3d 640, 645; United Trans. Union Local Unions 385 and 77 v. Metro–North Commuter Railroad Co., 1995 U.S. Dist. LEXIS 15989, 1995 WL 634906*, [*9] *5–6 (S.D.N.Y. Oct. 30, 1995). There is no legal basis for this Court to conclude that disclosure of the existence or nature of a client's representation in this context would reveal a client secret. However, this Court need not reach this issue because disclosure of the client names requested by defendants is required by law.

Plaintiffs argue that the LSC Act does not require recipients of LSC funds to disclose client secrets and specifically provides that LSC shall not interfere with an attorney's ethical obligations. See *42 U.S.C. § 2996e*(b)(3). n3 However, section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321, 1321–59 (1996) ("Section 509(h)"), supersedes the restrictions of § 2996e(b)(3) of the LSC Act. Section 509(h) states that:

> *Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3))*, financial records, time records, retainer agreements, client trust fund and eligibility records, and *client names*, for each recipient shall be made available to any auditor or monitor of the recipient, including any [*10] Federal department or agency that is auditing or monitoring the activities of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney–client privilege.

Id. (emphasis added). Plaintiffs argue that Section 509(h) does not require disclosure of client names along with the nature of the legal representation. This argument fails. In the DC Action, the district court held that the reference in Section 509(h) to client names did not "depend upon context." *100 F. Supp. 2d at 47*. The court of appeals affirmed the district court's ruling and noted that, since LSC regulations require retainer agreements to contain the nature of the legal representation, disclosure of retainer agreements along with client names under Section 509(h) "would reveal exactly the sort of information" sought to be withheld, that is "the general matter of individual clients' representations." *249 F.3d at 1083* (citations omitted). The court of appeals rejected LSNY's argument that Section 509(h) does not require disclosure [*11] of retainer agreements in a manner that connects the agreements with client names and stated that "if Congress had intended to require production of 'time records, retainer agreements, . . . and client names' only when disassociated from one another, surely it would have said so in terms different from the simple conjunctive phrasing in § 509(h)." Id.

n3 *42 U.S.C. § 2996e*(b)(3) reads:

> The Corporation [LSC] shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this

> subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

[*12]

This Court agrees with the D.C. Court of Appeals' interpretation of Section 509(h) and will not graft additional requirements into the statute that were not included or intended by Congress. Therefore, even if the requested information does constitute a client secret, plaintiffs are relieved of any perceived ethical obligations to withhold client names and the nature of the representation because they are required by law to disclose the requested information. See 22 N.Y.C.R.R. 1200.19(c)(2). Plaintiffs do not dispute that they are recipients of LSC funds through LSNY, and plaintiffs are not exempt from the requirements of section 509(h) merely because the funds that they receive from LSC are funneled through LSNY.

Furthermore, the provisions of the Contracts also require plaintiffs to provide the requested information to defendants. Section 14.3 of the Contracts states that, notwithstanding any other provisions of the Contracts, plaintiffs will comply with the "'Assurances Given By Applicant as Condition for Approval of Grant' made by LSNY to [LSC], a copy of which Assurances has been provided to [plaintiffs]." (Scherer Decl., Exh. A at 27, § 14.3; Scherer Decl., Exh. B [*13] at 27, § 14.3.) The Assurances provide that LSNY and plaintiffs will "comply with the [LSC Act], and *any applicable appropriations act* and any other applicable law, all requirements of the rules and regulations, policies, guidelines, instructions, and other directives of [LSC] . . . ." (Schwartz Decl., Exh. E at 12, § 1.) (emphasis added.) Section 509(h) is one such applicable appropriations act, particularly because it references the LSC Act. A provision in the Assurances also substantially duplicates Section 509(h). n4 (Schwartz Decl., Exh. E at 12, § 9.) Additionally, a provision in the Contracts themselves substantially duplicates Section 509(h). n5 (Scherer Decl., Exh. A. at 4, § 3.2(c); Scherer Decl., Exh. B. at 4, § 3.2(c).) As these provisions in the Assurances and in the Contracts incorporate Section 509(h), they are entitled to the same interpretation that this Court has given Section 509(h), which is that these provisions require plaintiffs to disclose the requested information.

> n4 Section 9 of the Assurances reads:
> notwithstanding grant assurance number 10 below, and § 1006(b)(3) of the LSC Act, *42 U.S.C. § 2996e*(b)(3), [LSNY and plaintiffs] shall make available financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, except for those reports or records which would properly be denied pursuant to the attorney–client privilege, to [LSC] and any federal department or agency that is auditing or monitoring the activities of [LSC, LSNY or plaintiffs] and any independent auditor or monitor receiving federal funds to conduct such auditing or monitoring, including any auditor or monitor of [LSC].

[*14]

> n5 Section 3.2(c) of the Contracts reads:
> notwithstanding paragraphs (a) and (b) above, and § 1006(b)(3) of the LSC Act, *42 U.S.C. § 2993*(b)(3) [sic] [plaintiffs] shall make available financial records, time records, retainer agreements, client trust funds and eligibility records, and client names, except for those reports or records which would properly be denied pursuant to the attorney–client privilege, to LSNY and any Federal department or agency that is auditing or monitoring the activities of [LSC], LSNY or [plaintiffs] and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of LSNY.

Plaintiffs other arguments are also without merit. Plaintiffs argue that the information requested by defendants is unnecessary and unreasonable. However, this issue has already been decided in the DC Action. In that action, LSNY contested the reasonableness of the information requested by the OIG and argued that the request was unduly burdensome. Both the D.C. District Court and the D. [*15] C. Court of Appeals rejected LSNY's argument. The district court stated that "it is not the province of this court to decide the best way for . . . OIG to carry out its responsibilities" and held that OIG's request was not unreasonable. *100 F. Supp. 2d at 47*. The court of appeals affirmed the decision of the district court and held that the information was relevant and would not "unduly disrupt or seriously hinder normal operations." *249 F.3d at 1084* (citations omitted). In the present action, LSNY is merely requesting from plaintiffs the information requested of LSNY by the OIG. This information has already been determined to be reasonable in the DC Action and plaintiffs

have offered no basis for this Court to make a different finding.

Plaintiffs also argue that the Inspector General Amendments Act of 1988, *5 U.S.C. app. 3,* is unconstitutional. This act designates LSC as a "designated Federal entity" and grants the OIG the authority "to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned [*16] by this Act . . . ." *5 U.S.C. app. 3* §§ 8G(a)(2) & 6(a)(4). Plaintiffs argue that the OIG is not a governmental entity and Congress unconstitutionally delegated its legislative power to a private entity by giving the OIG the authority to subpoena. Plaintiffs attempt to support their argument with two cases. However, these cases are readily distinguishable.

Plaintiffs quote language from *Loving v. United States, 517 U.S. 748, 758, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996),* stating "the fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity" and from *Panama Refining Co. v. Ryan, 293 U.S. 388, 421, 79 L. Ed. 446, 55 S. Ct. 241, 1 Ohio Op. 389 (1935),* stating "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." (Pls.' Mem. at 22.) The holding in Loving is actually contrary to plaintiff's position. The Court held that Congress has limited delegation powers. See *Loving, 517 U.S. at 751* (holding Congress has power to delegate its constitutional authority [*17] to the President to define "aggravating factors that permit a court–martial to impose the death penalty upon a member of the Armed Forces convicted of murder.") The language plaintiff quotes from the opinion was merely a statement of the general rule in order to illustrate an exception to the rule. In Panama Refining Co., the Court held that legislation which delegated unlimited authority to the President to pass a law prohibiting the transportation of petroleum and petroleum products was unconstitutional. *293 U.S. 388.* The Court stated that while Congress has the authority to delegate some of its functions to others, it may not delegate an essential lawmaking function to an entity without prescribing some limits to the entity's authority. *Id. at 421–33.* In contrast to the unlimited lawmaking authority delegated in Panama Refining Co., the Inspector General Amendments Act of 1988 merely grants the OIG limited authority to subpoena specific information in conducting audits. Thus, Panama Refining Co. is also inapposite. Accordingly, there is no basis for this Court to hold that the Inspector General Amendments Act of 1988 is unconstitutional. [*18]

Plaintiffs also argue that Section 509(h) is unconstitutional. Plaintiffs cite three reasons in support of this argument. First, plaintiffs argue that Section 509(h) violates the separation of powers principle because it infringes on the judicial function of regulating attorneys by requiring attorneys who receive LSC funds to disclose client secrets. However, New York's ethical rules allow attorneys to reveal client secrets when required by laws such as Section 509(h), thereby foreclosing any infringement arguments. See 22 N.Y.C.R.R. 1200.19(c)(2).

Plaintiffs argue that Section 509(h) violates the First Amendment by requiring disclosure of the identity of clients exercising their right of association to consult with an attorney, without any compelling need for the disclosure. However, there is a sound reason for the defendants' request. OIG is requesting the information from LSNY, and LSNY is requesting the information from plaintiffs, because OIG is carrying out the purposes for which it was established, to audit and investigate LSC and recipients of LSC funds. See *5 U.S.C. app 3* § 2.

Plaintiffs final constitutional argument is that Section 509(h) violates [*19] due process and equal protection by requiring disclosure of client secrets as a condition of receiving federal funds. Plaintiffs argue that clients' due process rights are violated because they are required to unreasonably disclose their association with plaintiffs as a condition of receiving federally funded legal services. As previously stated, the information requested is not unreasonable and the OIG is requesting the information to fulfill its statutory functions. Plaintiffs' equal protection argument is that only indigent people are affected. However, indigence alone is not a suspect class under equal protection analysis. See, e.g., *Maher v. Roe, 432 U.S. 464, 471, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977)* (citations omitted) (the Supreme Court "has never held that financial need alone identifies a suspect class for equal protection analysis."); *Woe v. Cuomo, 729 F.2d 96, 103 (2d Cir. 1984)* (citations omitted) ("the Supreme Court has consistently held that poverty without more is not a suspect classification."). Accordingly, there is no basis for this Court to hold that Section 509(h) is unconstitutional.

For the foregoing reasons, defendants' [*20] motions for summary judgment are granted and plaintiff's cross–motion for summary judgment is denied. The other motions pending in this action are, therefore, moot.

Dated: New York, New York

August 7, 2002

SO ORDERED:

GEORGE B. DANIELS

United States District Judge

LEXSEE 807 FSUPP 237

**UNITED STATES OF AMERICA, Petitioner, v. NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, Respondent.**

**Misc. No. 3014**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK**

***807 F. Supp. 237; 1992 U.S. Dist. LEXIS 18482***

**December 4, 1992, Decided**
**December 4, 1992, Filed**

**COUNSEL:** [**1] GARY L. SHARPE, United States Attorney, 900 Federal Building, Syracuse, New York 13260, OF COUNSEL: WILLIAM H. PEASE, Assistant United States Attorney.

STEPHEN J. SEGRETO, STUART M. GERSON, Attorneys, Civil Division, United States Department of Justice, P.O. Box 261, Ben Franklin Station, Washington, D.C. 20044.

ROBERT ABRAMS, Attorney General of the State of New York, The Capitol, Albany, New York 12224, OF COUNSEL: LAWRENCE L. DOOLITTLE, Assistant Attorney General.

**JUDGES:** McCurn

**OPINIONBY:** NEAL P. McCURN

**OPINION:** [*238]

NEAL P. McCURN, C.J.

**MEMORANDUM-DECISION AND ORDER**

This matter comes before the court today on a return of an order to show cause as to why the respondent, New York State Department of Taxation and Finance ("State"), should not be compelled to comply with an administrative subpoena duces tecum issued pursuant to *5 U.S.C. app. 3* § 6(a)(4) (West Supp. 1992) by the United States Department of Labor's Office of Inspector General. This court has jurisdiction over the dispute pursuant to *28 U.S.C. § 1345* (1988) (proceeding involving the United States).

**I. BACKGROUND**

In 1978, in an effort to control the rising tide of inefficiency and abuse in federal programs, [**2] Congress enacted the Inspector General Act of 1978 ("Act"). The Act established Offices of Inspector General in fifteen federal agencies, including the Department of Labor. The Offices were created to lead each agency's efforts in promoting efficiency and purging waste and fraud from their programs. See Act, Pub. L. No. 95-452, § 2, 92 Stat. 1101, 1101 (1978). To accomplish these goals, the Act requires Inspector Generals to conduct audits of, and investigations into, agency programs. Id. § 4(a)(1).

Congress gave the Inspector Generals sweeping investigative powers to perform their functions. Most notably (at least for purposes of this proceeding), Congress gave the Inspector Generals authority to issue administrative subpoenas for the production "of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of their functions . . . ." *5 U.S.C. app. 3* § 6(a)(4). Significantly, the Act places few restrictions on the Inspector Generals' subpoena power. The only substantive restriction relates to subpoenas issued to other federal agencies; after adding that limitation, Congress left the [**3] Inspector Generals' remaining subpoena power essentially unfettered.

Pursuant to its authority under the Act, the Department of Labor's Office of Inspector General ("OIG") investigates activities related to, inter alia, the Department's Job Training Partnership Act ("JTPA"). The OIG is currently conducting an audit to determine whether various JTPA participants have satisfied the JTPA's training and assistance requirements. See Campbell Decl. (10/7/92) P 4. As part of its audit, the OIG has subpoenaed from the State wage records of approximately 150 JTPA participants. See Petition (11/5/92) exh. "2" (subpoena, including list of 150 JTPA participants). The OIG has specifically requested records showing: (1) the names and addresses of the participants' respective employers; (2) the employers' ID numbers; (3) the participants' earnings; and (4) the participants' hours worked. According to the OIG's

Regional Inspector, the records sought would assist the OIG in determining whether the information contained in the participants' JTPA files is accurate. Campbell Decl. (10/7/92) P 6.

The Regional Inspector attests that she has requested this information from the State because [**4] "the wage records maintained by New York State are the most reliable and, in some instances, the only independent sources of verification." Id. The OIG's efforts have been hampered, however, by the State's refusal to produce the subpoenaed documents. The State bases its refusal upon Fed. R. Evid. 501 and N.Y. Tax L. § 697(e)(1) (McKinney 1987), which, the State contends, considered together erect an absolute privilege to disclosure of the subpoenaed records. After unsuccessfully negotiating for the disclosure of the records, the OIG commenced this proceeding pursuant to the Act, *5 U.S.C. app. 3* § 6(a)(4) [*239] to compel production. n1

n1 The relevant portion of *5 U.S.C. app. 3* § 6(a)(4) states that "subpoena[s], in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court. "

## II. DISCUSSION

### A. State's argument against compliance

As previewed above, the State's refusal to disclose the subpoenaed records is based upon its construction of the interplay [**5] of two statutes: Fed. R. Evid. 501 and N.Y. Tax L. § 697(e)(1). Thus, this discussion begins with a brief examination of those two statutes.

The State first argues that Rule 501 ("Privileges"), a federal law, dictates that the OIG's subpoena power is subject to state law governing privileges. The portion of Rule 501 upon which the State relies specifically states:

In civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of the decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. n2 Construing Rule 501 as a mandate that privileges set forth in state law limit the OIG's investigative authority, the State invokes the privilege set forth in N.Y. Tax L. § 697(e)(1) in an effort to avoid the subpoena. Section 697(e)(1) states, in pertinent part:

Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission . . . to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required [**6] under this chapter or under section one hundred seventy–one–a of this chapter.

n2 Rule 501 contains another substantive provision, as well, which provides that "the privilege of a witness, persons, government, State, or political subdivision thereof shall be governed by the principles of the common law . . . . " Since this portion relates only to common law privileges, and the privilege invoked by the State here is grounded in state statutory law, the State does not rely upon this provision here.

As the parties are well aware, today is not the first time that this court has reviewed the state's argument. In December, 1990, the court considered—and flatly rejected—these same arguments in nearly the identical context. See United States v. New York State Dep't of Taxation and Finance, Misc. No. 2628 (N.D.N.Y.). n3 At the time, the State similarly argued that Tax Law section 697(e)(1) creates a privilege that prevents the OIG from receiving tax and wage records. This court dismissed the State's argument based [**7] upon the text of the statute, noting that section 697(e)(1) is subject to the limitation, "except in accordance with proper judicial order or as otherwise provided by law . . . .". In light of this limitation, the court concluded that the nondisclosure prohibition is not applicable when the State acts in accordance with a proper judicial order. Tr. at 6 (citing *In re New York State Sales Tax Records, 382 F. Supp. 1205, 1206 (W.D.N.Y. 1974)).* Thus, once this court issued a "proper judicial order" pursuant to the section 6(a)(4) of the Act compelling the State to produce the wage records, the State could no longer rely upon section 697(e) to refuse compliance.

n3 The OIG has provided a transcript of the December 11, 1990 proceeding in which the court announced its decision. See Petition (11/5/92) exh. "2". For ease of reference, that transcript will hereinafter be referred to as "Tr."

The law has not changed in the two years since this court issued its last order. Still, the [**8] State once again challenges the subpoena and this court's power to compel compliance. The only difference between the instant proceeding and the 1990 proceeding is that the State has bolstered its arguments in opposition to the subpoena. The State contends that this court erred in issuing its 1990 order and asks the court to reconsider its reasoning behind compelling compliance. n4 The State's argument is

[*240] grounded primarily in a 1978 decision by the New York State Court of Appeals, *New York State Dep't of Taxation and Finance v. New York State Dep't of Law, 44 N.Y.2d 575, 406 N.Y.S.2d 747, 378 N.E.2d 110 (Ct. App. 1978),* in which that Court narrowly construed the exceptions to section 697(e)(1). The Court of Appeals limited the phrase "proper judicial order" to mean only those judicial orders which "[effectuate] the enumerated exceptions within the statute or which [arise] out of a case in which the report itself is at issue, as in a forgery or perjury prosecution." *Id. at 582.* By all accounts, the OIG's investigation relates to JTPA requirements and thus does not further an exception under the statute or otherwise relate to a tax prosecution. Therefore, agues the State, the [**9] "proper judicial order" exception upon which this court relied in 1990 does not apply, and section 697(e)(1) remains as a viable barrier to the State's production of the subpoenaed records.

> n4 The court's 1990 order compelling disclosure was not appealable. See *In re Grand Jury Subpoena for New York State Income Tax Records, 607 F.2d 566 (2d Cir. 1979).* Thus, the State was forced to comply with the order.

**B. Preemption**

Even if this court accepts, as it must, the New York Court of Appeals's construction of section 697(e)(1), see, e.g., *Harvey's Wagon Wheel, Inc. v. Van Blitter, 959 F.2d 153, 154 (9th Cir. 1992); Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co., 953 F.2d 985, 988 (5th Cir. 1992),* that statute still does not excuse the State from complying with the subpoena. This is because the State's expansive interpretation of section 697(e)(1) causes that statute to conflict with the Act's equally [**10] expansive subpoena provision, § 6(a)(4). Such a conflict between state and federal law immediately gives rise to the specter of preemption. For the reasons discussed below, this court finds that, notwithstanding the State's interpretation of its Tax Law, that statute is preempted by—and thus must give way to—the OIG's subpoena power as authorized by the Act.

Under the Constitution's Supremacy Clause, state laws that "interfere with, or are contrary to the laws of congress" are invalid. U.S. Const. art. VI, cl. 2. There are numerous means by which a federal law may preempt a state law, even when Congress does not specifically express its intent to preempt state laws in a given field. Most notably, in the absence of explicit Congressional direction, the doctrine operates to preempt those state law which "conflict with" federal law. Such a conflict occurs when "'compliance with both federal and state regulations is a physical impossibility,' or when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wisconsin Pub. Intervenor v. Mortier, 115 L. Ed. 2d 532, 111 S. Ct. 2476, 2482 (1991)* (citations [**11] omitted) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)); Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399 (1941));* accord, e.g., *Cable Television Ass'n v. Finneran, 954 F.2d 91, 98 (2d Cir. 1992).*

Under this standard, determination of whether a state law conflicts with a federal law turns upon the purposes and objectives of Congress. Id.; *Environmental Encapsulating Corp. v. New York, 855 F.2d 48, 53 (2d Cir. 1988).* If, after examining Congress's purposes and objectives in enacting a law, the court finds that the state law obstructs fulfillment of those goals, then the federal law preempts the state law and the state law will be of no effect. E.g. *Environmental Encapsulating Corp., 855 F.2d at 59* (citing *Pacific Gas and Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 216, 75 L. Ed. 2d 752, 103 S. Ct. 1713 n.28 (1983));* see *Motor Vehicle Mfrs. Ass'n v. Abrams, 899 F.2d 1315, 1318 (2d Cir. 1990),* cert. denied, *113 L. Ed. 2d 230, 111 S. Ct. 1122 (1991).* [**12] See generally Jose L. Fernandez, The Purpose Test: Shield State Environmental Statutes from the Sword of Preemption, *41 Syracuse L. Rev. 1201 (1990).* Thus, in order to determine whether the Act preempts operation of section 697(e) in this case, the court must turn [*241] its inquiry to discerning Congress's purposes and objectives in enacting the Act, with specific attention given to the Act's subpoena provision.

As discussed above, Congress's intent in promulgating the Act, and giving the OIG such broad investigatory and subpoena powers, was to facilitate detection of waste, fraud, and abuse in federal programs. See Act, Pub. L. No. 95–452, § 2, 92 Stat. 1101, 1101. In construing the Act, at least two Courts of Appeals have noted that "the enactment reflected congressional concern that fraud, waste and abuse in United States agencies and federally funded programs were 'reaching epidemic proportions.'" *United States v. Westinghouse Elec. Corp., 788 F.2d 164, 165 (3d Cir. 1986)* (quoting S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2679); accord, *United States v. Aero Mayflower Transit Co., 265 U.S. App. D.C. 383, 831 F.2d 1142, 1145 (D.C. Cir. 1987).* [**13] When it promulgated the Act, Congress took the extra measure to articulate its belief that the subpoena provision, section 6(a) (4), is an integral component, critical to fulfilling the Act's objectives:

Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General's functions. There are

literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities, the Inspector and Auditor General could have no serious impact on the way federal funds are expended.

S. Rep. 1071, 95th Cong., 2d Sess. 34, reprinted in 1978 U.S.C.C.A.N. 2676, 2709 (emphasis added).

It is undisputed that the OIG seeks to use its subpoena power here in furtherance of its audit into waste and abuse in the JTPA, a federally funded program. See Campbell Decl. (10/7/92) PP 4, 6. By invoking the provisions of Tax Law § 697(e)(1), the State has constructed an insurmountable barrier to the OIG's ability to fulfill that objective. Given that the OIG's stated objective mirrors that articulated by Congress in promulgating the Act, the [**14] court can comfortably conclude that the State's invocation of Tax Law § 697(e)(1) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Cf. *Wisconsin Pub. Intervenor, 111 S. Ct. at 2482; Cable Television Ass'n, 954 F.2d at 98.* Stated more succinctly, since the State's reliance upon state law to avoid the federal subpoena renders "compliance with both federal and state regulations . . . a physical impossibility," *Florida Lime & Avocado Growers, Inc., 373 U.S. at 142–43,* the state law, at least for purposes of this proceeding, is preempted by the federal Act. Therefore, the State cannot rely upon N.Y. Tax. L. § 697(e)(1) to avoid compliance with the subpoena.

The State presents several arguments as to why the Act should not preempt section 697(e). Throughout its opposition, the State urges the court to follow the analytical framework set forth by the First Circuit in *In re Hampers, 651 F.2d 19 (1st Cir. 1981),* in reviewing this motion. In Hampers, Massachusetts officials successfully relied upon a state [**15] confidentiality statute that is notably similar to section 697(e) to block a federal grand jury's subpoena of tax records. In reviewing the privilege claims in each case, the First Circuit utilized a balancing test, weighing the state's interest in confidentiality and candor in reporting against the federal interest in disclosure. From this balancing, the court concluded that the state interest prevailed and could thus withstand the grand jury's subpoena. *Hampers, 651 F.2d at 23.* But see *In re Grand Jury Subpoena for New York State Income Tax Records ("Grand Jury Subpoena"), 468 F. Supp. 575 (N.D.N.Y. 1979).* n5 The State urges that [*242] balancing test used in Hampers be applied here to yield the same result, i.e. that the state need not disclose the tax records.

n5 In Grand Jury Subpoena, in furtherance of an investigation into organized crime, a grand jury empaneled in this district subpoenaed from the State various tax and wage records related to its investigation. The State moved to quash the subpoena on grounds that compliance would contravene section 697(e)(1) of the Tax Law, the same law at issue in the present matter. *Id. at 576.*

Judge Munson rejected the State's arguments, finding that section 697(e)(1) is preempted by the Fifth Amendment and two federal statutes governing grand jury "powers and duties," *18 U.S.C. §§ 3332,* 3333. *Id. at 577 & n.1.* While Judge Munson considered the salutary purposes behind section 697(e)—to ensure personal privacy and to encourage truthful tax reporting—he did so only to show that the federal and state interests were not totally conflicting. It is nonetheless clear from his ruling, and from subsequent rulings by the Supreme Court and Second Circuit, that the State cannot rely upon a state statute to obstruct a federally–mandated activity, regardless of how commendable the State's objectives might be. See *id. at 577;* see also *Wisconsin Pub. Intervenor, 111 S. Ct. at 2482; Florida Lime & Avocado Growers, Inc., 373 U.S. at 142–43; Cable Television Ass'n, 954 F.2d at 98.*

[**16]

In this court's view, the approach utilized in Hampers is inappropriate in cases such as the present, in which a state's conflict with a Congressional mandate is so absolute. Unlike Hampers, this case presents a situation in which Congress has clearly announced the federal government's objective and prescribed specific means, the OIG's broad subpoena power, by which that objective must be fulfilled. Whereas in Hampers the court addressed a federal grand jury's interest—not Congress's interest—in reviewing various documents as part of a criminal investigation, here this court is faced with a clear Congressional mandate which the State seeks to inhibit. Since section 697(e) so clearly conflicts with the Congressional objective in promulgating the Act, such that "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc., 373 U.S. at 142–43,* Supreme Court precedent unambiguously dictates that the statute is preempted by the Act. Therefore, given the clear and dominating Congressional mandate underlying this case, the court declines to become entangled in a Hampers–type balancing. [**17]

The State also argues that section 697(e)(1) does not conflict with federal law because Fed. R. Evid. 501 (quoted supra p. 4), a federal law, directs that federal courts must respect state substantive laws governing privileges. A careful reading of Rule 501 shows that this

argument is without merit. As a preliminary matter, the State has not convinced the court that section 697(e)(1) provides for a "privilege" within the meaning of that Rule. Rather, that statute speaks only in terms of confidentiality of records. Statutory guarantees of confidentiality, however, do not necessarily translate into evidentiary privileges within the meaning of Rule 501. Cf. *Van Emrik v. Chemung Cty. Dep't of Social Servs., 121 F.R.D. 22, 25 (W.D.N.Y. 1988).*

In Van Emrik, the Western District addressed an issue related to the instant question, in which a party sought to invoke N.Y. Soc. Serv. L. § 422, a confidentiality statute, as a privilege in civil rights litigation brought pursuant to *42 U.S.C. § 1983.* While finding alternative grounds to reject reliance upon § 422, see *Van Emrik, 121 F.R.D. at 26,* [**18] the court expressed its concern over whether the § 422 confidentiality provision constitutes a "privilege" cognizable under Rule 501. The court explained, "merely asserting that a state statute declares that the records in question are 'confidential' does not make out a sufficient claim that the records are 'privileged' within the meaning of . . . Fed. R. Evid. 501." *Van Emrik, 121 F.R.D. at 25* (citations omitted).

This court shares the Western District's concern. While section 697(e) of the Tax Law surely mandates confidentiality, that mandate does not perforce create an evidentiary privilege—a wholly different concept—for Rule 501 purposes. This court, like the court in Van Emrik, need not resolve that issue today. Instead, for purposes of this discussion, the court may give the State the benefit of the doubt and treat section 697(e)(1) as a "privilege" within the meaning of Rule 501. See *121 F.R.D. at 25–26.* Even assuming, without deciding, that section 697(e) constitutes an evidentiary privilege, that privilege is nonetheless not saved in this case by Rule 501.

[*243] Rule 501 contains a qualification that is fatal [**19] to the State's case. The qualification, "with respect to an element of a claim or defense as to which State law supplies the rule of the decision," limits application of Rule 501 to cases that are governed by state law. In cases in which federal law will provide the rules upon which the case will be decided, privilege founded in state law does not control. E.g. *von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); In re Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983).* In other words, a party may invoke state–based privileges under Rule 501 only when state law will "supply the rule of the decision."

In the instant proceeding, the Department of Labor's OIG is conducting a federal audit into waste and abuse in the federal JTPA. The audit is being conducted pursuant to a Congressional mandate that the OIG purge federal programs of inefficiency and abuse. See S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978); Campbell Decl. (10/7/92) PP 4, 6. Nothing in the investigation signifies that state law issue will provide the rule of decision in the audit or any subsequent, related proceeding. In short, the State has supplied [**20] no justification for its reliance upon that portion of Rule 501 which allows the court to consider state–based privileges in reviewing a subpoena.

Section § 697(e) of the New York Tax Law irreconcilably conflicts with the OIG's Congressionally–mandated duties and authority under the Act. Since it obstructs fulfillment of Congress's purposes and objectives under the Act, section 697(e) is preempted by the Act and the State cannot rely upon it to block the OIG's subpoena of records. The State is not saved by Fed. R. Evid. 501, since that Rule recognizes state privileges only when state law will provide the rule of decision, a condition which is not present here. Since the State's opposition to the OIG's subpoena is without merit and the State has provided no other basis for refusing to comply with the subpoena, the OIG's motion to compel compliance with the subpoena is granted.

**III. CONCLUSION**

Petitioner United States's petition for enforcement of its subpoena is granted. The respondent New York State Department of Taxation and Finance is hereby ordered to comply with the United States's subpoena, dated March 24, 1992, within sixty (60) days of this order, unless the parties [**21] mutually agree upon an alternative schedule.

IT IS SO ORDERED.

DATED: December 4, 1992
Syracuse, New York

Neal P. McCurn
Chief, U.S. District Judge

LEXSEE 866 FSUPP 884

**UNITED STATES OF AMERICA ON THE BEHALF OF AGENCY FOR INTERNATIONAL DEVELOPMENT, Petitioner, v. THE FIRST NATIONAL BANK OF MARYLAND, Respondent.**

**CIVIL NO. HAR 94-1602**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

***866 F. Supp. 884; 1994 U.S. Dist. LEXIS 14121***

**September 28, 1994, Decided**

**DISPOSITION:** [**1] Granted.

**LexisNexis (TM) HEADNOTES- Core Concepts:**

**COUNSEL:** For Petitioner: Kathleen McDermott, Asst. U.S. Attorney, Baltimore, Maryland.

For Respondent: Kenneth F. Krach, Baltimore, Maryland.

**JUDGES:** Hargrove

**OPINIONBY:** JOHN R. HARGROVE

**OPINION:**

[*885] MEMORANDUM OPINION

The United States of America, on behalf of the Office of Inspector General for the Agency for International Development ("OIG-AID"), filed this Petition for Summary Enforcement of an Inspector General ("IG") Subpoena to compel First National Bank of Maryland ("First National") to produce certain bank records pertaining to accounts of two corporate customers. The IG subpoena was issued pursuant to an official investigation conducted by OIG-AID within the bounds of its duly constituted authority under the Inspector General Act. *5 U.S.C. App. § 6*(a)(4). n1

n1 The IG subpoena satisfies the requirements for a valid subpoena. Namely, the subpoena is within the statutory authority of the Inspector General Act because its purpose is to investigate the expenditure of federal funds, the documents sought pursuant to the subpoena are relevant to the investigation, and the subpoena is not excessively burdensome. See *United States v. Newport News Shipbuilding and Drydock, Co., 837 F.2d 162, 165 (4th Cir. 1988).*

[**2]

First National relies on Maryland's Confidential Financial Record Act ("CFRA"), § 1-304, as limiting OIG-AID's right in this regard. *Md. Fin. Inst. Code Ann. § 1-304* (1992). In response, OIG-AID argues that it is not required to comply with CFRA under the Supremacy Clause of the United States Constitution.

[*886] Having reviewed the parties' memoranda, and finding no dispute as to either the facts or the legal principles to be applied, the Court concludes that no hearing is necessary. Local Rule 105.6 (D. Md.). This Court has jurisdiction over this matter pursuant to *28 U.S.C. § 1345* (1988) (proceeding involving the United States).

Discussion

First National has not claimed, nor has it been shown, that the IG subpoena is unreasonable or burdensome, or that the documents requested are irrelevant to OIG-AID's investigation. The only question for this Court is whether a validly-issued IG subpoena must comply with Maryland's financial privacy statute as a condition precedent to enforcement of the subpoena.

The Inspector General Act of 1978 ("IG Act") enables the OIG to issue subpoenas for the production "of all information, documents, reports, answers, [**3] records, accounts, papers and other data and documentary evidence necessary in the performance of their functions . . . " *5 U.S.C. App. 3* § 6(a)(4) (West Supp. 1992). An IG subpoena is subject to the Right to Financial Privacy Act ("RFPA"), *12 U.S.C. §§ 3401*-3433 (1989). The purpose behind the RFPA is "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R.Rep. No. 1383, 95th Cong., 2d Sess. 33 (1978). The RFPA requires federal agencies "to follow the procedures established by this title when they seek an individual's records . . . " Id.

Notice to customers is a prerequisite to enforcement of an administrative subpoena. *12 U.S.C. § 3405.* Under RFPA, however, notification is only required to individuals and partnership entities of less than five individuals. *12 U.S.C. § 3401*(4). See *Duncan v. Belcher, 813 F.2d 1335, 1338 (4th Cir. 1987).* Because OIG–AID seeks bank records from corporate account [**4] holders, it need not serve notice on these customers to enforce the IG subpoena under the federal statute.

Nonetheless, First National argues that the IG subpoena is invalid because it is not in compliance with Maryland's privacy statute, CFRA. Under CFRA, financial records can only be disclosed pursuant to a subpoena if the subpoena contains a certification that (1) a copy of the subpoena had been served on the bank's customer, § 1–304(b)(1), or (2) the notification requirement had been waived by the court for good cause, § 1–304(b)(1). First National challenges the IG subpoena because it does not contain either of CFRA's required certifications.

The government asserts that CFRA's requirements for compliance with an administrative subpoena hinder the enforcement of the IG Act and that such interference is expressly prohibited by the Supremacy Clause of the United States Constitution. The Supremacy Clause mandates that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Thus, federal legislation, [**5] if enacted pursuant to Congress' lawful authority, can nullify conflicting state or local actions. See *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819); Feikema v. Texaco, Inc., 16 F.3d 1408 (4th Cir. 1994).* Such a conflict occurs when "compliance with both federal and state regulations is a physical impossibility or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984); Worm v. American Cyanamid Co., 970 F.2d 1301, 1304–05 (4th Cir. 1992).*

Congress' intent in passing the IG Act, and giving the OIG such broad investigatory and subpoena powers, was to facilitate the detection of waste, fraud and abuse in federally–funded programs. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2679. When it promulgated the IG Act, Congress took the extra measure to articulate its belief that the [*887] subpoena provision, [**6] section 6(a)(4), is an integral component, critical to fulfilling the IG Act's objectives:

> Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General's functions. There are literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities the Inspector and Auditor General could have no serious impact on the way federal funds are expended.

S. Rep. 1071, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2709.

The purpose behind giving the Inspector General subpoena power was to encourage prompt and thorough cooperation with OIG investigations. Id. The Maryland notice provisions serve as an obstacle to the accomplishment of the congressional objective. If OIG–AID were forced to comply with CFRA, it would likewise have to comply with many different state statutes relating to bank records, resulting in substantial frustration to the enforcement of the IG Act. Because the IG subpoena is valid and complies with the notification requirements under federal law, it is enforceable against First [**7] National.

Consequently, this Court finds that under the Supremacy Clause, CFRA does not apply to subpoenas issued pursuant to the authority of the IG Act. It is therefore unnecessary for the OIG–AID to resort to the courts whenever a financial institution refuses to obey a subpoena on the basis of the agency's failure to comply with CFRA's customer notification requirements.

Conclusion

The petition for Summary Enforcement of an Inspector General Subpoena is granted. In accordance with this Memorandum Opinion, it will be so ordered.

9/28/94
Date

John R. Hargrove

Senior United States District Judge

ORDER

This 28th day of September, 1994, it IS, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That OIG–AID's Petition for Summary Enforcement of Inspector General Subpoena BE, and the same hereby IS, GRANTED.

2. That the Clerk of the Court CLOSE this case.

3. That the Clerk of the Court MAIL copies of this

Order and the attached Memorandum Opinion to all parties of record.

John R. Hargrove

Senior United States District Judge

LEXSEE 743 FSUPP 783

**UNITED STATES OF AMERICA, Petitioner, v. CUSTODIAN OF RECORDS, SOUTHWESTERN FERTILITY CENTER, Respondent**

**Civ. No. 90-105-R**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

***743 F. Supp. 783; 1990 U.S. Dist. LEXIS 8020***

**May 15, 1990, Decided**
**May 15, 1990, Filed**

**COUNSEL:**

[**1] Attorney(s) For Petitioner: Mary M. Smith, Assistant U.S. Attorney, Oklahoma City, Oklahoma, Michael F. Hertz, Ronald H. Clark, Mark D. Polston, Commercial Litigation Branch, Civil Division, U. S. Department of Justice, Washington, District of Columbia.

Attorney(s) For Respondent: Robert L. Wyatt, IV, Stephen Jones, Carol Hambrick, Jones, Bryant & Hambrick, Enid, Oklahoma.

**JUDGES:**

David L. Russell, United States District Judge.

**OPINIONBY:**

RUSSELL

**OPINION:** [*784] ORDER DENYING MOTION TO DISMISS AND GRANTING PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENA

DAVID L. RUSSELL, UNITED STATES DISTRICT JUDGE

Before the Court is a motion filed February 20, 1990 to dismiss the petition for summary enforcement of an administrative subpoena by respondent, Custodian of Records of the Southwestern Fertility Center ("SFC"). *Fed. R. Civ. P. 12(b)*. Petitioner, the Inspector General for the Department of Defense ("DoD IG") responded in opposition on March 6, 1990. Also at issue is the DoD IG's petition filed January 18, 1990 for summary enforcement of administrative subpoena. SFC filed a brief in opposition on April 2, 1990, and DoD IG replied on April 17, 1990.

I. BACKGROUND FACTS AND CONTENTIONS

Drs. Avery and Migliaccio are obstetricians and gynecologists with SFC, 3617 West Gore Boulevard, Lawton, Oklahoma. Both physicians are separately incorporated in Oklahoma. The doctors provide [**2] medical care for the Civilian Health and Medical Program of the Uniformed Services [*785] ("CHAMPUS"), an agency within DoD that provides primary health benefits for military dependents and retirees. The doctors' practice is commonly known as the "Southwestern Fertility Center," which is a registered name for their clinic in Comanche County, Oklahoma. The name "Southwestern Fertility Center" appears on the doctors' letterhead. The Center is listed in the local phone directory and advertised in local newspapers. The doctors also own a bank account in the name of another registered partnership, A.M. Properties. They have also incorporated part of their practice as A.M. Surgery, Inc. Both doctors use the same IRS identification number when they submit their individual claims to CHAMPUS.

In 1988, CHAMPUS allegedly learned that doctors from the Center may have been reimbursed for reversals of tubal sterilizations, a procedure not covered by CHAMPUS. Wisconsin Physicians Services, which processes claims under a contract with CHAMPUS, reviewed medical records associated with CHAMPUS claims submitted by Dr. Avery. The review allegedly indicated that Dr. Avery may have reversed tubal sterilizations [**3] and provided artificial insemination for patients, and then sought reimbursement by designating different, covered, procedures on claim forms for those patients.

In 1988 DoD was advised of possible fraud in connection with CHAMPUS claims filed by the respondent clinic and its doctors. The Federal Bureau of Investigation ("FBI") and DoD's Defense Criminal Investigative Service ("DCIS") are jointly investigating these allegations. Agents interviewed several military dependents covered by CHAMPUS, who allegedly con-

firmed that doctors at the Center performed reversals of tubal ligations or artificial insemination on them, for which they understood CHAMPUS had paid the Center. The corresponding CHAMPUS claims for these women, prepared by the doctors, did not report these procedures.

On October 26, 1989 the FBI executed a search warrant on the Center at its premises at 3617 West Gore Blvd., Suite C, Lawton, Oklahoma. Agents seized an unknown number of patient files estimated to be in excess of one hundred. n1 On October 27, 1989, the IG's office served an administrative subpoena upon the Custodian of Records for the Center. The subpoena requested the Custodian to produce to a designated [**4] agent of the United States, on November 27, 1989, the following: (1) the medical records of specified patients (including electronic data); (2) all billing information presented to CHAMPUS concerning these patients (including electronic data); (3) any videotapes of surgeries performed on these patients; (4) all lists maintained by the physicians and SFC of patients receiving reversals of tubal ligations or artificial insemination procedures, and; (5) records pertaining to employees of the Center.

> n1 The search warrant requested medical records of specific patients, billing information (including computer records), memorializing the claims submitted to CHAMPUS for these patients, and videotapes documenting surgical procedures performed on them. The FBI seized this information for all but approximately thirty of the patients listed on the search warrant. The DoD IG's subpoena requests respondent SFC to produce the same information for all patients, including the records of the thirty patients not previously retrieved.
>
> The Affidavit supporting issuance of the warrant indicated that all files seized or copies thereof would be returned within five days in order for the doctors' businesses to operate without undue interference. Some of those files or documents have allegedly not yet been returned, even though more than ninety days have elapsed.

[**5]

SFC refused to comply with the subpoena, asserting through counsel, that the subpoenaed documents are the property of the individual physicians, Drs. Avery and Migliaccio. SFC contends that although the FBI and the DoD IG are distinct agencies within the executive branch, by their own admission the FBI and the DCIS are "jointly investigating these allegations."

SFC further contends that the enforcement of the IG subpoena would be unnecessarily duplicative and would extend the interference with the doctors' respective practices although the search warrant was [*786] issued with the intent of reducing interferences to a minimum.

Additionally, SFC contends that each doctor has claims pending with CHAMPUS, and this investigation is a subterfuge to avoid payment of those claims to the doctors or to attempt to force a settlement of those claims.

## II. PROCEDURAL HISTORY

DoD IG filed its petition for summary enforcement of administrative subpoena on January 18, 1990. That same date DoD IG filed a motion for SFC to show cause why the subpoena duces tecum should not be summarily enforced. On January 23, 1990, this Court issued an Order requiring SFC to respond to the motion for show cause within [**6] fifteen days, with a reply to be filed seven days thereafter, and discovery was stayed. On February 6, 1990, this Court enlarged the time for filing the response until February 20, 1990. On that date SFC filed the motion to dismiss now at issue. On February 28, 1990 the Court enlarged the time for DoD IG's reply deadline, and a reply was filed on March 6, 1990.

Thereafter on March 15, 1990, SFC filed a motion for clarification of briefing schedule and leave to file brief. In that pleading SFC argued that it did not receive a copy of this Court's January 23, 1990 Order, and only became aware of it on March 7, 1990.

SFC requested permission to file a response brief in opposition to the summary enforcement of the administrative Order. That request was granted on March 23, 1990, and the brief was filed on April 2, 1990. On March 15, 1990, SFC filed a motion for leave to file its answer. That motion was also granted on March 23, 1990. Therefore, the motion to dismiss involving procedural challenges, and the petition for summary enforcement involving substantive matters are both ripe for adjudication.

## III. MOTION TO DISMISS

### A. *Delegation of Power To Issue Subpoena*

SFC argues that the [**7] subpoena issued by Deputy Inspector General Derek Vander Schaaf should be quashed because the Inspector General is not authorized to delegate the power to issue subpoenas under *5 U.S.C. App. 3* § 6. Section 6(a)(4) of the Inspector General Act provides that the Inspector General is authorized "to require by subpena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act. . . ." *Id.* at § 6(a)(4). The Inspector General is given broad discretion to delegate his powers under section 6(a)(7),

which provides that the Inspector General is authorized "to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office. . . ." *Id.* at § 6(a)(7).

SFC argues that Congress specifically chose not to delegate the power to issue subpoenas because it expressly authorized delegation in subsections 6, 7, and 8. *5 U.S.C. App. 3* § 6(a)(6)–(8). To support its argument, SFC relies on *Cudahy Packing Co. v. Holland, 315 U.S. 357, 86 L. Ed. 895, 62 S. Ct. 651 (1942), superseded by statute as stated in,* [**8] *Donovan v. National Bank of Alaska, 696 F.2d 678 (9th Cir. 1983).* In *Cudahy Packing,* the Supreme Court held that the Federal Trade Commission Administrator could not delegate his subpoena power under the Fair Labor Standards Act. The Court relied on the legislative history of the Act, which showed that Congress had specifically eliminated a provision granting the authority to delegate the subpoena power. *Id. 315 U.S. at 366.* Therefore, Congress did not intend delegation authority to be implied in the statute.

*Cudahy Packing* is distinguishable from the instant case. Unlike the Fair Labor Standards Act the legislative history of the Inspector General Act does not reveal that Congress expressly rejected a delegation provision regarding subpoena powers. See S. Rep. No. 95–1071, *reprinted in,* 1978 U.S. Code Cong. & Admin. News 2709. Rather, the Senate Report only [*787] shows that Congress provided for delegation specifically in subsections 6, 7, and 8 to prevent denial of such authority. Therefore, there is no evidence that Congress did not intend to allow delegation of the subpoena power.

Furthermore, several courts have found that *Cudahy Packing* is an isolated case and confined [**9] to the Fair Labor Standards Act, and that the authority to delegate subpoena power is implied in other statutes. *Cf., e.g., Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 119–23, 91 L. Ed. 1375, 67 S. Ct. 1129 (1947)* (Emergency Price Control Act); *Donovan v. National Bank of Alaska, 696 F.2d at 681–82* (Employee Retirement Security Act); *NLRB v. John S. Barnes Corp., 178 F.2d 156, 159 (7th Cir. 1949)* (National Labor Relations Act); *see generally Smith v. Fleming, 158 F.2d 791, 791–92 (10th Cir. 1946)* (per curiam) (Emergency Price Control Act). The courts noted that the legislative history of these statutes did not show that Congress expressly rejected a delegation provision for subpoena powers. Therefore, this Court finds that the Inspector General was impliedly authorized to delegate the power to issue subpoenas pursuant to *5 U.S.C. App. 3* § 6, and SFC's argument is therefore without merit. *See Wirtz v. Atlantic States Constr. Co., 357 F.2d 442, 445–46 (5th Cir. 1966); see generally 5 U.S.C. § 903*(a)(5) (authorization of officers to delegate their functions under Executive Reorganization Plans).

B. *Service Of The Subpoena*

Next, SFC contends that the subpoena should be [**10] quashed because service was insufficient. The subpoena was directed to the "Custodian of the Records." However, Mary Jean Dees, the receptionist, was served.

SFC argues that *Fed. R. Civ. P. 45* applies, and "the subpoena duces tecum calling on [a specific individual] to appear personally as a witness fails because it was not personally served . . . ." *Gillam v. A. Shyman, Inc., 17 Alaska 747, 22 F.R.D. 475, 479 (1958).* Alternatively, SFC argues that service must be made on an officer, managing agent or general agent of that entity. *Ghandi v. Police Dep't, 74 F.R.D. 115, 121 (E.D. Mich. 1977).*

DoD IG responds that *Fed. R. Civ. P. 45* applies to judicial subpoenas and not administrative subpoenas. *Fed. R. Civ. P. 45* (Advisory Committee Notes) ("It does not apply to enforcement of subpoenas issued by administrative officers . . . ."); *Fed. R. Civ. P. 81(a)(3); EEOC v. Maryland Cup Corp., 785 F.2d 471, 477* (4th Cir.), *cert. denied, 479 U.S. 815, 93 L. Ed. 2d 26, 107 S. Ct. 68 (1986); see also United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986)* (enforcement of DoD IG subpoena). DoD IG argues that service on the receptionist was sufficient because she was SFC's agent. *See In re* [**11] *Equitable Plan Co., 185 F. Supp. 57, 59* (S.D.N.Y.), *modified sub nom. Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960)* (records restricted to those in possession of agent due to questionable removal of foreign documents); *In re Grand Jury Subpoenas Duces Tecum, 72 F. Supp. 1013, 1021 (S.D.N.Y. 1947); see generally* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2461 at 447 (1971) (service on an agent of a corporation is sufficient). The Court agrees with DoD IG and SFC's motion to dismiss is consequently DENIED.

IV. PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENA.

The Court's role in evaluating an enforcement request "is a strictly limited one." *FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 871–72 (D.C. Cir. 1977)* (en banc), *cert. denied sub nom., 431 U.S. 974, 97 S. Ct. 2939, 53 L. Ed. 2d 1072 (1977).* The Court must only ask whether the courts' process would be abused by enforcement. *SEC v. Wheeling–Pittsburgh Steel Corp., 648 F.2d 118, 125 (3d Cir. 1981)* (en banc).

The DoD IG argues that its subpoena meets all applicable criteria for judicial enforcement; and the fifth amendment prohibition of compelled testimony does not protect SFC's production of the requested business [**12]

records. *Braswell v. United States, 487 U.S. 99, 108 S. Ct. 2284, 2288,* [*788] *101 L. Ed. 2d 98 (1988)* ("collective entity" rule); *United States v. White, 322 U.S. 694, 701, 88 L. Ed. 1542, 64 S. Ct. 1248 (1944); United States v. Radetsky, 535 F.2d 556, 568–69* (10th Cir.), *cert. denied, 429 U.S. 820, 50 L. Ed. 2d 81, 97 S. Ct. 68 (1976).* In this regard the Court finds under the facts of this case stated in section I that the doctors' business comprised a collective entity.

The DoD IG further argues that the CHAMPUS member doctors waived their fifth amendment privilege under the required records exception. *E.g., Grosso v. United States, 390 U.S. 62, 67–68, 19 L. Ed. 2d 906, 88 S. Ct. 709 (1968); 32 C.F.R. § 199.7(b)(4)(i)* (1988) (the office of "CHAMPUS . . . may request and shall be entitled to receive information . . . relating to . . . treatment, or services . . . ."). Furthermore, business records have no fifth amendment protection. *E.g., United States v. Doe, 465 U.S. 605, 610, 79 L. Ed. 2d 552, 104 S. Ct. 1237 (1984).*

SFC argues that the subpoena should be quashed due to an improper delegation of power. The Court has already rejected that argument when considering the motion to dismiss. Alternatively, SFC asks this Court to modify the subpoena to exclude documents already produced to the FBI since they [**13] are duplicative. *See United States v. Powell, 379 U.S. 48, 57–58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964)* (Pursuant to statute IRS cannot retrieve duplicative information which is already in its possession.); *see also Fed. R. Crim. P. 17(c)* (regarding production of documents that are not otherwise procurable).

SFC further argues that the client medical records and surgery videotapes should be excluded from the subpoena. *United States v. Plesons, 560 F.2d 890, 892–93* (8th Cir.), *cert. denied, 434 U.S. 966, 54 L. Ed. 2d 452, 98 S. Ct. 506 (1977).* SFC contends that these records are kept individually by the individual doctors and not collectively by SFC. Also, SFC is not the custodian of these records and therefore the wrong entity was served. SFC argues that the authority relied on by DoD IG excluded client files from production. *Cf. Bellis v. United States, 417 U.S. 85 at 87 n. 1, 98 & n. 9, 40 L. Ed. 2d 678, 94 S. Ct. 2179* (exclusion of attorney's client files).

Moreover, SFC argues that the government is not entitled to documents that predate the existence of the partnership. *Wheeler v. United States, 226 U.S. 478, 490, 57 L. Ed. 309, 33 S. Ct. 158 (1913).* SFC also argues that the required records doctrine under CHAMPUS does not require production of the client medical records or the videotapes. [**14] *Grosso v. United States, 390 U.S. at 68.* Finally, SFC argues that the act of production, and admission of existence and authenticity is privileged. *United States v. Doe, 465 U.S. at 608.*

In reply DoD IG contends that it does not need duplicative documents already obtained by the FBI, but argues that it has no assurance that the information obtained by the FBI is complete. DoD IG also argues that it has met its burden of showing that the inquiry is within its authority, the information is reasonably relevant, and the request is not unduly burdensome. *United States v. Morton Salt Co., 338 U.S. 632, 652–53, 94 L. Ed. 401, 70 S. Ct. 357 (1950).* DoD IG suggests that delivery of the following, along with a certification of completeness, would satisfy the warrant:

> (1) the medical records maintained between January 1, 1985 and August 31, 1989 relating to the care and treatment of approximately thirty patients of SwFC which were subsequently billed to CHAMPUS; (2) videotapes of all surgeries performed on approximately one hundred patients between January 1, 1985 and August 31, 1989 which were later billed to CHAMPUS; (3) All lists or indices maintained by the SwFC doctors of patients that had a tubal reversal [**15] or artificial insemination procedure between January 1, 1985 and August 31, 1989; (4) All records disclosing the identity, address, date of birth, date of employment and title of position, for all employees of SwFC from January 1, 1985 and August 31, 1989; and (5) Any files retaining billings [*789] to CHAMPUS or other insurance providers for 16 patients.

DoD IG's Reply Brief at 2 n. 1. The Court concludes that the government can insist on redundant information to assure completeness. *See United States v. Lench, 806 F.2d 1443, 1446 (9th Cir. 1986).* However, SFC is hereby authorized to comply with the subpoena as required below through compliance with DoD IG's suggestion.

The DoD IG persuasively argues that the collective entity doctrine controls this issue as the custodian of records maintains the records in a representative capacity for SFC. *Bellis v. United States, 417 U.S. at 98.* Therefore, records that may be personally created by the individual doctors can be reached through a subpoena served upon SFC when the records are used to conduct the business of SFC as here. *E.g., United States v. Lench, 806 F.2d at 1446.* Further, records belonging to SFC that predate the limited [**16] partnership are held by the custodian of records of SFC in a representative capacity subject to the legal rights of the doctors. *Cf. Wheeler v. United States, 226 U.S. at 490* (subpoena was issued after corporation dissolved and thus records transformed into personal documents); *cf. also Bellis v. United States, 417 U.S. at 98 n. 9* (dictum

that attorney's client files might be protected).

This Court is persuaded that the patient records in this case are business records which have no fifth amendment protection. *See, e.g., United States v. Radetsky, 535 F.2d at 569 n. 14.* The Court finds that the CHAMPUS regulations are broadly written and express that the office of CHAMPUS is entitled to the types of records requested in the subpoena. *32 C.F.R. § 199.7(b)(4)(i)* (1988) (documents "necessary for the accurate and efficient administration of CHAMPUS benefits"). The Court further finds that the records sought by DoD IG are well within the purview of regulatory purposes since there is raised a legitimate issue as to whether CHAMPUS resources have been misapplied. The Court rejects SFC's contention that the investigation is a subterfuge to avoid payment of a legitimate CHAMPUS [**17] claim or merely an attempt to force settlement of pending claims. The fact that a criminal proceeding may follow the investigation is not relevant to this Court's inquiry. *In re Grand Jury Proceedings, 801 F.2d 1164, 1168 (9th Cir. 1986).* Further, the Court finds that any impropriety by the FBI regarding delay of the return of copies of previously seized files has no impact on enforcement of the DoD IG's administrative subpoena. The Court finds no abuse by DoD IG of this Court's process, and prior conduct of a third party is irrelevant. *SEC v. Wheeling–Pittsburgh Steel Corp., 648 F.2d at 125.* These records are reasonably within the range of those required pursuant to a valid regulatory program and therefore have a "public aspect." *Donovan v. Mehlenbacher, 652 F.2d 228, 231 (2d Cir. 1981).* The Court further finds that the video tapes and patient records appear to be customarily kept in the course of the business of SFC. This finding is based on the fact that the FBI previously retrieved approximately 112 patient files and 47 video tapes. This significant ratio of videotapes to patient files supports the government's contention that videotapes and patient files are customarily [**18] maintained in the course of business of SFC. Finally, the Court rejects SFC's argument that the act of production of these documents is testimonial in nature and is protected by the fifth amendment. *Braswell v. United States, 108 S. Ct. at 2291; In re Grand Jury Proceedings, 801 F.2d at 1168–69.* Therefore, the petition for summary enforcement of the subpoena is GRANTED and SFC's request for modification is DENIED.

V. CONCLUSION

Accordingly, the motion to dismiss is DENIED and the petition for summary enforcement of the subpoena is GRANTED. The Custodian of Records of SFC is hereby ORDERED to appear before James R. Flich, Special Agent in Charge; or his designee, at the Defense Criminal Investigative Service, Building 24, Room 17, Fort [*790] Worth, Texas on June 11, 1990, at 10:00 a.m. The Custodian of Records of SFC is further ordered to bring and produce at the above specified time and place the documentary evidence identified in Court's Ex. A (attached).

IT IS SO ORDERED this 15th day of May, 1990.

COURT'S EX. A.

Furnish original documents as they relate to the Southwestern Fertility Center, 3617 West Gore Boulevard, Suite C, Lawton, OK 73505, specifically the following:

1. [**19] All medical records relating to the care and treatment of patients listed in DoD IG's Exhibit A (attached), which were subsequently billed to the Office of Civilian Health and Medical Program for the Uniformed Services (CHAMPUS), for the period of January 1, 1985 through August 31, 1989.

2. All billing information pertaining to claims submitted to CHAMPUS, on behalf of the patients listed in DoD IG's Exhibit A.

3. All videotapes of surgeries performed by either Dr. Bert M. Avery or Dr. John H. Migliaccio, or their assistants, on the patients listed in DoD IG's Exhibit A, for the period of January 1, 1985 through August 31, 1989.

4. All electronic data containing patient and/or billing information related to billings submitted to CHAMPUS on behalf of the patients listed in DoD IG's Exhibit A, for the period of January 1, 1985 through August 31, 1989.

5. All lists or indices maintained by Dr. Bert M. Avery, Dr. John H. Migliaccio and the Southwestern Fertility Center, 3617 West Gore Boulevard, Suite C, Lawton, OK 73505, of patients that had a tubal reanastomosis (tubal reversal) or artificial insemination procedure performed during the period of January 1, 1985 through August 31, 1989, [**20] which was subsequently billed to CHAMPUS.

6. All records providing the identity, address, date of birth, date of employment and title of position, for all employees of Southwestern Fertility Center, 3617 West Gore Boulevard, Suite C, Lawton, OK 73505, during the period of January 1, 1985 through August 31, 1989. A listing containing this information can be provided in lieu of the records specified.

[SEE EXHIBIT A IN ORIGINAL]