INSPECTOR GENERAL DESKBOOK

VOLUME 2

Office of Inspector General
Department of The Treasury

Inspector General Deskbook
Volume 2

TABLE OF CONTENTS

Section 3- Seminal Case Law

Overall Authority of Inspectors General

Gould v. General Services Administration, 688 F. Supp. 689 (D.D.C. 1988).

Otherwise non-exempt contract documents originally created for routine auditing purposes may subsequently be considered "records or information compiled for law enforcement purposes" under 5 U.S.C. § 552(b) (7) when placed in an investigatory file and utilized for purposes of a law enforcement investigation. Allowed IG to withhold audit paper work against FOIA request. Rule aff'd in John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

United States v. Art Metal-U.S.A., Inc., 484 F. Supp. 884 (D.NJ. 1980).

OIG distinguished from IRS, which, under 26 U.S.C. § 7122, loses its investigative power to continue civilly once the DOJ begins to move criminally; the powers of the IG are not so limited. IG may issue subpoenas where criminal proceedings are eminent so long as 1) IG has not itself made a formal recommendation to the Justice Department to prosecute; and (2) the summons or subpoena has a civil purpose.

Greater New York Hospital Association v. United States, 1999 U.S. Dist. LEXIS 17391 (S.D.N.Y. Nov. 9, 1999).

OIG audits directed towards uncovering a particular type of fraud do not generally usurp the regulatory compliance functions of the agency.

Subpoena Authority of Inspectors General

University of Medicine & Dentistry v. Corrigan, 347 F.3d 57 (3d Cir. 2003).

Court enforced IG subpoena, holding that performance assessment audits of hospitals (PATH audits) were squarely within the broad authority of the IG to audit healthcare providers for the purpose of preventing fraud and abuse within the Medicare program. The audits did not represent a transfer of program operating responsibilities, but rather, a permissible duplication of functions or copying of techniques.

United States v. Legal Services for New York City, 249 F.3d 1077 (D.C. Cir. 2001).

Court enforced IG 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.

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

Court enforced IG subpoena requesting confidential and proprietary information, holding that the subpoenas were neither outside IG authority nor unduly burdensome. The protective order afforded adequate protection in light of the IG's stipulation not to disclose protected competitive materials. IG's subpoena authority not limited by legislation limiting the Department of Justice's authority to issue Civil Investigative Demands (CIDs) under the False Claims Act (FCA).

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

Court enforced IG subpoena *duces tecum*, holding that it was issued for a purpose within IG statutory authority, to test the efficiency of the federal program implementation. Court found that IG had not usurped the program operating responsibilities of the parent agency.

Inspector General of the U.S. Department Agriculture v. Glenn, 122 F.3d 1007 (11th Cir. 1997).

Court will enforce an IG subpoena so long as (1) the IG's investigation is within its authority; (2) the subpoena's demand is not too indefinite or overly burdensome; and (3) the information sought is reasonably relevant. Here, Court enforced subpoena, concluding the investigation of public involvement in government programs did not exceed OIG statutory authority because subpoena power was vital to the IG function of investigating alleged fraud and abuse. The subpoenas were not unduly burdensome, nor were the protected by accountant-client privilege.

Burlington Northern Railroad Co. v. Office of Inspector General, 983 F.2d 631 (5th Cir. 1993).

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

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

Court enforced IG 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.

United States v. Educational Development Network Corp., 884 F.2d 737 (3d Cir. 1989); United States v. Westinghouse Electric Corp., 788 F.2d 164 (3d Cir. 1986); Lytle v. Inspector General of Department of Defense, 1988 U.S. Dist. LEXIS 618 (N.D. Ill. Jan. 25, 1988); United States v. Montefiore, 1998 U.S. Dist. LEXIS 5492 (E.D. Pa. Apr. 22, 1998).

IG has the statutory authority to issue a subpoena at the request of another agency, as long as he does so in furtherance of a purpose within his statutory authority and exercised some independent judgment in deciding to issue the subpoena.

United States v. Aero Mayflower Transit Co., 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 Department of Justice investigation.

United States v. Iannone, 610 F.2d 943 (D.C. Cir. 1979).

IG does not have testimonial subpoena authority.

United States v. Comley, 1992 U.S. App. LEXIS 31586 (1st Cir. Aug. 31, 1992).

IG not limited to investigations specifically related to the expenditure of federal funds. Legislative history confirms legitimacy of IG examining specific instances of employee misconduct unrelated to federal funds.

United States *ex rel* Agency for International Development v. First National Bank of Maryland, 866 F. Supp 884 (D. Md. 1994); United States v. Philadelphia Housing Authority, 2011 U.S. Dist. LEXIS 12053 (E.D. Pa. Feb. 4, 2011).

Under the Supremacy Clause, a state's confidential record law does not apply to subpoenas issued under IG authority.

United States v. New York Department of Taxation and Finance, 807 F. Supp. 237 (S.D.N.Y. 1992).

IG Act preempted operation of New York tax statute prohibiting disclosure by N.Y. Tax Commission of tax information, where IG exercised subpoena authority to further audit into waste and abuse in federally funded program.

Doyle v. U.S. Postal Service, 771 F. Supp. 138 (E.D. Va. 1991); United States v. Custodian of Records, Southwest Fertility Center, 743 F. Supp 783 (W.D. Okla. 1990).

IG Act implicitly authorizes IG to delegate power to issue subpoenas to a subordinate.

United States v. Teeven, 745 F. Supp. 220 (D. Del. 1990).

A court will enforce an IG subpoena if (1) the subpoena is within the IG's statutory authority; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome. In order to satisfy this *prima facie* burden, the IG may submit affidavits or sworn declarations.

United States v. Medic House, Inc., 736 F. Supp. 1531 (W.D. Mo. 1989); Cordt v. Office of the Inspector General, 2000 U.S. Dist. LEXIS 13615 (D. Minn. May 31, 2000); Choiniere v. United States, 2009 U.S. Dist. LEXIS 3314 (N.D. Ind. Jan. 14, 2009).

IG may subpoena records for criminal investigation, and is not limited to civil purposes.

Bronx Legal Services v. Legal Services Corp., 2002 U.S. Dist. LEXIS 14674 (S.D.N.Y Aug. 8, 2002) aff'd Bronx Legal Services v. Legal Services Corp., 64 Fed. Appx. 310 (2d Cir. 2003).

Court upheld enforcement of IG subpoena despite plaintiff's argument that the information requested constituted a client secret. The court held that the Legal Services Corporation Act required disclosure of the client names requested. The IG Act Amendments of 1988 do not unconstitutionally grant the IG unlimited law making authority, but rather grant limited authority to subpoena specific information in conducting audits.

Judicial Review of Inspector General Actions

Moye, O'Brien, O'Rourke, Hogan & Pickert v. AMTRAK, 376 F.3d 1270 (11th Cir. 2004).

Freedom of Information Act Exemption 5's deliberative process privilege does not extend only to documents that a decision-maker actually reviewed. Proper inquiry was whether the documents reflected advisory opinions, recommendations, and deliberations comprising part of a process by which Amtrak's IG auditing policies were formulated.

Association of American Medical Colleges v. United States, 217 F.3d 770 (9th Cir. 2000); Temple University v. Rehnquist, 46 Fed. Appx. 124 (3d Cir. 2002); Department of Public Welfare v. United States, 2006 U.S. Dist. LEXIS 67024 (W.D. Pa. Sept. 19, 2006).

IG decision to conduct an audit and the audit itself do not constitute final agency actions for purposes of judicial review under either the Administrative Procedures Act or the ripeness doctrine.

Jones v. Lujan, 1991 U.S. App. LEXIS 13687 (10th Cir. June 25, 1991).

Appellant employee and his employer Department of the Interior entered into a stipulated settlement of appellant's pending discrimination action, which called for a cease in an investigation by the DOI-IG alleged to have been initiated in retaliation for the discrimination action. Appellant filed a motion in part for an order enforcing the settlement agreement against appellee Secretary of the Interior. The court found that the IG Act precluded any agreement by appellee that limited or proscribed the IG's investigative powers.

United States *ex rel.* Fine v. Advanced Sciences, 879 F. Supp. 1092 (D.N.M. 1995); *see also* United States *ex rel.* Fine v. Chevron, U.S.A., 72 F.3d 740 (9th Cir. 1995) ("the fact that [relator] was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary").

OIG employees are barred from bringing *qui tam* actions under the FCA. During his employment, former OIG employee discovered that defendant was intentionally requesting reimbursement for costs that were unreimbursable under the contracting regulations and later brought a *qui tam* action. The court held that the employee could not bring the action because a conflict existed between the FCA and the IG Act. The court noted that the IG was created to prevent fraud, and that it would undermine the effectiveness of OIGs if employees could use information gained through their employment to pursue a *qui tam* action for their own gain under the FCA. The court also held that it did not have jurisdiction over the *qui tam* action because the employee was not the original source of the information; he obtained it from his audits.

United States *ex rel.* Fine v. MK-Ferguson Co., 861 F. Supp. 1544 (D.N.M. 1994); *c.f.*, *e.g.*, United States *ex rel.* Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10th Cir. 2003) (no court has accepted the argument that government employees *per se* can never be relators in a qui tam action).

Defendant claimed extra expenditures in completing a government contract that relator, a former OIG employee, believed were false. Defendant moved for summary judgment based on relator's previous employment. Court found that OIG employees are not *per se* barred from bringing *qui tam* actions under the FCA, and the question of a conflict of interests belonged to the legislature.

Covert v. Herrington, 663 F. Supp. 577 (E.D. Wash. 1987).

Department of Energy IG disclosed personnel security files of employees following investigation in order to prosecute them. Defendant claimed a violation of the Privacy Act. Court ruled that IG is not exempted from complying with the Privacy Act, however disclosures to law enforcement may be covered under the "routine use" exception.

Luttrell v. Department of Defense, 2010 U.S. Dist. LEXIS 58851 (E.D.N.C. June 10, 2010).

Department of Defense IG attempted to enforce a subpoena for defendant's personal bank accounts in order to determine if she had been defrauding the government. Court ruled that IG is not exempted from complying with the Right to Financial Privacy Act; however, here, the DOD-IG had complied with the relevant procedures under the RFPA.

Section 3

Seminal Case Law

Overall Authority of Inspectors General

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, federal agency and its office of inspector general, appealed the judgment of the United States Court of Appeals for Eleventh Circuit that upheld respondent Federal Labor Relations Authority's ruling that petitioners violated the Federal Service Labor-Management Relations Statute, 5 U.S.C.S. § 7114, by requiring employees to participate in interviews without active participation of a union representative.

OVERVIEW: Petitioner office of inspector general investigated an employee of petitioner federal agency. An investigator from petitioner office of inspector general interviewed the employee. While a union representative attended the interview, the representative's participation was curtailed. The union filed an unfair labor charge with respondent Federal Labor Relations Authority, which ruled in favor of the union. On appeal, petitioners argued that petitioner office of inspector general was not a representative of petitioner federal agency for the purpose of conducting an employee examination under the Federal Service Labor-Management Relations Statute, 5 U.S.C.S. § 7114(a)(2)(B). The court found that investigators employed by petitioner office of inspector general were representatives of petitioner federal agency when acting within the scope of their employment. Thus, the court concluded that the employee's right to union representation was protected by § 7114(a)(2)(B), and the judgment was affirmed.

OUTCOME: The judgment that that petitioners violated the Federal Service Labor-Management Relations Statute by requiring employees to participate in interviews without active participation of a union representative was affirmed. The court concluded that an investigator from petitioner inspector general office was a representative of petitioner federal agency.

CORE TERMS: inspector, investigator, interview, administrator, audit, General Act, subcomponent, personnel, discipline, union representative, agency head, investigatory, disciplinary action, labor practice, bargaining unit, investigate, conducting, unfair, entity, collective-bargaining, headquarters, exclusive representative, collective bargaining, labor-management, investigative, establishment, general supervision, inter alia, employee's right, information obtained

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials
[HN1]See 5 U.S.C.S. § 7114(a).

Administrative Law > Judicial Review > General Overview
Governments > Federal Government > Employees & Officials
Governments > Legislation > Interpretation
[HN2]If a federal agency is interpreting a statute Congress directs it to implement and administer and the agency's conclusion is certainly consistent with the statute, then to the extent the statute and congressional intent are unclear, a federal court may rely on an agency's reasonable judgment.

Governments > Federal Government > Employees & Officials
[HN3]The Federal Service Labor-Management Relations Statute, 5 U.S.C.S. § 7114(a)(2)(B), is not limited to agency investigators representing an entity that collectively bargains with the employee's union.

Governments > Federal Government > General Overview
[HN4]The Inspector General Act (Act) § 2, 5 U.S.C.S. App. § 2, 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.

Governments > Federal Government > General Overview
[HN5]See 5 U.S.C.S. App. § 2.

Governments > Federal Government > General Overview
[HN6]See 5 U.S.C.S. App. §§ 3 and 4.

DECISION:

Investigator from Office of Inspector General of National Aeronautics and Space Administration (NASA) held to be "representative" of NASA for purposes of 5 USCS 7114(a)(2)(B), giving right to union representation at certain examinations of employee by representative of agency.

SUMMARY:

In 1978, Congress enacted the Inspector General Act (IGA) (5 USCS Appx 1 et seq.), which created an Office of Inspector General (OIG) in each of several federal agencies, including the National Aeronautics and Space Administration (NASA). On the next day, Congress enacted a Federal Service Labor-Management Relations Statute (FSLMRS) provision (5 USCS 7114(a)(2)(B)) which gives an employee of a unionized unit in an agency a right to union representation at any examination of the employee by a "representative of the agency" in connection with an investigation, if the employee (1) reasonably believes that an examination may result in disciplinary action against the employee, and (2) requests representation. During an investigation by NASA's OIG of some allegedly threatening activities by an employee at a NASA facility in Alabama, an OIG investigator agreed that a union representative could attend an interview of the employee, but the investigator's conduct of the interview gave rise to a complaint by the union representative that the investigator had improperly limited the representative's participation. The union filed with the Federal Labor Relations Authority (FLRA) a charge alleging that NASA and its OIG had committed an unfair labor practice. An Administrative Law Judge, in ruling for the union, concluded that (1) the OIG investigator was a representative of the agency within the meaning of 7114(a)(2)(B), and (2) certain aspects of the investigator's behavior had violated the right to union representation under 7114(a)(2)(B). On review, the FLRA (1) agreed that the investigator (a) was a representative of the agency for such purposes, and (b) had improperly prevented the union representative from actively participating in the interview; and (2) issued an enforcement order (50 FLRA 601). The United States Court of Appeals for the Eleventh Circuit, in denying a NASA petition for review and in granting an application by the FLRA for enforcement of its order, expressed the view that the FLRA had correctly concluded that the investigator was a representative of the agency within the meaning of 7114(a)(2)(B) (120 F3d 1208, 1997 US App LEXIS 22959).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ., it was held that an investigator from NASA's OIG is considered to be a representative of NASA when the investigator is conducting an employee examination covered by 7114(a)(2)(B), for (1) when the ordinary tools of statutory construction are combined with the FLRA's position on the matter, the application of 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union; (2) the proper operation of the IGA does not require nullification of 7114(a)(2)(B) in all OIG examinations; and (3) some broader policy arguments to the contrary by NASA and its OIG were unpersuasive.

Thomas, J., joined by Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissenting, expressed the view that

(1) in light of the independence guaranteed Inspectors General by the IGA, investigators employed in an OIG will not represent agency management in the typical case; and (2) there was no basis for concluding, as the FLRA had, that in the case at hand, the investigator from NASA's OIG was a representative of the agency within the meaning of 7114(a)(2)(B).

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CIVIL SERVICE §1

Office of Inspector General -- examination of employee -- right to union representation --

Headnote:[1A][1B][1C][1D][1E][1F][1G][1H][1I]

An investigator from the Office of Inspector General (OIG) of the National Aeronautics and Space Administration (NASA) is considered to be a representative of NASA when the investigator is conducting an examination covered by a Federal Service Labor-Management Relations Statute provision (5 USCS 7114(a)(2)(B)) which gives an agency employee a right to union representation at certain examinations by a "representative of the agency," for (1) when the ordinary tools of statutory construction are combined with the position of the Federal Labor Relations Authority (FLRA) in favor of 7114(a)(2)(B)'s applicability, the application of 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union; (2) it is unnecessary to defer to the FLRA for purposes of interpreting the Inspector General Act (IGA) (5 USCS Appx 1 et seq.), as the relevant IGA provisions plainly favor the FLRA's position that the proper operation of the IGA does not require nullification of 7114(a)(2)(B) in all OIG examinations; and (3) some policy arguments by NASA and its OIG to the contrary are unpersuasive, as (a) even though the confidentiality concerns raised by NASA and its OIG are legitimate, these concerns are not weighty enough to justify a nontextual construction of 7114(a)(2)(B) that has been rejected by the FLRA, (b) in the case at hand, it is unnecessary to consider an argument by NASA and its OIG that the FLRA has construed 7114(a)(2)(B) too broadly in other cases, (c) the right which Congress created in 7114(a)(2)(B) vindicates--or must have been thought by Congress to vindicate--countervailing federal policies of strengthening the morale of the federal workforce, providing fair treatment for employees under investigation, and facilitating the factfinding process, and (d) it must be presumed that Congress took account of the policy concerns on both sides of the balance when Congress decided to enact both the IGA and on the next day, 7114(a)(2)(B). (Thomas, J., Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissented from this holding.)

[***LEdHN2]

CIVIL SERVICE §4

right to union representation -- Federal Labor Relations Authority remedy --

Headnote:[2A][2B][2C]

With respect to an examination of an employee at a National Aeronautics and Space Administration (NASA) facility by an investigator from NASA's Office of Inspector General (OIG), the conclusion that the investigator was acting as a representative of NASA--for purposes of a Federal Service Labor-Management Relations Statute (FSLMRS) provision (5 USCS 7114(a)(2)(B)) which gives an agency employee a right to union representation at certain examinations by a "representative of the agency"--makes it appropriate for the Federal Labor Relations Authority (FLRA) to charge both the OIG and NASA, as the parent agency to which the OIG reports and for which the OIG acts, with responsibility for insuring that such investigations are conducted in compliance with the FSLMRS, as (1) it is undisputed that (a) the employee in question reasonably believed that the investigation could result in discipline against him, (b) he requested union representation, (c) NASA is the relevant agency for purposes of 7114(a)(2)(B), and (d) if the provision applies, then a violation of 7114(a)(2)(B) occurred; (2) under a provision (5 USCS Appx 3(a)) of the Inspector General Act (IGA) (5 USCS Appx 1 et seq.), NASA's Administrator retains general supervisory authority over the OIG; (3) the remedy imposed by the FLRA does not require NASA to interfere unduly with OIG prerogatives, where the FLRA (a) orders both NASA and its OIG to cease and desist (i) requiring bargaining unit employees to participate in OIG interviews under 7114(a)(2)(B) without allowing active participation of a union representative, and (ii) likewise interfering with, coercing, or restraining employees in exercising their rights under the statute, and (b) further directs NASA (i) to order its OIG to comply with 7114(a)(2)(B), and (ii) to post appropriate notices at the facility in question; and (4) NASA and its OIG offer no convincing reason to believe that the FLRA's remedy (a) is inappropriate in view of the IGA, or (b) will be ineffective in protecting the limited right of union representation secured by 7114(a)(2)(B).

[***LEdHN3]

CIVIL SERVICE §1

STATUTES §113

construction -- right to union representation --

Headnote:[3A][3B]

When the ordinary tools of statutory construction are combined with the position of the Federal Labor Relations Authority (FLRA) on the matter, the application of a Federal Service Labor-Management Relations Statute (FSLMRS) provision (5 USCS 7114(a)(2)(B)), which gives an agency employee a right to union representation at certain examinations by a "representative of the agency," is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union, as (1) 7114(a)(2)(B) is not so limited by its express terms; (2) the FLRA, in resolving this issue so as not to impose such a limit, is interpreting a statute which Congress, in 5 USCS 7105, directed the FLRA to implement and administer; (3) the FLRA's conclusion is consistent with the FSLMRS; (4) to the extent that the statute and congressional intent are unclear, a reviewing court may properly rely on the FLRA's reasonable judgment; (5) while the context of 7114(a)(2)(B), as part of a larger section addressing rights and duties related to collective bargaining, helps to explain why the right granted in 7114(a)(2)(B) is limited to situations 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--there is nothing in this context suggesting that an examination that obviously presents the risk of employee discipline is nevertheless outside the coverage of the section because the examination is conducted by an investigator housed in one office of NASA rather than another; (6) while the phrase "representative of the agency," which is used in two other places in the FSLMRS concerning grievances and bargaining, should ordinarily retain the same meaning wherever used in the same statute, (a) an agency must rely on a variety of representatives to carry out its functions, and (b) each, though acting in different capacities, may be acting for, and on behalf of, the agency; and (7) while 7114(a)(2)(B) is patterned after the United States Supreme Court's decision in NLRB v J. Weingarten, Inc. (1975) 420 US 251, 43 L Ed 2d 171, 95 S Ct 959--which upheld, under the general protection afforded by 7 of the National Labor Relations Act (29 USCS 157) to the concerted activities of employees, the National Labor Relations Board's provision of a similar right to union representation at certain investigations by private employers--Congress' specific endorsement, in the text of the FSLMRS, of a government employee's right to union representation gives that right a different foundation. (Thomas, J., Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissented from this holding.)

[***LEdHN4]

CIVIL SERVICE §1

right to union representation -- Inspector General Act --

Headnote:[4A][4B][4C][4D]

With respect to a Federal Service Labor-Management Relations Statute provision (5 USCS 7114(a)(2)(B)) which gives an agency employee a right to union representation at certain examinations by a "representative of the agency," the proper operation of the Inspector General Act (IGA) (5 USCS Appx 1 et seq.)--which created an Office of Inspector General (OIG) in each of several federal agencies, including the National Aeronautics and Space Administration (NASA)--does not require nullification of 7114(a)(2)(B)) in all examinations of NASA employees by OIG investigators, as (1) in common parlance, such investigators are representatives of NASA when acting within the scope of their employment, for (a) the IGA created no central office or officer to supervise, direct, or coordinate the work of all OIGs and their respective staffs, (b) other than in some specific circumstances involving congressional committees or the President, each Inspector General has no supervising authority, except the head of the agency of which the OIG is a part, and (c) while Congress intended that the various OIGs would enjoy a great deal of autonomy in conducting their work, an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which the OIG is stationed; and (2) while an OIG's ability to proceed without consent from agency higher-ups is vital to effectuating Congress' intent and maintaining an opportunity for objective inquiries into bureaucratic waste, fraud, abuse, and mismanagement, (a) this factor does not make NASA's OIG any less a representative of NASA when the OIG investigates a NASA employee, (b) 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 (c) in many instances, honest cooperation between an OIG and management-level agency personnel can be expected. (Thomas, J., Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissented from this holding.)

[***LEdHN5]

CIVIL SERVICE §2

dismissal of employee --

Headnote:[5A][5B]

During an examination of a National Aeronautics and Space Administration (NASA) employee by an investigator from NASA's Office of Inspector General (OIG), if the investigator tells the employee that he or she will face dismissal if the employee refuses to answer

questions, then the investigator invokes NASA's authority, not the investigator's own, because disciplining an employee for his or her choice to demand union participation or to discontinue an examination requires more authority than Congress granted the OIGs in the Inspector General Act (5 USCS Appx 1 et seq.).

[***LEdHN6]

APPEAL §1339.5

certiorari -- Federal Court of Appeals' judgment -- issues not considered --

Headnote:[6A][6B]

On certiorari to review a judgment by a Federal Court of Appeals--which upheld a decision by the Federal Labor Relations Authority (FLRA) that an investigator from the Office of Inspector General (OIG) of the National Aeronautics and Space Administration (NASA) was a representative of NASA within the meaning of a Federal Service Labor-Management Relations Statute provision (5 USCS 7114(a)(2)(B)) which gives an agency employee a right to union representation at certain examinations by a "representative of the agency"--because NASA and its OIG elected not to challenge the FLRA's conclusion that an OIG investigator's attempt to limit participation by a union representative at a particular examination of a NASA employee constituted an unfair labor practice, it is not necessary for the United States Supreme Court, in order to resolve the question presented in the case at hand, (1) to agree or disagree with the FLRA's various rulings regarding the scope of 7114(a)(2)(B), or (2) to consider whether the outer limits of the FLRA's interpretation so obstruct the performance of an OIG's statutory responsibilities that the right must be more confined in this context; also, the case at hand does not present the distinct questions as to (1) the process by which the scope of 7114(a)(2)(B) may properly be determined, or (2) the application of 7114(a)(2)(B) to law enforcement officials with a broader charge.

[***LEdHN7]

COURTS §92.3

federal legislation --

Headnote:[7A][7B]

Litigants cannot bind the United States Supreme Court to an erroneous interpretation of federal legislation.

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 sta-

tioned. 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 implicate 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.

OPINION BY: STEVENS

OPINION

[*231] [**1982] [***265] JUSTICE STEVENS delivered the opinion of the Court.

[***LEdHR1A] [1A] 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).

[***LEdHR2A] [2A]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, asking 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

[HN1]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).

[***LEdHR1B] [1B] [***LEdHR2B] [2B] 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).

[***LEdHR3A] [3A]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, [HN2]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 noth-

ing 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 [1] 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.

1 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. [2] The basis for the right to union representation in this context cannot compel the uncodified limitation proposed by NASA and its OIG.

2 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").

[***LEdHR1C] [1C] [***LEdHR3B] [3B]Employing ordinary tools of statutory construction, in combination with the Authority's position on the matter, we have no difficulty concluding that [HN3]§ 7114(a)(2)(B) is not limited to agency investigators representing an "entity" that collectively bargains with the employee's union.

III

[***LEdHR1D] [1D] [***LEdHR4A] [4A]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 agencies 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. [HN4]

[*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. [HN5]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). [3]

> 3 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.

[HN6]

[**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] [***LEdHR4B] [4B]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. [4] 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 "repre-

sentatives" of NASA when acting within the scope of their employment.

> 4 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. [5] [*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.

> 5 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. [6]

> 6 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] [***LEdHR4C] [4C] [***LEdHR5A] [5A]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. [7]

> 7 [***LEdHR5B] [5B]
>
> 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] [***LEdHR1E] [1E] [***LEdHR4D] [4D]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

[***LEdHR1F] [1F]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.

[***LEdHR1G] [1G] [***LEdHR6A] [6A] 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. [8]

8 [***LEdHR6B] [6B]

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.

[***LEdHR1H] [1H]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.

[***LEdHR1I] [1I] [***LEdHR7A] [7A]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. [9]

9 [***LEdHR7B] [7B]

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

[***LEdHR2C] [2C]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.

DISSENT BY: 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.* [1] 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).

1 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"). [2] 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:

2 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. [3] 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. [4] 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). [5]

3 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.

4 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.

5 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.*). [6] 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). [7] [***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).

6 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).

7 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). [8] 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).

8 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 Gen-

eral 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). [9]

9 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

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.

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

251 F.3d 183; 346 U.S. App. D.C. 122; 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.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a nonprofit organization of motor carriers and related companies, sought review of an order of the United States District Court for the District of Columbia which found that the Motor Carrier Safety Improvement Act of 1999 (MCSIA), Pub. L. No. 106-159, 113 Stat. 1748, 1773, granted appellee, the Inspector General (IG), authority to conduct investigations of motor carriers' fraudulent and criminal activities.

OVERVIEW: Appellants filed suit in district court alleging that the U.S. Department of Transportation (DOT) IG lacked legal authority to engage in the contested compliance review investigations. They argued that the IG was not authorized to engage in DOT operations, specifically, compliance investigations of federal motor carrier safety regulations. 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, the court of appeals held that the IG had no authority to engage in the kinds of criminal investigations at issue and concluded that appellants were entitled to the return of records and other property seized from them during the IG's ultra vires investigations and seizures. The appellate court added that the MCSIA did 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 were authorized by the 1999 law.

OUTCOME: The district court's order granting the Inspector General summary judgment was vacated on holding that the IG violated the Inspector General Act and the Motor Carrier Safety Improvement Act of 1999 did not retroactively authorize IG investigations that were conducted prior to its enactment. The government was thereby ordered to return all materials seized during the ultra vires searches of appellants' premises.

CORE TERMS: carrier, General Act, subpoena, audit, search and seizure, criminal investigations, investigate, authorize, trucking, seizures, ripe, seized, fraudulent, hardship, driver, Motor Carrier Safety Act, underlying events, criminal activities, unlawful actions, investigative, consolidated, conducting, ultra vires, investigated, injunction, vacate, entity, new law, entitled to summary judgment, summary judgment

LexisNexis(R) Headnotes

Governments > Federal Government > Claims By & Against
[HN1]The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, established the Office of Inspector General in order to facilitate objective inquiries into bureaucratic waste and mismanagement.

Governments > Federal Government > Claims By & Against
[HN2]See 5 U.S.C.S. App. 3 § 2(2).

Governments > Federal Government > Claims By & Against
[HN3]See 5 U.S.C.S. App. 3 § 9(a)(2).

Governments > Federal Government > Claims By & Against
[HN4]See 113 Stat. 1773.

Civil Procedure > Justiciability > Ripeness > General Overview
[HN5]There will be no ripe case fit for judicial review until the Government acts to apply the statute in a concrete factual setting.

Civil Procedure > Justiciability > Ripeness > Tests
[HN6]In assessing whether a case is ripe for review, courts 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.

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.

OPINION BY: 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

[HN1]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. [HN2]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. [HN3]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.

[HN4]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.).

[HN5]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.

[HN6]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

AirTrans, Inc., Plaintiff-Appellant, v. Kenneth Mead, individually and in his capacity as Inspector General, U.S. Department of Transportation; Joseph Zschiesche, Special Agent, Office of Inspector General; Jeff Holt, Dyer County Sheriff; Larry Bell, Captain, Dyer County Sheriff's Department; Dyer County, Tennessee; Samsung International, Inc.; U.S. Logistics Inc.; and Christopher Asworth, Esq., Defendants-Appellees, United States of America, Intervenor, Four Unnamed Agents of the Tennessee Department of Transportation; Jimmy Porter, Dyer County Investigator Sheriff's Department, Defendants.

No. 02-6411

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

04a0400p.06; 389 F.3d 594; 2004 U.S. App. LEXIS 24063; 2004 FED App. 0400P (6th Cir.)

June 15, 2004, Argued
November 18, 2004, Decided
November 18, 2004, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by AirTrans, Inc. v. Mead, 2005 U.S. LEXIS 5740 (U.S., Oct. 3, 2005)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 01-02951. Samuel H. Mays, Jr., District Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff trucking company sued defendants, law enforcement officers and businesses, under 42 U.S.C.S. § 1983 for alleged violations of the company's Fourth Amendment rights. The United States District Court for the Western District of Tennessee at Memphis dismissed some of the company's claims pursuant to Fed. R. Civ. P. 12(b)(6) and granted summary judgment on other claims. The company appealed.

OVERVIEW: The company's claims arose from the search of its offices pursuant to a warrant obtained by the Office of Inspector General (OIG) of the United States Department of Transportation (DOT) as part of an investigation of violations of federal criminal statutes. The district court properly dismissed the company's claims, some pursuant to Fed. R. Civ. P. 12(b)(6) and some on summary judgment, after concluding that (1) the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C.S. § 101 note and 5 U.S.C.S. app. § 4 note), authorized the OIG to conduct its investigation and obtain the challenged search warrant and that (2) the federal defendants were entitled to qualified immunity. The investigating agent confined his investigation and search to criminal activity relating to DOT programs and operations and complied with § 228 of the Act, codified at 49 U.S.C.S. § 354.

OUTCOME: The court affirmed the judgment of the district court.

CORE TERMS: search warrant, carrier, transportation, constitutional rights, criminal activities, driver, Motor Carrier Safety Improvement Act, qualified immunity, false statements, money damages, fraudulent, trucking, seizure, execute, entity, color, federal criminal, federal government, summary judgment, de novo, properly dis-

missed, investigative, deprivation, conducting, initiated, executing, ensuing, genuine, clarifies

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]A federal appeals court reviews de novo a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Whether the district court properly dismissed the complaint pursuant to Rule 12(b)(6) is a question of law. All factual allegations are deemed admitted, and when an allegation is capable of more than one inference, it must be construed in the plaintiffs' favor.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN2]A Fed. R. Civ. P. 12(b)(6) motion should only be granted if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN3]A federal appeals court reviews de novo the grant of summary judgment by a district court.

Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN4]Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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).

Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > False Statements > General Overview
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Governments > Legislation > Statutory Remedies & Rights
[HN5]There is no right to bring a private action under 18 U.S.C.S. § 1001, a federal criminal statute.

Civil Rights Law > Implied Causes of Action
Civil Rights Law > Section 1983 Actions > Scope
[HN6]To state a claim for violation of its constitutional rights, whether under Bivens or 42 U.S.C.S. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of law.

Civil Rights Law > Immunity From Liability > General Overview
[HN7]In determining whether government officials are immune from suit under Bivens and/or 42 U.S.C.S. § 1983, courts utilize a two-part test. First, the plaintiff must allege and demonstrate the deprivation of a constitutionally protected right. If successful in meeting that part of the test, the plaintiff must further show that the right is so "clearly established" that a "reasonable official" would understand that what he is doing violates that right.

Civil Procedure > Remedies > Damages > Monetary Damages
Civil Rights Law > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
[HN8]The United States Supreme Court has created a federal right of action for money damages for the violation of constitutional rights. Although the Fourth Amendment does not allow an award of money damages, where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Governments > Federal Government > Employees & Officials
Transportation Law > Carrier Duties & Liabilities > General Overview
Transportation Law > Commercial Vehicles > Maintenance & Safety
[HN9]In the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C.S. § 101 note and 5 U.S.C.S. app. § 4 note), the United States Congress substantially described the scope of authority of the Department of Transportation's Inspector General.See 106 Pub. L. No. 159, 228; 113

Stat. 1748, 1773 (codified at 49 U.S.C.S. § 354), part of the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C.S. § 101 note and 5 U.S.C.S. app. § 4 note).In the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C.S. § 101 note and 5 U.S.C.S. app. § 4 note), the United States Congress substantially described the scope of authority of the Department of Transportation's Inspector General.

Governments > Federal Government > Employees & Officials
Transportation Law > Carrier Duties & Liabilities > General Overview
Transportation Law > Commercial Vehicles > General Overview
[HN10]See 106 Pub. L. No. 159, 228; 113 Stat. 1748, 1773 (codified at 49 U.S.C.S. § 354), part of the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C.S. § 101 note and 5 U.S.C.S. app. § 4 note).

COUNSEL: ARGUED: Anthony J. McMahon, Bethesda, Maryland, for Appellant.

Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., James B. Summers, NEELY, GREEN, FARAGARSON, BROOKE & SUMMERS, Memphis, Tennessee, Edward Medina, KIRBY & McGUINN, San Diego, California, for Appellees.

ON BRIEF: Anthony J. McMahon, Bethesda, Maryland, for Appellant.

Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., James B. Summers, NEELY, GREEN, FARAGARSON, BROOKE & SUMMERS, Memphis, Tennessee, Edward Medina, Dean T. Kirby, Jr., KIRBY & McGUINN, San Diego, California, for Appellees.

JUDGES: Before: DAUGHTREY and SUTTON, Circuit Judges; COOK, District Judge. *

* The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

[*596] [***2] PER CURIAM. This civil rights action, filed pursuant to 42 U.S.C. § 1983, was initiated by the plaintiff, AirTrans, Inc., a Dyer County (Tennessee) long-distance trucking company, [**2] while the company was under investigation by the Office of Inspector General (OIG) of the United States Department of Transportation (DOT) for alleged violations of federal criminal statutes. AirTrans sought damages from and injunctive relief against various state and federal government officials and others, after its offices were subjected to a search and the seizure of company records. The complaint was based on the contention that the agents' action in executing the search warrant at the AirTrans offices was in violation of the Fourth Amendment because the DOT's Inspector General lacked authority to obtain and execute a search warrant. The district court dismissed the action against all defendants after finding that the complaint failed to state a claim upon which relief could be granted, principally because the court concluded that the search warrant was authorized under § 228 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C. § 101 note and 5 U.S.C. App. § 4 note (2004)). We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2001, Special [**3] Agent Joseph Zschiesche of the DOT's OIG, assisted by FBI agents and deputies from the Dyer County Sheriff's Department, executed a federal search warrant on the premises of plaintiff AirTrans's business offices in Dyersburg, Tennessee. During execution of the warrant, the agents seized records and disabled company computers, leaving AirTrans effectively unable to operate. As a result of the search and the continuing federal investigation, AirTrans allegedly suffered injury to its sales, credit, goodwill, and reputation.

The source of the plaintiff's difficulties with the government was an agreement that AirTrans had reached with defendants Samsung and U.S. Logistics, Inc., under which AirTrans would provide transportation of Samsung's manufactured goods from its factory in Tijuana, Mexico. Ultimately, a dispute broke out among the parties in December 1999, with AirTrans alleging that Samsung and U.S. Logistics had proposed a fraudulent billing scheme that AirTrans refused to adopt. Samsung and U.S. Logistics, on the other hand, contended that AirTrans had charged them for some six or seven times the amount of traffic that AirTrans had actually provided, and they refused to pay the [**4] full amount of the invoices that AirTrans had sold to a factoring agent named Allied. As a result, Christopher Ashworth, an attorney representing Samsung and U.S. Logistics, sent Allied a letter dated May 16, 2000, accusing Allied and AirTrans of criminal conduct and indicating that at the request of his clients, he had sent certain [*597] business records to the FBI and requested an investigation.

It is not clear from the record in this case whether or not the DOT's ensuing investigation of AirTrans was precipitated by information sent by Ashworth. What is clear is that the investigation led to criminal litigation involving AirTrans in California and, as part of that investigation, the search of the AirTrans offices in Tennessee. After the search, AirTrans filed a § 1983 action against the defendants seeking compensation for its business losses, an order declaring the search illegal, and an injunction against the government's continuing investigation of AirTrans. Motions to dismiss were filed by Inspector General Kenneth Mead and Special Agent Zschiesche, the federal defendants who authorized and secured the search warrant; by the United States as intervenor; and by Samsung, U.S. Logistics, [**5] and Christopher Ashworth, the private defendants who allegedly initiated the investigation of AirTrans. Dyer Sheriff Jeff Holt, Captain [***3] Larry Bell, and Dyer County, the state defendants who assisted in executing the warrant, filed a motion for summary judgment. All of the motions were granted and the complaint was dismissed by the district court. AirTrans now appeals the order of dismissal.

DISCUSSION

[HN1]We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). "Whether the district court properly dismissed the complaint pursuant to [Rule] 12(b)(6) is a question of law . . . . All factual allegations are deemed admitted, and when an allegation is capable of more than one inference, it must be construed in the plaintiffs' favor." *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir. 1991). [HN2]"A Rule 12(b)(6) motion should only be granted if 'it appears beyond doubt that the plaintiffs can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993) [**6] (quoting *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)).

[HN3]We additionally review de novo the grant of summary judgment by a district court. *See Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). [HN4]Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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).

Although there are peripheral issues raised on appeal, [1] the dispositive issue on [*598] appeal concerns the district court's decision to dismiss the action against the federal defendants on the basis of qualified immunity. AirTrans argues that Agent Zschiesche lacked authority to obtain and execute the search warrant and thereby violated the company's constitutional rights. [2] In support of this contention, the company argues that the district court misinterpreted the Motor Carrier Safety Improvement Act of 1999 (the 1999 Act) in ruling that the federal defendants [**7] were entitled to qualified immunity. [***4]

1 For example, AirTrans contended that false statements by attorney Ashworth led to the issuance of the search warrant and invoked 18 U.S.C. § 1001 as a basis for seeking damages against both Ashworth and, on a theory of respondeat superior, his clients, Samsung and U.S. Logistics. But [HN5]there is no right to bring a private action under that federal criminal statute and, as the district court held in dismissing this claim under applicable California law, the statements were privileged because made in the court of official proceedings, citing California Civil Code § 47(b)(3). On appeal, AirTrans seeks to shift the focus away from Ashworth's statements to law enforcement and onto statements made in letters to Allied, conceding that it "does not believe that any report that Ashworth made to the FBI in San Diego resulted in the investigation in Tennessee," but instead positing that a member of Allied contacted the FBI in Tennessee as a result of Ashworth's letter to Allied, creating a chain of events for which Samsung should be held liable. AirTrans does not make clear under what theory or upon what statutory basis this liability should be imposed.

AirTrans also contends that the Dyer County officials who assisted in the search knew that it was illegally obtained and so violated 42 U.S.C. § 1983 by violating AirTrans' constitutional rights under color of state law. The Dyer county defendants maintain that when assisting with the search warrant they were actually "on loan" to the federal government and se were not acting under color of state, but rather federal law. However, the district court did not reach this issue as it was satisfied that the warrant had been obtained legally and so found that AirTrans failed to provide evidence sufficient to raise a genuine issue of material fact showing that its constitutional rights were violated.

[**8]

2 AirTrans also attacks the government's motive in pursuing the investigation in the first place, as well as Agent Zschiesche's reason for conducting the search of the AirTrans premises, insisting that the sole purpose of the investigation

was to "bring down Freddie Ford," the CEO of the company, in retaliation for his succeeding in having prior federal charges against him dismissed. The most that can be said about this contention is that it was unsubstantiated on the record in this appeal.

As the district court noted, in order [HN6]to state a claim for violation of its constitutional rights, whether under *Bivens* [3] or 42 U.S.C. § 1983, AirTrans "must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of . . . law." *Watkins v. City of Southfield*, 221 F.3d 883, 887 (6th Cir. 2000) (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). [HN7]In determining whether government officials are immune from suit, courts utilize a two-part test. *See Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996). [**9] First, the plaintiff must allege and demonstrate the deprivation of a constitutionally protected right. *Id.* If successful in meeting that part of the test, the plaintiff must further show that "the right is so 'clearly established' that a 'reasonable official' would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)); *see also Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000).

3 [HN8]*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) created a federal right of action for money damages for the violation of constitutional rights. The Supreme Court writing through Justice Brennan for the majority, acknowledged that although the Fourth Amendment does not allow an award of money damages, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396, quoting *Bell v. Hood*, 327 U.S. 678, 684, 90 L. Ed. 939, 66 S. Ct. 773 (1946). Thus, the Court, "having concluded that petitioner's complaint states a cause of action under the Fourth Amendment," held that petitioner was "entitled to recover money damages for any injuries he has suffered as a result of the agent's violation of the Amendment." *Bivens*, 403 U.S. at 397.

[**10] Here, AirTrans alleges that its Fourth Amendment rights were violated by an illegal search and seizure of its property, citing *Truckers United for Safety v. Mead*, 86 F. Supp. 2d 1 (D.D.C. 2000) (Truckers United I), and *Truckers United for Safety v. Mead*, 346 U.S. App. D.C. 122, 251 F.3d 183 (D.C. Cir. 2001) [*599] (*Truckers United II*), to support its contention that the DOT Inspector General was not authorized under § 228 of the 1999 Act to obtain and execute a search warrant of the AirTrans offices. In *Truckers United I*, the district court held that the 1999 Act "granted the IG new authority to conduct investigations of motor carriers' fraudulent and criminal activities related to DOT's operations and programs." *Truckers United II*, 251 F.3d at 185. On appeal, however, the D.C. Circuit Court reversed the district court's judgment, noting that the investigation in question occurred before the effective date of the amendment, holding that the Act should not be applied retroactively to that investigation, and declining to deliver an "advisory opinion" on the question of the amendment's effect until timely presented. Given the dates [**11] on which the activity in this case was conducted, the question is now ripe for resolution.

The controversy finds its genesis in the original design of the Office of Inspector General, created by Congress in 1978 to provide the various government agencies with "leadership and coordination" by allowing the Inspectors General to "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. § 2(2). Because they are appointed by the President and confirmed by the Senate, 5 U.S.C. App. § 3(a), the Inspectors General are clothed with a degree of objectivity and independence meant to enhance their principal roles of curtailing bureaucratic waste and mismanagement and of preventing fraud and abuse within each agency by conducting audits and investigations its programs and operations. *See generally Truckers United II*, 251 F.3d at 185-86. Although supervised by the heads of the various agencies in which they serve, the Inspectors General report directly to Congress and may not [**12] be impeded in their work by the heads of their agencies. 5 U.S.C. App. §§ 3(a), 6(a).

Under the Motor Carrier Safety Act of 1984, the Secretary of the DOT has the authority to ensure vehicle safety that includes the power to investigate, to subpoena records and witnesses, and to inspect motor carriers and their documentation. *See* 49 U.S.C. §§ 502(a), 504(c), 506(a). These activities were delegated to and carried out by the Federal Highway Administration (FHA) until January 1, 2000, when regulation of interstate motor carriers was transferred to the newly created Federal Motor Carrier Safety Administration as part of the 1999 Act. [HN9]In the same legislation, Congress substantially described the scope of authority of the DOT's Inspector General, as follows: [***5]

[HN10](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) [**13] 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 of funds from the Department or its operating administrations.

106 P.L. 159, 228; 113 Stat. 1748, 1773 (codified at 49 U.S.C. § 354 (2004)).

Although there may have been some dispute between the DOT's OIG and various trucking companies concerning the scope of the Inspector General's investigative [*600] authority prior to the 1999 Act, [4] there can no longer be any question, given the plain language of § 228. The parties agree that Special Agent Zschiesche obtained a warrant by telling a magistrate judge that he was investigating "criminal activity relating to the programs and operations of the Department [of Transportation]." 49 U.S.C. § 354(a). More specifically, Zschiesche claimed that drivers at AirTrans made false statements in an attempt to cover-up violations of federal safety regulations. Coinciding with Zschiesche's claims, the magistrate judge issued a warrant for the seizure of [**14] relevant documents, including "driver qualification files and [] personnel files," "driver logs" and "any and all records relating to ICC or DOT numbers and of applications for such numbers." And, according to the Government, one individual has pleaded guilty to making false statements to the Government on a driver employment application as a result of Zschiesche's investigation. In this way, Zschiesche confined his investigation and search to "criminal activity relating to the programs and operations of the Department [of Transportation]" and complied with § 228 of the 1999 Act.

> 4 The joint explanatory statement of H.R. 3419: Motor Carrier Safety Improvement Act of 1999 by Rep. Bud Shuster, Rep. James Oberstar, Rep. Thomas Petri, Rep. Nick Rahall, Sen. John McCain and Sen. Ernest Hollings stated:
>
> > This section clarifies Congressional intent with respect to the criminal investigative authority of the Department of Transportation Inspector General (IG). When the Office of Motor Carrier Safety find evidence of egregious criminal violations of motor carrier safety regulations through their regulatory compliance efforts, it refers these cases to the IG's Office of Investigations. Recently, a U.S. District Court concluded that an investigation undertaken by the IG exceeded its jurisdiction, see In the Matter of the Search of Northland Trucking Inc. (D.C. Arizona) [sic], finding that the motor carrier involved was not a grantee or contractor of the Department, nor was there evidence of collusion with DOT employees. This *narrow construction of the IG's authority is not well grounded in law,* and the managers are concerned about the adverse impacts the Order could have on IG operations. *This provision, therefore, 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 not such parties receive Federal funds from the Department. 145 Cong Rec H 12874 (Nov. 18, 1999)(emphasis added).

[**15] We hold that the district court was correct in determining that the search warrant secured and executed by Special Agent Zschiesche was validly obtained and that ensuing search did not violate the plaintiff's Fourth Amendment rights in any respect. Having found that there was no constitutional violation, the district court was also correct in granting qualified immunity to the federal defendants and dismissing the complaint as to them, pursuant to Rule 12(b)(6).

CONCLUSION

Because the district court properly dismissed the complaint in this case as to the federal defendants, and because the remaining issues raised on appeal are derivative and therefore rendered moot, we AFFIRM the judgment of the district court as to all defendants.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed from order of United States District Court for Eastern District of Texas enforcing administrative subpoena issued by plaintiff, U.S. Inspector General for Department of Interior, for documents concerning defendants' alleged underpayment of royalties to the government for production under federal oil and gas leases.

OVERVIEW: Plaintiff, the United States as represented by the Department of Interior Inspector General, issued administrative subpoenas to defendants for documents related to defendants' federal oil and gas leases as part of an investigation that defendants had misrepresented the value of their federal lease production. Defendants objected to the subpoenas' scope and threat to confidential and proprietary information. The district court ordered the subpoenas enforced subject to a protective order. Defendants contended the subpoenas were outside plaintiff's authority and were unduly burdensome. The court found statutory authority within the Inspector General Act of 1978, 5 U.S.C.S. app. 3, and the False Claims Act, 31 U.S.C.S. § 3730(b), for plaintiff to issue subpoenas. It also rejected defendants' claims that the subpoenas were overbroad and unduly burdensome because defendant offered no adequate explanation why the compliance cost and effort unduly disrupted or seriously hindered normal operations.

OUTCOME: Enforcement order affirmed; subpoenas were neither outside plaintiff's authority nor unduly burdensome; no abuse of discretion in district court's finding that protective order afforded defendants adequate protection especially in light of plaintiff's stipulation not to disclose protected competitive material.

CORE TERMS: subpoena, protective order, disclosure, inspector general, administrative subpoenas, confidentiality, lease, abuse of discretion, legislative history, post-argument, confidential, investigative, false claims, burdensome, royalties, unduly, notice, audits, investigate, Freedom of Information Act, federal funds, private party, statutory authority, establishment, cooperation, designated, recipient, notified, empower, oil

LexisNexis(R) Headnotes

Civil Procedure > Justiciability > Mootness > General Overview

[HN1]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.

Civil Procedure > Justiciability > Mootness > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN2]A case is not moot where court can still grant some relief by ordering documents returned or destroyed.

Civil Procedure > Pretrial Matters > Subpoenas
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN3]A subpoena enforcement order is reviewed for abuse of discretion.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
Pensions & Benefits Law > Railroad Workers > General Overview
[HN4]The requirements for judicial enforcement of an administrative subpoena are minimal. 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.

Administrative Law > Separation of Powers > Executive Controls
[HN5]See 5 U.S.C.S. app. 3 § 4(a).

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN6]See 5 U.S.C.S. app. 3 § 6(a)(4).

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN7]A subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Civil Procedure > Discovery > Protective Orders
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN8]The federal court of appeals reviews a district court's enforcement order of a protective order for abuse of discretion.

Administrative Law > Governmental Information > Personal Information > General Overview
[HN9]An agency's determinations on the protections required for confidential information are not to be lightly disregarded. Deference is due an agency in choosing its own procedures for guarding confidentiality. It is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality.

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.

OPINION BY: 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.*, [HN1] ***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*, [HN2] 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.

[HN3]A subpoena enforcement order is reviewed for abuse of discretion. *E.g.*, [HN4] ***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). [HN5]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.) [HN6]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 expended") 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*.)

[HN7]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.

[HN8]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.

[HN9]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.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner Nuclear Regulatory Commission (NRC) sought review of an order of respondent Federal Labor Relations Authority (FLRA), which found that the proposals of intervenor union were proper subjects for negotiation and entered an order directing the NRC to negotiate with the union.

OVERVIEW: The union, the authorized bargaining unit for the NRC's employees, advanced proposals regarding procedures to be followed during investigatory interviews by the Inspector General. The NRC refused to bargain and the union filed a petition with the FLRA. The FLRA held that the proposals were appropriate and ordered the NRC to negotiate. The NRC petitioned for review. The court granted the petition for review. The court held that the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C.S. § 7101 et seq., did not require the NRC to bargain about investigatory interviews because that would authorize the parties to interfere with the independent status of the Inspector General. The court found that, in the FSLMRS, Congress accommodated the Inspector General Act by requiring bargaining only when it was not inconsistent with other laws. 5 U.S.C.S. § 7117. The court held that the four proposals advanced by the union compromised the Inspector General's independence.

OUTCOME: The court granted the NRC's petition to review the order of the FLRA.

CORE TERMS: General Act, collective bargaining, interview, agency head, investigatory, investigative, negotiate, audit, federal law, bargaining, employee rights, general supervision, union representatives, duty to bargain, negotiation, supervision, bargain, warning, federal labor, federal employees, clarify, nonnegotiable, interviewed, IG Act, agency officials, criminal investigations, mismanagement, investigate, negotiable, conducting

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize
[HN1]The Federal Service Labor-Management Relations Statute, 5 U.S.C.S. § 7101 et seq., establishes the right of federal employees to form and join labor unions and engage in collective bargaining over conditions of em-

ployment. 5 U.S.C.S. § 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.S. § 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.S. § 7117(a)(1).

Environmental Law > Litigation & Administrative Proceedings > Judicial Review
Governments > Federal Government > Employees & Officials
Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption
[HN2]Orders of the Federal Labor Relations Authority (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.S. § 7123(a) & (b), and the appropriate standard of review is that specified in § 706 of the Administrative Procedure Act. 5 U.S.C.S. § 7123(c). Thus, 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.S. § 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 Federal Service Labor-Management Relations Statute, 5 U.S.C.S. § 7101 et seq., because the Authority has specialized expertise in this field.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain
[HN3]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.

Governments > Federal Government > Employees & Officials
[HN4]Congress enacted the Inspector General Act of 1978, 5 U.S.C.S. app. 3 § 1 et seq., in order to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of departments and agencies. To that end, Congress established in each specified governmental agency, 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.S. app. 3 § 4(a)(1). One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased.

Administrative Law > Agency Investigations > General Overview
Energy & Utilities Law > Nuclear Power Industry > U.S. Nuclear Regulatory Commission
Governments > Federal Government > Employees & Officials
[HN5]Proposals which concern investigations conducted by the Inspector General, are not appropriately the subject of bargaining between an agency and a union. Such proposals run afoul of the mandate of the Inspector General Act, 5 U.S.C.S. app. 3 §1 est seq., that it is the Inspector General who has the authority to conduct, supervise, and coordinate audits and investigations relating to the Nuclear Regulatory Commission.

Governments > Local Governments > Employees & Officials
Labor & Employment Law > Collective Bargaining & Labor Relations > Interpretation of Agreements
Labor & Employment Law > Collective Bargaining & Labor Relations > Subjects of Bargaining
[HN6] 5 U.S.C.S. § 7112(b)(7) provides that no bargaining unit may include employees primarily engaged in investigative or audit functions. This language has been interpreted to mean that employees of the Inspector General may not engage in collective bargaining.

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.

OPINION BY: [**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

[HN1]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. [1]

1 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

[HN2]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 [HN3]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.

[HN4]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 [2] 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.*

2 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 audits, 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 [HN5]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* [3] 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.

> 3 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. [HN6]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 in-

consistent 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

DISSENT BY: 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.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent, the Federal Labor Relations Authority (the FLRA), found that petitioner, the United States Department of Justice's Office of the Inspector General (the OIG) violated 5 U.S.C.S. § 7114(a)(2)(B) by refusing an employee's request for the assistance of a union representative. The OIG appealed from the finding of an unfair labor practice.

OVERVIEW: The OIG received a report than an employee had smuggled illegal drugs into a federal prison. The employee asked for union representation, but the investigating agents denied the request and interviewed him anyway. The union representing the employee filed an unfair labor practice charge, claiming the agents' denial of the employee's request violated § 7114(a)(2)(B). In the meantime, the United States Supreme Court issued a decision holding that a National Aeronautics and Space Administration (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 him adequate union representation. Section 7114(a)(2)(B) applied equally to the OIG's criminal investigations. The OIG agents were representatives of the agency when they interviewed the employee and therefore they violated 5 U.S.C.S. § 7114(a)(2)(B) when they denied his request for union representation.

OUTCOME: The court affirmed the FLRA's order.

CORE TERMS: criminal investigation, administrative investigation, union representative, manager, answer questions, cooperation, law enforcement officials, disciplinary action, classification, investigative, investigator, interviewed, deference, criminal law, labor practice, bargaining unit, reasonable grounds, administratively, applicability, interview, overlap, unfair, rested, owe

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview
[HN1] 5 U.S.C.S. § 7114(a)(2)(B) requires an agency to give an employee the opportunity to have a union representative at an interrogation under certain circumstances.

Governments > Federal Government > Employees & Officials
[HN2]See 5 U.S.C.S. § 7114(a)(2)(B).

Administrative Law > Judicial Review > Standards of Review > General Overview
Governments > Federal Government > Employees & Officials
[HN3]As 5 U.S.C.S. § 7114(a)(2)(B) is part of the Federal Labor Relations Authority's organic statute, a court owes its interpretation deference under Chevron.

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation
[HN4]An agency has no special competence or role in interpreting a judicial decision.

Business & Corporate Law > Agency Relationships > Agents Distinguished > General Overview
Governments > Federal Government > Employees & Officials
[HN5] 5 U.S.C.S. App. § 4(d) requires any Office of the Inspector General agent to report expeditiously to the United States Attorney General whenever the inspector general has reasonable grounds to believe there has been a violation of federal criminal law.

Governments > Federal Government > Employees & Officials
[HN6]Nothing in 5 U.S.C.S. App. § 4(d) overrides 5 U.S.C.S. 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.

Governments > Federal Government > Employees & Officials
[HN7]Office of the Inspector General agents are representatives of their respective agencies.

Administrative Law > Agency Investigations > Constitutional Rights > Self-Incrimination Privilege
Evidence > Privileges > Self-Incrimination Privilege > General Overview
Governments > Federal Government > Employees & Officials
[HN8]In both administrative and criminal investigations, the federal agency employee enjoys a Fifth Amendment right not to incriminate himself in his answers to a government investigator.

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Governments > Local Governments > Employees & Officials
[HN9]An interrogatee's right to counsel cannot render 5 U.S.C.S. § 7114(a)(2)(B) inapplicable.

Governments > Federal Government > Employees & Officials
[HN10]The risks of a union representative's testimony against an employee cannot enable the employer to deny the employee his or her Weingarten right.

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.

OPINION BY: 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). [HN1]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*.

* * *

[HN2]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). [HN3]As the section is part of the FLRA's organic statute, we owe its interpretation deference der *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 [HN4]"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. [HN5] 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, [HN6]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 [HN7]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. [HN8]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 [HN9]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 [HN10]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 investigation 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.

Inspector General, United States Dept. of Housing and Urban Development, Petitioner, v. Banner Plumbing Supply, Co., Inc., Respondent.

No. 98 C 1319

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

34 F. Supp. 2d 682; 1998 U.S. Dist. LEXIS 19642

December 9, 1998, Decided
December 11, 1998, Docketed

DISPOSITION: [**1] HUD-OIG's motion for summary enforcement granted and Banner's request for relief denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner housing inspector filed a motion for summary enforcement of an administrative subpoena duces tecum that it issued to and served on respondent plumbing contractor.

OVERVIEW: Petitioner housing inspector initiated an investigation of respondent plumbing contractor and issued and served an administrative subpoena duces tecum demanding production of various documents. Respondent partially complied with the subpoena, but refused to produce the remainder of the requested documents, claiming that petitioner did not have the authority to investigate respondent and that petitioner subpoenaed the documents for an improper purpose. Petitioner filed a motion for summary enforcement of its administrative subpoena duces tecum. The court granted petitioner's motion, holding that under petitioner's broad investigatory powers, petitioner was entitled to the requested documents because petitioner had reasonable grounds to believe there had been a violation of federal criminal law by respondent.

OUTCOME: Motion granted because under petitioner housing inspector's broad investigatory powers, petitioner was entitled to the requested documents from respondent plumbing contractor as petitioner had reasonable grounds to believe there had been a violation of federal criminal law by respondent.

CORE TERMS: subpoena, inspector general, investigate, audit, administrative subpoenas, federal funds, contractor, housing, disputed, subpoena power, federal government, false claim, improper purpose, investigative, suspicion, plumbing, housing authority, own investigation, local authorities, innuendo, authority to issue, statutory authority, investigating, cooperation, contracted, low-income, Inspector, supervise, debarment, subpoena duces tecum

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
[HN1]The court's role in a subpoena enforcement proceeding is sharply limited. Generally, administrative subpoenas will be enforced as long as the subpoena: 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) seeks information the government does not presently possess.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Financing > Federal Programs > U.S. Department of Housing & Urban Development Programs
[HN2]The Office of the Inspector General for the Department of Housing and Urban Development has the duty and responsibility to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the Department of Housing and Urban Development (HUD) and to conduct, supervise, or coordinate other activities carried out or financed by HUD for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations. 5 U.S.C.S. App. 3 § 4(a)(1) & (3).

Public Health & Welfare Law > Housing & Public Buildings > General Overview
[HN3]The Inspector General may institute an investigation relating to the administration of the programs and operations of the Department of Housing and Urban Development if, in the judgment of the Inspector General, such investigation is necessary or desirable. 5 U.S.C.S. App. 3 § 6(a)(2). Accordingly, an Inspector General may investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Civil Procedure > Pretrial Matters > Subpoenas
Public Health & Welfare Law > Housing & Public Buildings > General Overview
[HN4]See 5 U.S.C.S. App. § 6(a)(4).

Governments > Federal Government > Employees & Officials
[HN5]The normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
Governments > Courts > Court Personnel
Public Health & Welfare Law > Housing & Public Buildings > General Overview
[HN6]The Inspector General of the Department of Housing and Urban Development is required 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. 5 U.S.C.S. App. 3 § 4(d).

COUNSEL: For INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, petitioner: Kurt N. Lindland, Young B. Kim, United States Attorney's Office, Chicago, IL.

For BANNER PLUMBING SUPPLY CO., INC., respondent: Mark W. Solock, Attorney at Law, Chicago, IL.

JUDGES: JOAN B. GOTTSCHALL, United States District Judge.

OPINION BY: JOAN B. GOTTSCHALL

OPINION

[*683] **MEMORANDUM OPINION AND ORDER**

Petitioner, the Office of the Inspector General for the Department of Housing and Urban Development ("HUD-OIG"), moves this court for summary enforcement of an administrative subpoena *duces tecum* that it issued to and served on respondent Banner Plumbing Supply ("Banner") on August 5, 1997. Banner partially complied with the subpoena, which demanded the production of various documents, but has refused to produce a number of these documents on two grounds. First, Banner contends that the OIG has no authority to investigate Banner or to subpoena those records Banner has refused to produce. Second, Banner contends that the OIG subpoenaed the records for an improper purpose. For the following reasons, the [**2] court grants HUD-OIG's motion for summary enforcement and denies Banner's request for relief.

I. BACKGROUND [1]

1 The court takes the facts included in this section from the parties' pleadings and attached affidavits, indicating which facts and allegations are contested.

On October 19, 1993, the Chicago Housing Authority ("CHA"), then an Illinois Municipal Corporation subject to the supervision and regulation of the Illinois Housing Authority, [2] awarded Banner a contract to supply and deliver plumbing and heating-related supplies. That contract required Banner to provide requested plumbing supplies at a 54.11% discount off the manufacturers' list prices, as defined by the trade guide "Trade Service's Modern Contractor's Trade Net Guide." From October 1993 to October 1994, the time period at issue, Banner provided various supplies to CHA, and the CHA paid Banner $ 1,689,965.27 pursuant to the contract. CHA also received federal funds during this time period. Specifically, HUD provided CHA with federal [**3] funds via its Comprehensive Grant Program and its op-

erating subsidy fund, funds that were commingled with other monies in CHA's general operating revenues. CHA paid Banner out of these general operating revenues.

2 On or before June 2, 1995, CHA apparently came under the control of HUD.

In early 1994, CHA's Office of Inspector General ("CHA-OIG") obtained information suggesting that Banner was violating the contract by supplying products that were inferior to those billed pursuant to CHA's audit of all plumbing supplies in its warehouse. According to Banner, the CHA's director then "unilaterally empowered" a CHA employee, "designated as the inspector general," to subpoena contractor records. Respondent's [*684] Memorandum at 2. This employee then issued a subpoena to Banner requesting several documents. Banner produced contracts with the CHA pertaining to the relevant time period, purchase orders it received from CHA, invoices it had sent to CHA, and the relevant trade guide. Banner refused to produce its financial [**4] statements; tax records; records of payments received form the CHA; and records of purchases from suppliers, including purchase orders, invoices, and payment records.

The CHA subsequently filed an action in Cook County Circuit Court to enforce the subpoena. On September 7, 1995, Judge Reid ruled in favor of Banner, sustaining Banner's objections to the subpoena in finding that the disputed documents were "confidential and proprietary information and not the proper subject for disclosure pursuant to said Administrative Subpoena and Petition to Enforce." Respondent's Memorandum, Exhibit B at 1. By this point, Banner contends, HUD had gained control of CHA and, disappointed by the ruling, improperly requested at some later date that HUD-OIG use its subpoena power to gain access to the disputed documents, thereby circumventing Judge Reid's ruling.

HUD-OIG admits that it learned about concerns regarding Banner's conduct in regard to the CHA contract from other sources, specifically, from CHA-OIG and the U.S. Attorney's Office ("USAO"), both of which, according to HUD-OIG, "requested HUD-OIG's assistance in their investigation of Banner for violation of the False Claims Act." Petitioner's [**5] Memorandum at 3. Upon reviewing the facts, however, HUD-OIG maintains that it "determined that it had an independent investigative interest in determining whether Banner defrauded the CHA and HUD." *Id.* Accordingly, in July 1997, HUD-OIG commenced its own investigation of Banner for violations of the federal False Claims Act, 31 U.S.C. § 3739 et seq.

After concluding that it needed to examine various documents related to the contract, HUD-OIG issued the subpoena *duces tecum* now at issue. HUD-OIG's request appears to be coextensive with the subpoena that CHA had issued, which means HUD-OIG's subpoena requests the same documents that Judge Reid denied CHA. Banner has taken the same position with respect to HUD-OIG's subpoena as with the CHA subpoena. Accordingly, the same documents previously in dispute are now the subject of the dispute in this court.

HUD-OIG contends: 1) that it has authority to issue the subpoena; 2) that it has complied with the relevant procedural requirements for issuance; 3) that the disputed documents are relevant as necessary to support (or eliminate) its suspicion that Banner violated the False Claims Act or other applicable laws, regulations, and [**6] HUD requirements; and 4) that the subpoena is neither unreasonably broad nor burdensome. Banner apparently contests only the first of these points, namely, that HUD-OIG lacks the authority to subpoena the disputed documents. Banner further contends that HUD-OIG issued the subpoena for an improper purpose.

II. ANALYSIS

As an initial matter, the court notes that the Seventh Circuit has described [HN1]the court's role in a subpoena enforcement proceeding as "sharply limited." *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987). Generally, administrative subpoenas will be enforced as long as the subpoena: 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) seeks information the government does not presently possess. *See U.S. v. Powell*, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964); *see also EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 645 (7th Cir. 1995) (stating that courts generally will "enforce an administrative subpoena if it seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency's authority"). [**7] As Banner contests only one prong of this test-HUD-OIG's authority to issue the subpoena-the court will not discuss the other prongs.

Banner contends that HUD-OIG lacks authority to investigate and issue a subpoena to Banner. According to Banner, HUD-OIG's authority to investigate does not reach it [*685] because it contracted with CHA, an Illinois Municipal Corporation, rather than with HUD, a federal entity. Banner claims that HUD cannot "regulate the individual contractors whom the local authorities contract with for the purchase of needed goods." Respondent's Memorandum at 5. HUD-OIG, however, contends that it has both the responsibility and authority to investigate Banner and subpoena documents under Banner's control because it must ferret out fraud and abuse in programs that receive HUD, i.e., federal, money. Banner counters by arguing that it did not participate in HUD's

low-income housing program. According to Banner, "entering into an agreement with a local housing authority and being paid by that authority from its general operating revenues" does not constitute participation in HUD's low-income housing program. *Id.* at 6. Banner further argues that any funds it received from [**8] CHA in payment on the contract cannot be considered federal funds. According to Banner, the funds HUD gave CHA "lost their identity as federal funds" because they constituted only a small percentage of CHA's general operating revenues and were commingled with monies from other sources. *Id.* at 7.

The court finds that HUD-OIG has authority to investigate Banner and issue the subpoena in question. Congress has given [HN2]HUD-OIG the "duty and responsibility" to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [HUD]" and to "conduct, supervise, or coordinate other activities carried out or financed by [HUD] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations." 5 U.S.C. App. 3 § 4(a)(1) & (3); *see also Inspector General, U.S. Dept. of Housing and Urban Development v. St. Nicholas Apts.*, 947 F. Supp. 386, 389 (C.D. Ill. 1996). [HN3]The Inspector General may institute an investigation "relating to the administration of the programs and operations of [HUD]" if, "in the judgment of the Inspector General," such investigation is "necessary [**9] or desirable." 5 U.S.C. App. 3 § 6(a)(2). Accordingly, an Inspector General may investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *St. Nicholas Apartments*, 947 F. Supp. at 389 (citing *U.S. v. Morton Salt*, 338 U.S. 632, 642-43, 94 L. Ed. 401, 70 S. Ct. 357 (1950)).

HUD-OIG has the authority to investigate Banner because Banner has received money originating from an authorized HUD program and HUD-OIG suspects that Banner has violated the federal False Claims statute or has otherwise defrauded the federal government. Congress has given HUD statutory authority to provide funds to public housing agencies to help them modernize public housing, 42 U.S.C. § 14371, which HUD does through its Comprehensive Grant Program, as well as the authority to provide such agencies specifically with funds to cover the costs of operating public and low-income housing projects, 42 U.S.C. § 1437g, which HUD does through its operating subsidies program. HUD provided federal funds to CHA under both of these programs, and CHA used some of those funds to pay Banner for plumbing supplies, a cost of improving and operating housing [**10] projects. Once HUD disbursed federal funds to CHA for improving and operating public housing, HUD-OIG came under an obligation to investigate allegations of fraud in where that money went. And that is precisely what HUD-OIG seeks to do in this case.

The court rejects Banner's argument that HUD-OIG's authority to investigate does not extend to Banner because it contracted with CHA rather than with HUD. Banner has provided this court with no authority holding that an Inspector General may not investigate a party who contracts with a local housing authority, and this court is aware of no such authority. Indeed, the only cases Banner cites- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943), *U.S. v. Candella*, 487 F.2d 1223 (2d Cir. 1973), and *U.S. v. Beasley*, 550 F.2d 261 (5th Cir. 1977)-all *sanctioned* federal government pursuit of parties under federal false claims statutes even though those parties had contracted with state or local authorities because the parties were paid at least in part with funds the federal government provided to the [*686] state or local authority. [3] Moreover, as cases like *St. Nicholas* and *Morton Salt* indicate, an [**11] Inspector General's investigative authority is broad and may be predicted solely on a suspicion of illegality.

> 3 To the extent that Banner attempts to carve out from this line of cases a rule that an administrative subpoena cannot be enforced against a party who contracts with a state or local authority where 1) the contractor does not know that the federal government shoulders some of the costs and 2) the federal government does not directly reimburse the state or local government, the court rejects such a rule in the context of administrative subpoenas. *Marcus*, *Candella*, and *Beasley* involve the propriety of conviction under federal false claims statutes, not the propriety of issuing an administrative subpoena. While the issue of a contractor's knowledge goes to the question of the contractor's specific intent to defraud the federal government and thus to the propriety of conviction for making a false claim, it has nothing to do with the enforceability of an administrative subpoena.

The court also rejects [**12] Banner's argument that the federal funds HUD provided to CHA lost their identity as federal funds because they represented only a small percentage of CHA's general operating revenues and were commingled with funds from other sources. Banner cites absolutely no authority for this proposition, and the court is aware of none. Moreover, the statute, which broadly authorizes inspection to ferret out fraud and abuse, imposes no such limitations on an Inspector General's investigative power.

Having found that HUD-OIG has the authority to investigate Banner, the court also finds that it has the

authority to issue a subpoena to Banner. [HN4]The Inspector General Act of 1978 grants Inspector Generals the authority to require by administrative subpoena the production of records "necessary in the performance of the functions assigned by [the] Act" and further provides that such subpoenas "shall be enforceable by order of any appropriate United States district court." 5 U.S.C. App. § 6(a)(4). Courts have construed this subpoena power broadly. [4] *See, e.g.*, *U.S. v. Aero-Mayflower Transit Co.*, 646 F. Supp. 1467, 1472 (D.D.C. 1986) (noting that the subpoena power is extensive and that it may serve [**13] as the most important tool for ferreting out waste, fraud, and abuse), *aff'd*, 265 U.S. App. D.C. 383, 831 F.2d 1142 (D.C. Cir. 1987); *U.S. v. Westinghouse Elec. Corp.*, 788 F.2d 164, 170 (3d Cir. 1986) (holding that "[a] constricted interpretation [of the subpoena power] would be at odds with the broad powers conferred on the Inspector General by the statute"). In order to investigate the alleged fraud in this case, HUD-OIG will undoubtedly find helpful documents showing what items Banner ordered from its suppliers, for instance, so that HUD-OIG can compare these items with those that it actually received. [5]

4 Indeed, some case law suggests that the subpoena power reaches even third parties "not expressly within [an agency's] regulatory jurisdiction," provided that the agency seeks information "relevant and necessary to the effective conduct of [its] authorized and lawful inquiry." *See U.S. v. Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 887 (D. N.J. 1980).

5 As the court previously noted, as to the subpoena, Banner challenges only HUD-OIG's issuing authority and does not argue that the documents therein requested are irrelevant to HUD-OIG's investigation. Accordingly, the court need not discuss relevancy.

[**14] Banner's citation of *Bowsher, Comptroller General of the U.S. v. Merck & Co., Inc.*, 460 U.S. 824, 75 L. Ed. 2d 580, 103 S. Ct. 1587 (1983), does not persuade this court to the contrary. *Bowsher* addressed the General Accounting Office's right to demand access to documents, not the Inspector General's subpoena power. Both the GAO and Inspectors General may request documents pursuant to investigations for fraud or abuse, but the statute granting the GAO access rights does so in a limited fashion, in stark contrast to the broad wording of the Inspector General Act. *See Bowsher*, 460 U.S. at 831 (holding that Congress in relevant part limited GAO's access power to documents that "directly pertain to and involve transactions relating to, the contract or subcontract"). No such limitation exists in the Inspector General Act.

The court also rejects Banner's second ground for refusing to produce the documents in question: its contention that HUD-OIG issued the subpoena for an improper purpose. In this regard, Banner argues that HUD-OIG has conceded that "HUD and the U.S. Attorney first requested OIG to obtain [*687] the records before OIG initiated this investigation and issued their subpoena" [**15] and that this concession demonstrates that HUD-OIG had an improper purpose in issuing the subpoena. Banner further argues that HUD is using HUD-OIG's investigatory powers to perform HUD's regulatory operations, an activity Banner contends is inappropriate given HUD-OIG's mandate to audit and supervise HUD. The court disagrees on both counts.

First, the court finds that HUD-OIG has not conceded that either HUD or the USAO asked HUD-OIG to subpoena the disputed records. Rather, HUD-OIG has stated that "CHA-OIG and the United States Attorney's Office requested HUD-OIG's assistance in their investigation of Banner for violation of the False Claims Act." Petitioner's Memorandum at 3. *See also id.* at Exhibit 1 PP 12, 17 (Declaration of Special Agent Marguerite Smith) (averring that CHA-OIG and the USAO requested HUD-OIG's participation in investigating Banner). As an initial matter, the court notes that Banner seems to be conflating HUD and CHA-OIG. HUD-OIG did not state that HUD requested HUD-OIG to obtain the disputed records, Banner's representations notwithstanding. Rather, HUD-OIG said that *CHA-OIG* (not HUD) approached HUD-OIG with information about Banner's conduct.

Banner [**16] also incorrectly argues that HUD-OIG has conceded that HUD and the USAO "requested OIG to obtain the records before OIG initiated this investigation and issued their subpoena." *See supra*. HUD-OIG has never indicated that *anyone* requested it to obtain the disputed records or to issue the subpoena. Rather, HUD-OIG has stated that CHA-OIG and the USAO requested HUD-OIG's help *in their investigation. See supra*.

The court further rejects Banner's suggestion that HUD-OIG's investigation and subpoena have somehow been rendered illegitimate because other entities first brought the matter to HUD-OIG's attention and requested HUD-OIG's help in their own investigations. As discussed below, the court is not persuaded that any impropriety exists by virtue of asking HUD-OIG for assistance, and Banner has provided the court with nothing but innuendo to suggest otherwise. Moreover, HUD-OIG has offered an affidavit attesting that HUD-OIG made an independent decision to investigate and subpoena Banner after learning about CHA-OIG's suspicions regarding Banner's conduct.

The key question is not how or from whom HUD-OIG learned about Banner but rather whether HUD-OIG has the authority to [**17] investigate and subpoena Banner and whether such activity is for a legitimate purpose. Having already found that HUD-OIG has the authority to investigate and subpoena Banner, the court now finds that HUD-OIG's reason for doing so is legitimate. HUD-OIG has stated that it decided to institute its own investigation of Banner pursuant to information it learned when CHA-OIG and the USAO requested HUD-OIG's help in their own investigations of Banner. [6] The court has been given no reason to doubt HUD-OIG's assertion that it made an independent decision to investigate Banner and therefore to issue the subpoena in question. [7] Innuendo and speculation do not suffice to override "[HN5]the normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof." *See* Starr v. FAA, 589 F.2d 307, 315 (7th Cir. 1978). As Banner has provided this court with nothing but innuendo, the court accepts HUD-OIG's assertion of independence. *Accord St. Nicholas Apartments*, 947 F. Supp. at 391 (accepting [*688] HUD-OIG's assertion of independence where nothing but innuendo supported respondent's claim of improper purpose).

6 HUD-OIG Special Agent Marguerite Smith averred that "in February 1997, CHA OIG and the United States Attorney's Office requested HUD OIG participation in its investigation of Respondent. Upon review and discussion of the facts of the case, HUD OIG had an independent investigative interest in determining whether Respondent perpetrated a fraud against the CHA and HUD. As such, HUD OIG commenced a formal investigation of Respondent in July 1997." Declaration of OIG Special Agent Marguerite Smith, Petitioner's Memorandum at Exh. 1 P 19.

[**18]

7 While the timing of HUD-OIG's investigation might, as in St. Nicholas Apartments, "raise concerns regarding the independence of the audit," *see St. Nicholas Apartments*, 947 F. Supp. at 390, the record is devoid of any other evidence suggesting improper HUD-OIG action.

Second, the court rejects Banner's argument that HUD is improperly using HUD-OIG's investigatory powers to perform HUD's regulatory operations and is thereby compromising its independence. HUD-OIG is seeking to investigate a specific allegation of fraud, not to conduct a general screening of CHA contractors in a fishing expedition to catch the lawless. To the extent that Banner relies on *Burlington Northern RR Co. v. Office of the Inspector General*, 767 F. Supp. 1379 (N.D. Tex. 1991), to support its position, the court finds the case inapposite and further notes that it actually supports HUD-OIG's position. In *Burlington Northern*, OIG undertook a general audit of railroad companies to determine whether they were properly contributing to various railroad programs. *See id.* at 1380. The Fifth Circuit held that "an [**19] Inspector General lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance investigations or audits." *Burlington Northern*, 983 F.2d 631, 642 (5th Cir. 1993). In so holding, the Fifth Circuit specifically distinguished situations in which the Inspector General has specific reason to suspect fraudulent or abusive conduct. *See id.* at 640. Unlike in *Burlington Northern*, the court cannot conclude from the evidence before it that HUD-OIG issued the subpoena in question as a regulatory instrument because HUD-OIG has identified specific reasons for investigating Banner and has further averred that it made an independent decision to investigate and subpoena Banner. [8] *Accord St. Nicholas Apartments*, 947 F. Supp. at 390 (finding *Burlington Northern* inapposite where HUD-OIG instituted "an audit of a particular HUD insured mortgagor which was suspected of equity skimming" rather than conducting the audit as "part of a long-term, nationwide audit").

8 In addition to Special Agent Smith's declaration, HUD-OIG further specified in its reply brief that it "commenced its investigation of potentially fraudulent activities by Banner on the basis of information provided by the United States Attorney's Office, and, thus, the OIG's investigation does not constitute a regulatory compliance audit." Petitioner's Reply at 10.

[**20] The court similarly finds that HUD-OIG's interaction with the USAO has not been improper. [9] Once again, Banner incorrectly characterizes HUD-OIG's assertions about its interaction with the USAO regarding Banner's conduct. Banner states that "the OIG concedes that they were asked by the U.S. Attorney to obtain records on behalf of the U.S. Attorney and to aid in an investigation of Banner." Respondent's Memorandum at 11. What HUD-OIG actually stated, however, as indicated above, is that the USAO requested HUD-OIG's assistance in investigating Banner. Moreover, Banner has cited this court to, and the court is aware of, no authority holding that cooperation and/or coordination between an Inspector General and the USAO is improper. Indeed, analogous authority is to the contrary. *See, e.g., Aero Mayflower Transit Co.*, 831 F.2d at 1146 (stating that "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"). Moreover, at least some degree of cooperation appears necessary

given the statutory requirement that [HN6]Inspectors General [**21] "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3 § 4(d).

9 To the extent that Banner relies on *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978), to support its contention of improper cooperation, the court finds this reliance misplaced. In *Marshall*, the Court refused to permit OSHA to conduct a warrantless inspection of a company's business premises because, among other reasons, the search did not fit the "closely regulated" business warrant exception. *See id.* at 313-15. *Marshall* is obviously distinguishable in several respects, including the fact that no government official is attempting to enter and search Banner's premises without a warrant. Moreover, the court notes that OSHA admitted having no particular reason to search Barlow's, whereas HUD-OIG has specifically asserted suspicions of fraud as grounds supporting the issuance of the subpoena.

[**22] Nor does the court find impropriety in HUD-OIG's decision to seek the same documents [*689] Judge Reid refused to allow CHA to obtain. Judge Reid refused a CHA request for enforcement of a CHA subpoena; neither HUD nor HUD-OIG were involved. Moreover, Banner has not explained why Judge Reid denied enforcement of the CHA subpoena except to say that he found the disputed documents to be proprietary and confidential and not the proper subject of a CHA administrative subpoena. This court need not arrive at the same decision with respect to HUD-OIG's request for enforcement. No issue of res judicata or collateral estoppel has been raised, [10] and, as the court previously discussed, HUD-OIG has broad investigative and subpoena powers, powers it has properly exercised in this case.

10 To the extent that Banner may be trying to suggest that CHA and either HUD or HUD-OIG are in privity, the court notes that Banner has made no showing that CHA was authorized to represent HUD in the adjudication of the issue. *See generally Facchiano Const. Co., Inc. v. U.S. Dept. of Labor*, 987 F.2d 206, 212 (3rd Cir. 1993) (holding that HUD and DOL were not in privity for purposes of giving res judicata effect to HUD order debarring contractor so as to preclude subsequent government-wide debarment order by DOL because HUD, which had more limited debarment authority than DOL, did not have authority to represent the U.S. in final adjudication of the issue in controversy: government-wide debarment).

[**23] **III. CONCLUSION**

For the foregoing reasons, the court grants HUD-OIG's request for summary enforcement of its subpoena *duces tecum*. Banner shall comply with the subpoena by January 11, 1999.

ENTER:

JOAN B. GOTTSCHALL

United States District Judge

DATED: December 9, 1998

LEXSEE

Caution
As of: Mar 18, 2011

UNITED STATES OF AMERICA AND JOHN ADAIR, INSPECTOR GENERAL OF THE RESOLUTION TRUST CORPORATION, Petitioners, v. HUNTON & WILLIAMS, Respondent.

Misc. Action No. 95-459 (RMU)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

952 F. Supp. 843; 1997 U.S. Dist. LEXIS 283

January 3, 1997, Decided
January 3, 1997, FILED

DISPOSITION: [**1] Petitioners' motion to enforce the subpoena duces tecum is granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner United States inspector general of a resolution trust corporation (inspector general) motioned to enforce the subpoena duces tecum against respondent law firm.

OVERVIEW: The inspector general retained the private law firm to provide it with legal services on a number of matters relating to the management of several failed savings and loans institutions, pursuant to its authority in 12 U.S.C.S. § 1441a(b)(11)(A). A letter later informed the law firm that it was selected for a random audit for fraud and abuse. The law firm refused to disclose original source material to the independent auditors. The instant subpoena duces tecum sought the production of information pertaining to conflict of interest searches conducted by the law firm, including a client list or timesheets for all lawyers in the firm who performed related work for the inspector general. The court held that the subpoena should be enforced because the inspector general had a lawful purpose and authority to issue the subpoena, the requested documents were reasonably relevant, and compliance was not unduly burdensome for the law firm. Nevertheless, the court agreed that the law firm had legitimate confidentiality concerns of its client identities. The court ordered a confidentiality agreement between the parties.

OUTCOME: The court granted the inspector general's motion to enforce the subpoena duces tecum because it was issued for a lawful purpose, it was reasonably relevant to such purpose, and it was not unduly burdensome to the law firm.

CORE TERMS: subpoena, audit, contractor, law firm, federal funds, recipient, conflict of interest, timesheets, General Act, subpoena duces tecum, investigate, legal services, reasonably relevant, confidential..., transferred, completion, oversight, disclose, lawful purpose, burdensome, personnel, merged, unduly, merger, detect, subpoena powers, confidentiality agreement, administrative subpoena, legislative history, grand jury

LexisNexis(R) Headnotes

Banking Law > Federal Acts > Financial Institutions Reform, Recovery & Enforcement Act > General Overview
Banking Law > Federal Deposit Insurance Corporation > Enforcement Powers
Banking Law > Regulatory Agencies > U.S. Resolution Trust Corporation
[HN1]Under the Financial Institutions Reform and Recovery Act of 1989, 12 U.S.C.S. § 1441a(b)(11)(A), the Office of the Inspector General of the Resolution Trust Corporation is authorized to hire outside contractors,

such as private law firms, to assist it in carrying out its duties.

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN2]It is well established that a court is compelled to enforce an administrative subpoena, if the court concludes that: (1) the subpoena was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the documents requested are relevant to that purpose; and (3) the subpoena demand is reasonable and not unduly burdensome.

Administrative Law > Agency Investigations > General Overview
Administrative Law > Separation of Powers > Legislative Controls > General Overview
Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN3]Under the Inspector General Act (Act), 5 U.S.C.S. App. 3 §§ 4(a)(1)-(3), the office of inspector general (OIG) of any given agency is charged with the responsibility of conducting, supervising, or coordinating audits and investigations relating to the programs of such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in such programs and operations. The Act provides a vehicle for the OIG to address the misuse of time, information and money in government agency activities. In order to accomplish this mission, Congress grants the OIG broad investigative powers, including the authority to make such investigations as are in the judgment of the Inspector General, necessary or desirable in carrying out his duties, pursuant to 5 U.S.C.S. § App. 3 § 6(a)(2).

Administrative Law > Separation of Powers > Legislative Controls > General Overview
Banking Law > Federal Deposit Insurance Corporation > Enforcement Powers
Civil Procedure > Pretrial Matters > Subpoenas

[HN4]Congress specifically provides the Office of Inspector General (OIG) with 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 by the Inspector General Act (Act), 5 U.S.C.S. App. 3 § 6(a)(4). Under the Act, 5 U.S.C.S. App. 3 § 3(a) the head of the agency in question may not prevent or prohibit the OIG from initiating, carrying out, or completing any audit or investigation. The OIG may therefore investigate both an agency's internal operations and its federally funded programs and to identify perpetrators of programmatic fraud.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas

[HN5]Subpoena power is absolutely essential to the discharge of the Inspector 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Separation of Powers > Legislative Controls > General Overview
Pensions & Benefits Law > Railroad Workers > General Overview

[HN6]The Inspector General Act, 5 U.S.C.S. App. § 9(a)(2) provides, in pertinent part, that such other offices or agencies or functions, powers, or duties as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of the Act, except that there shall not be transferred to an Inspector General, under paragraph (2) program operating responsibilities.

Banking Law > Federal Deposit Insurance Corporation > Supervisory Powers
Banking Law > Regulatory Agencies > U.S. Resolution Trust Corporation
Estate, Gift & Trust Law > Trusts > Modification & Termination

[HN7]The Completion Act, 12 U.S.C.S. § 1441a (1995) gives the Task force five duties: (1) examine the operations of the Federal Deposit Insurance Corporation and the Resolution Trust Corporation to identify, evaluate, and resolve differences in the operations of the corporations to facilitate an orderly merger of such operations; (2) recommend which of the management, resolution or asset disposition systems of the Resolution Trust Corporation should be preserved for use by the Federal Deposit Insurance Corporation; (3) recommend procedures to be followed by the Federal Deposit Insurance Corporation and the Resolution Trust Corporation in connection with the transition which will promote (A) coordination between the corporations before the termination of the Resolution Trust Corporation; and (B) an orderly transfer of assets, personnel, and operations.

Banking Law > Federal Acts > General Overview
Banking Law > Federal Deposit Insurance Corporation > Enforcement Powers
Banking Law > Regulatory Agencies > U.S. Resolution Trust Corporation
[HN8]The Completion Act, 12 U.S.C.S. § 1441a (1995) gives the Task force five duties: (4) evaluate the management enhancement goals applicable to the Resolution Trust Corporation under section 21A(p) of the Federal Home Loan Bank Act and recommend which goals should apply to the Federal Deposit Insurance Corporation; (5) Evaluate the management reforms applicable to the Resolution Trust Corporation under section 21A(w) of the Federal Home Loan Bank Act and recommend which of such reforms should apply to the Federal Deposit Insurance Corporation.

Banking Law > Federal Deposit Insurance Corporation > Enforcement Powers
Banking Law > Regulatory Agencies > U.S. Resolution Trust Corporation
[HN9]The preamble to the RTC Completion Act, 12 U.S.C.S. § 1441a pmbl., reads, in pertinent part that an Act to provide for the remaining funds needed to assure that the United States fulfills its obligation for the protection of depositors at savings and loan institutions, to improve the management of the Resolution Trust Corporation (RTC) in order to assure the taxpayers the fairest and most efficient disposition of savings and loan assets, to provide for a comprehensive transition plan to assure an orderly transfer of RTC resources to the Federal Deposit Insurance Corporation, to abolish the RTC, and for other purposes.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN10]A successor agency has the ability to enforce a subpoena issued by its predecessor.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN11]It is well settled that a district court must enforce an administrative subpoena if the information sought is reasonably relevant to a lawful investigation. "Reasonably relevant" means merely that the information must be relevant to any inquiry that the agency is authorized to undertake. The court must defer to the agency's appraisal of relevancy in connection with an investigative subpoena as long as it is not "obviously wrong." The information sought cannot be plainly incompetent or irrelevant to any lawful purpose of the agency.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN12]The burden of showing that a subpoena request is unreasonable is on the subpoenaed party. This burden is not easily met where the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Moreover, agencies are accorded extreme breadth in conducting their investigations.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN13]Questions of privilege are governed by federal law where the underlying action arises under federal, as opposed to state law.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN14]The nature of a subpoena enforcement proceeding rests soundly in federal law, and federal law of privilege governs any restrictions on its scope.

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For Defendant: Stephen L. Braga, Miller, Cassidy, Larroca & Lewin, Washington, D.C.

JUDGES: Ricardo M. Urbina, United States District Judge

OPINION BY: Ricardo M. Urbina

OPINION

[*845] **MEMORANDUM OPINION AND ORDER**

Granting Petitioners' Motion to Enforce the Subpoena Duces Tecum and Ordering the Parties to Enter Into a Confidentiality Agreement

I. Introduction

This matter comes before the court upon the United States' and the Office of the Inspector General of the Resolution Trust Corporation's (OIG-RTC) motion to enforce a subpoena duces tecum. [1] The RTC retained Hunton & Williams (H&W), a private law firm, to provide it with legal services on a number of matters relating to the management of several failed savings and loans (S&L) institutions. The subpoena seeks the production of information pertaining to conflict of interest searches conducted by H&W including, inter alia, a client list for all H&W attorneys who performed RTC-related work, or in the alternative, the timesheets, with client names redacted, [**2] relating to the 40 invoices H&W submitted to the RTC as part of the OIG-RTC's audit, prior to H&W accepting to represent the RTC on a number of matters.

1 Since the RTC and the FDIC merged in 1995, the Office of the Inspector General of the Federal Deposit Insurance Corporation (OIG-FDIC) joins the OIG-RTC in filing this motion.

After having considering the parties' submissions and the relevant law, the court concludes that the subpoena, as narrowed, shall be enforced. Specifically, the court concludes that: the OIG-RTC had the authority to issue the subpoena; the information sought by the subpoena is reasonably relevant to the Inspector General's audit of H&W; and finally, that compliance with the subpoena is not unduly burdensome to H&W. Nevertheless, H&W has raised legitimate privacy and confidentiality concerns with respect to the representation of its clients. The parties shall therefore enter into a confidentiality agreement.

II. Background

Petitioners are the United States of America and the [**3] OIG-RTC. Congress created the RTC in response to the S&L crisis of the 1980's. The RTC is the product of the Financial Institutions Reform and Recovery Act of 1989 (FIRREA), Pub. L. 101-73, 103-Stat. 1983, which is an amendment to the Federal Home Loan Bank Act (FHLBA). The primary mission of the RTC was to manage and resolve the financial problems of the failed S&L institutions for which conservators or receivers had been appointed beginning January 1, 1989. FIRREA, [*846] § 501(a), Pub. L. 101-73, 103 Stat. 183, 369 (codified as 12 U.S.C. § 1441a (b)(3)(A)(1) (Supp. V 1993)). [2] Pursuant to the Inspector General Act of 1978, Congress established the OIG-RTC as part of the RTC's administrative structure. 5 U.S.C. App. 3 §§ 11(1) and (2) (Supp. V. 1993). On December 31, 1995, the RTC's term expired and the majority of its assets, personnel and operations, including those of the OIG-RTC, were transferred to the Federal Deposit Insurance Corporation (FDIC).

2 The RTC was created in part to act as a successor to the Federal Savings and Loan Insurance Corporation as a conservator or receiver for such thrift institutions. FIRREA, § 1441 a(b)(11)(A). Pursuant to the Resolution Trust Completion Act, the assets, personnel and operations of the RTC (including those of the Office of the Inspector General of the RTC) were transferred to the FDIC. See Pub. L. 103-204 107 Stat. 2382, codified at statutory note to 12 U.S.C.A. § 1441a at 235-36. Thus, the FDIC now acts as a conservator or receiver for any remaining S&L entities that underwent financial crisis. See also discussion regarding the merger of the RTC and the FDIC, § II(A) (2)(b), infra.

[**4] The Respondent, H&W, is a private law partnership based in Richmond, Virginia, with a Washington, D.C. office located at 2000 Pennsylvania Avenue, N.W., 9th Floor, Washington, D.C. H&W provided a variety of legal services to the RTC from 1990 to 1995.

A. The OIG-RTC's Audit of Hunton & Williams

[HN1]Under FIRREA, the RTC was authorized to hire outside contractors, such as private law firms, to assist it in carrying out its duties. 12 U.S.C. § 1441a(b)(11)(A). Beginning in 1990, the RTC retained H&W to provide it with legal services on a number of matters relating to the management of several failed S&L institutions. As of July 1995, H&W has been paid over $ 2.9 million for such services. [3]

3 Declaration of Sharon Vander Vennnet, Assistant Inspector General of Audit for the RTC, attached to Pet. Mem. as Exhibit B (Vander Vennet Decl.).

On March 7, 1994, H&W was informed, by letter, that it had been selected for an audit by the OIG-RTC to determine whether the services it rendered to the RTC between [**5] 1991 and 1993 and the costs it charged to the RTC and the FDIC with respect to those services were "reasonable, adequately supported, and within the terms of applicable policies, regulations and agreements." [4]

4 Among the "applicable policies and regulations" in question is the requirement that any outside law firm disclose to the RTC and the FDIC (and to certify that it has disclosed) all or potential conflicts of interest.

The audit was initiated in accordance with a program established by the OIG to review all legal fees and expenses billed to the RTC by outside law firms in order to prevent fraud and abuse. Id. [5] A central component of the program is for the RTC to review each firm's conflict of interest policies and the application of such policies to the representation of the RTC. [6] The OIG must determine whether: (a) the firm maintained and operated a system to identify actual or potential conflicts of interest; (b) the firm informed the RTC (or the FDIC) of any actual or [*847] potential conflict; (c) [**6] the firm obtained a waiver from the RTC or the FDIC regarding any conflict or whether it withdrew its representation of the client causing the conflict; and finally, (d) the firm obtained a conditional waiver and complied with the conditions of the conditional waiver. Id.

5 The potential for fraud and abuse is great, given that the amount of outside legal work performed and the concomitant taxpayer dollars paid for such services is considerable. The RTC law firm audit program, was indeed "deemed necessary by the OIG because of the RTC's extensive reliance on outside counsel to assist it in performing its statutory duty to manage and resolve troubled savings and loans, and the fact that by the end of this year [1995] the RTC will have spent over $ 1.54 billion on legal services." Vander Vennet Decl. at 2 (emphasis added).

6 "In addition to actual or potential conflicts covered by the Code of Professional Responsibility, Model Rules or other applicable federal state provisions, there are other actual or potential conflicts situations particular to a law firm's representation of the RTC or FDIC which a law firm is obligated to disclose to them. These include, but are not limited to, such matters as participation of any member 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 member or associate of the firm is a borrower or guarantor; and representation of a client in a matter adverse to the FDIC or RTC." RTC Guide for Outside Counsel, February 1992, attached to Opp. Mem. as Exhibit E.

[**7] In May 1994, the H&W partner in charge of RTC matters, Mr. Jack Molenkamp, met with independent auditors under contract with the OIG-RTC and their sub-contract attorney, Mr. Greg Garvin. During this meeting, Mr. Molenkamp provided Mr. Garvin with copies of the firm's conflict policy and conflict forms as well as other information regarding the conflict surveys that were performed in 1991.

In June of 1994, Mr. Garvin asked to review the original source material that supported the conflict reports, including copies of the attorney responses to the firm survey data and the data from the computer conflicts search. Id. [7] Although Mr. Molenkamp allowed Mr. Garvin to interview the paralegal responsible for conflicts searches, Ms. Judy Bugay, he refused to provide him with the original source material on the grounds that it contained confidential information about the firm's clients and other individuals with whom the firm had "confidential relationships." Id. at 7.

7 "Original source material" is the actual conflicts questionnaire forms and responses by the attorneys, as opposed to summaries of such information (the conflict reports) prepared by the firm.

[**8] Subsequently, Mr. Ben Bornstein, of the OIG-RTC, personally contacted Mr. Molenkamp and requested a complete list of H&W clients, as well as all of the original source material for the 1991 and 1993 conflict checks. Id. Mr. Molenkamp again refused to provide the requested information without first obtaining client consent because it was his belief that such consent was mandated by Virginia ethical rules. Id. [8]

8 H&W found that many of the affected clients (i.e., those identified in the RTC conflicts source material) it contacted were unwilling to consent to having their identity revealed. Opp. Mem. at 8.

In October 1994, Mr. Garvin additionally requested to review random conflicts searches performed by H&W in relation to non-RTC cases, as opposed to only those related to RTC conflicts. Id. at 8. Mr. Molenkamp subsequently pulled several random files, but refused to allow the RTC to perform the random selection of conflicts memoranda itself. The firm also continued to refuse to disclose its client [**9] list. By way of a letter dated October 21, 1995, Mr. Molenkamp again advised Mr. Garvin that H&W was unable to comply with the RTC request because the firm was bound by Virginia Disciplinary Rule DR 4-101 which requires lawyers to protect "the confidences and secrets" of clients and a number of Legal Ethics Opinions by the Virginia State Bar that interpret the rule to include the protection of client identity. Id.

B. The Subpoena Duces Tecum

Over the next several months the parties attempted to compromise on the level of disclosure, but negotiations ultimately resulted in an impasse. As a result, on November 9, 1996, the OIG-RTC issued a subpoena duces tecum to H&W, requiring the production of:

> 1. A list of all clients for the law firm of H&W (covering the period December 1, 1990-December 31, 1993)
>
> 2. The June 1991 and June 1993 conflicts questionnaires issued to H&W attorneys and the attorney's responses, including draft responses produced by the attorneys and any other firm or contract personnel, issued in connection with RTC and FDIC work performed; and
>
> 3. H&W's conflicts memoranda and conflicts alert materials for the following RTC matters:

[**10]

(a)	LDID # 920065087:	Chapter 11 Bankruptcy Great Lakes
(b)	LDID # 920009454:	Country Club Square Limited Partnership
(c)	LDID # 920013911:	Richard and Brenda Knopp Matter;
(d)	LDID 920009255	Loan Default by John F. McMahon, Jr.;
(e)	LDID # 920034867:	NCR Corporation- Litigation (Disaffirmance)
(f)	LDID # 920058486:	[9] Edward J. Sarrazin- Foreclosure.

9 See Subpoena and Attachment A to RTC-OIG subpoena, attached to Pet. Brief as Exhibit C.

[*848] H&W responded by offering to provide all of the information requested except for a complete client list (item no. 1). H&W reiterated its position that it could not ethically reveal the names of all of its clients. The OIG-RTC responded by advising H&W that a subpoena duces tecum would be issued requiring the production of the documents.

On December 29, 1995, the OIG-RTC filed the Petition for Summary Enforcement of Administrative Subpoena Duces Tecum. Subsequently, the OIG-RTC voluntarily narrowed the subpoena. [**11] [10] Paragraph 1 of the subpoena now requires H&W to produce all attorney timesheets to support the 40 invoices submitted by H&W to the RTC as part of the audit or, in the alternative, a client list for those H&W attorneys who were handling RTC/FDIC matters during the period December 1, 1990 through December 31, 1993 (instead of a complete firm client list, as previously requested). Id. The narrowed subpoena allows H&W to redact from the timesheets all information concerning any activities and services rendered to non-RTC/FDIC clients. The timesheets, however, must reveal the identities of these non-RTC/FDIC clients and the time charged to these clients. Id. Paragraph 2 has now been modified to require all information which the firm has located pertaining to the June 1993 conflicts questionnaire and responses thereto. Paragraph 2 also requires H&W to submit an affidavit detailing their efforts to find any of the documents requested. Id. Paragraph 3 of the subpoena remains unchanged. Id. H&W, however, continues to object to the subpoena because it still requires H&W to disclose the identities of clients not related to RTC matters. Id at 11.

10 See Pet. Mem. P16 and attachment A thereto.

[**12] **II. Discussion**

A. Summary Enforcement of an Administrative Subpoena

[HN2]It is well established that a court is compelled to enforce an administrative subpoena, if the court concludes that: (I) the subpoena was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the documents requested are relevant to that purpose; and (3) the subpoena demand is reasonable and not unduly burdensome. 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. 1987); United States v. Aero Mayflower Transit Co., 265 U.S. App. D.C. 383, 831 F.2d 1142 (D.C. Cir. 1987); FTC v. Invention Submission Corp., 296 U.S.

App. D.C. 124, 965 F.2d 1086, 1089 (D.C. Cir. 1992), cert. denied, 507 U.S. 910, 113 S. Ct. 1255, 122 L. Ed. 2d 654 (1993); RTC v. Thornton 309 U.S. App. D.C. 384, 41 F.3d 1539, 1544 (D.C. Cir. 1994); accord United States v. Morton Salt Co., 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950).

The subpoena meets all three of these requirements. In addition, while H&W raises legitimate concerns regarding the preservation of attorney-client confidences, its contention that the information sought by the RTC is protected from the administrative subpoena [**13] under Virginia Disciplinary Rule DR-4-101 and by a number of Virginia State Bar Opinions is without merit.

1. Lawful Purpose

The question of whether the subpoena was issued for a lawful purpose turns on whether the OIG-RTC possessed the requisite statutory authority to issue it in the first place. H&W argues that the OIG-RTC did not have the statutory authority to investigate H&W as outside contractors. In the alternative, H&W posits that because the RTC terminated on December 31, 1995, the subpoena is no longer valid. Both arguments fail. First, the statutory law, legislative history and case law clearly establish that the OIG has the authority to audit and investigate outside contractors in order to detect fraud and/or abuse Second, the legislative history demonstrates that the merger effected between the RTC and FDIC by the RTC-Completion Act of 1993 included the transfer of the OIG-RTC's programs and operations [*849] to the OIG-FDIC. The issuance of the subpoena is therefore valid.

a. Legal Authority to Issue the Subpoena

The statutory law, legislative history and case law support the OIG-RTC's authority to investigate outside contractors for the purpose of detecting [**14] and preventing fraud by outside legal contractors. [HN3]Under the Inspector General Act, the OIG of any given agency is charged with the responsibility of:

> conducting, supervising or coordinating audits and investigations relating to the programs of such establishment [] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in [such] programs and operations.

5 U.S.C.A. App. 3 § 4(a)(1)-(3). In other words, the Act provides a vehicle for the OIG to address the misuse of time, information and money in government agency activities. In order to accomplish this mission, Congress granted the OIG broad investigative powers, including the authority "to make such investigations [] as are in the judgment of the Inspector General, necessary or desirable" in carrying out his duties. Id. at § 6(a)(2). [HN4]Congress specifically provided the OIG with 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 by this Act[.]

5 U.S.C.A. [**15] App. 3 § 6(a)(4). Under the Act, the head of the agency in question (in this case, the RTC/FDIC) may not prevent or prohibit the OIG from "initiating, carrying out, or completing any audit or investigation." Id. at § 3(a). The OIC may therefore investigate "both an agency's internal operations and its federally funded programs" and to identify "perpetrators of programmatic fraud." 1978 U.S.C.C.A.N. at 2702.

There is no explicit limit on the OIG's authority to conduct such investigations anywhere in the Inspector General Act. The OIG may initiate an audit or investigation of a federal recipient without particularized suspicion since "an administrative agency can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Morton Salt, 338 U.S. at 642-43. [11] Moreover, the legislative history of the Act clearly indicates that Congress specifically intended to extend the OIG's power of review over private entities working closely with government agencies because such entities are privy to highly confidential information and are paid large sums of federal funds for their services, creating a potential risk for abuse [**16] both inside and outside government agencies. See Adair v. Rose Law Firm, 867 F. Supp. 1111, 1115 (D.D.C. 1994).

> 11 See also FTC v. Texaco, Inc, 180 U.S. App. D.C. 390, 555 F.2d 862 (D.C. Cir.)(en banc), cert. denied, 431 U.S. 974 (1977).

In a House Report, Congress made it clear that Inspectors General "would have direct responsibility for conducting audits and investigations relating to []the prevention and detection of fraud and abuse [in order] to determine financial integrity and compliance with pertinent laws and regulations." H.R. Rep. 584, 95th Cong., 1st Sess. at 11,12 (1977). In a 1994 Senate report, Congress explicitly stated that the OIG-RTC was to "conduct [] audits and investigations of RTC operations and contractors in order to detect fraud, waste, and mismanagement in the disposition of insolvent S&L institutions and

their assets by the RTC." S. Rep. No. 311, 103rd Cong., 2nd Sess. (1994) (emphasis added). [12]

> 12 Hunton & Williams' reliance on the remarks of Congressman Levitas, who was one of the co-sponsors of the Act, is unavailing. Specifically, H&W points to Congressman Levitas' statement that "the offices of the Inspector General would not be a new layer of bureaucracy." Opp. Mem. at 22 n.20, (citing 124 Cong. Rec H 2950 (daily ed. Apr. 18, 1978)). Congressman Levitas, however, also states that while "the Inspector General would be responsible for audits and investigations only," its "public contact" would include the "investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars." Id. "Those persons" clearly include any recipient of federal funds that is in a position to cause such abuse, including outside contractors. Congressman Levitas' statement thus supports the conclusion that "Congress understood the Act to give the Inspector General the authority to investigate the recipients of federal funds[.]" Adair, 867 F. Supp. at 1116.

[**17] [*850] Another Senate report speaks of the need for the OIG to address the extensive corruption and waste in the operations of the federal government and among recipients of federal funds. In explaining the need for subsection 4(a)(3), which gives the Inspector General the "duty and responsibility to conduct [] other activities [] for the purpose of preventing and detecting fraud and abuse in [the agency's] programs and operations," the report states that:

> Without such a provision, the legislation could be read to suggest the [OIG] was simply responsible for coordinating and supervising audits and investigations. However, the Committee intends that the [OIG] will assume a leadership role in any and all activities which he deems useful in order to []prevent and detect fraud, waste and abuse in [the agency's] programs and operations.

S. Rep No. 1071, 95th Cong., 2d Sess. at 4 (1978), reprinted in 1978 U.S.C.C.A.N. 2676, 2702. Discussing the OIG's need for broad subpoena powers, the report further notes:

> [HN5]Subpoena power is absolutely essential to the discharge of the Inspector [] General's functions. There are literally thousands of institutions in the [**18] 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[.]

Id. at 2709. Citing this report, Judge Paul Friedman found that,

> the Act [] makes plain that Congress intended the Inspector General's investigatory authority to extend to the investigation of recipients of government funding 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.

Adair, 867 F. Supp. at 1116 (internal citations omitted). The court therefore concludes that the H&W audit and subpoena fall within the OIG-RTC's authority.

H&W additionally argues that the audit of H&W as an outside contractor does not fall within the OIG's authority because such an investigation constitutes a "program operating responsibility" and under § 9(a)(2) of the Inspector [**19] General Act an agency head may not transfer "program operating responsibilities" to the OIG. See 5 U.S.C.A. App. 3 § 9(a)(2). [13] Program operating responsibilities may be defined as those activities which are central to an agency's statutory mission versus those which are purely internal or administrative. In support of this argument, H&W primarily relies on Burlington Northern R.R. Co. v. Office of the Inspector General, 983 F.2d 631 (5th Cir. 1993).

> 13 [HN6] 5 U.S.C. App. § 9(a)(2). This section provides, in pertinent part:
>
> > Such other offices or agencies or functions, powers, or duties as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of the Act, except that there shall not be transferred to an Inspector General, under paragraph (2) program operating responsibilities.

Burlington Northern involved an attempt by the OIG of the Railroad Retirement Board (OIG-RRB) to investigate [**20] tax compliance by a regulated railroad that was not a recipient of federal funds. Specifically, the OIG-RRB attempted to enforce a subpoena seeking information regarding tax contributions and compensation reported under the Railroad Unemployment Insurance Act and the Railroad Retirement Act in order to ensure the respondent's compliance with those acts, a task which the court concluded was the direct responsibility of the RRB. Burlington Northern, 983 F.2d at 636. The court concluded that "when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, [the OIG] will lack the authority to make investigations or conduct audits which are designed to carry out that function directly." Id. at 642. The Burlington court, however, emphasized [*851] the "limited nature of [its] decision." Burlington Northern, 983 F.2d at 642. [14]

14 The court further noted that "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." Burlington Northern, 983 F.2d at 643.

[**21] H&W's reliance on Burlington Northern is misplaced for several reasons. As an initial matter, the facts of Burlington Northern are distinguishable from those of this case. This case involves the auditing by the OIG of a recipient of federal funds. The OIG is reviewing H&W's representations vis-a-vis any professional conflicts of interest it may have had relating to its representation of the agency. The audit also involves the oversight of RTC/FDIC personnel in carrying out the investigation. [15] In addition, in this case, the OIG-RTC's audit was specifically and narrowly tailored to detect or prevent fraud or abuse among outside law firms such as H&W. Conversely, the OIG investigation in Burlington Northern was in no way related to oversight responsibilities for a federal program, nor was the OIG-RRB investigating fraud, abuse or waste of federal funds. [16] Finally, as this court has previously concluded, "Burlington Northern imposed limits on the authority of Inspectors General that do not appear on the face of the [Inspector General Act] or in its legislative history." Adair, 867 F. Supp. at 1117. [17]

15 The "regulatory oversight" objected to in Burlington may be defined as the oversight of compliance by an agency with an act's regulatory provisions, as opposed to oversight of compliance by such agency with the internal policies of the agency. Since FIRREA regulates thrift institutions, not RTC contractors, the auditing of outside law firms does not constitute "regulatory oversight."

[**22]

16 The court found that the audit conducted by the OIG-RRB had "no oversight purpose and that it was "not designed to detect fraud and abuse." Burlington Northern, 983 F.2d at 639-41 n.4.

17 H&W also relies Winters Ranch Partnership v Viadero, 901 F. Supp. 237, 240 (W.D. Tex. 1995), to support its argument that the Inspector General's powers are "severely limited." (extending the logic of the Burlington Northern case). Yet the use of this case is equally ineffectual since the Burlington court itself held that "[the Inspector General Act] gives [Inspector Generals] broad -- not limited-investigatory and subpoena powers" 983 F.2d at 641 (emphasis in the original).

The facts of Winters are also distinguishable from those of this case. The Winters case involved subpoenas issued by the Office of the Inspector General of the Department of Agriculture directly to a participant in the federal wool and mohair price support programs administered under the National Wool Act of 1954, not, as in the instant case, a subpoena issued to a recipient of federal funds which assisted the agency in carrying out its activities.

[**23] On this matter, Adair v. Rose Law Firm is instructive. As in this case, Adair involved a subpoena duces tecum that was issued to a private firm (the Rose Law Firm) by the OIG-RTC requiring the production of a client list in connection with an audit. The audit sought to determine whether the firm had in fact disclosed all conflicts of interest. Adair, 867 F. Supp. at 1113-4. The firm refused to comply with the subpoena and sought a protective order. Id. In concluding that the subpoena did not exceed the OIG's authority under the Inspector General Act, the court stated:

> The OIG investigation into possible conflicts of interest directly concerns whether a government 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 . . . 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 OIG might conclude constituted waste and abuse. Any miscertification of the nonexistence of conflicts could have constituted false statements [**24] and fraud.

Adair, 867 F. Supp. at 1117. The Adair decision thus also establishes that the OIG-RTC possesses the requisite authority to conduct audits of outside contractors in order to prevent fraud and abuse. The OIG-RTC's audit of H&W does not, the court therefore concludes, constitute an attempt on the part of the OIG to usurp or execute a RTC regulatory [*852] function that lies beyond the delegated scope of its authority. [18]

> 18 The court additionally notes that in agreeing to the terms and conditions of the RTC representation, H&W was effectively put on notice that it could be asked to provide information other than a pamphlets and memoranda describing the firm's conflict check system. H&W knew or should have known that as a contract employee of the government its work and professional practices would be subject to greater scrutiny. H&W's legal services were provided pursuant to legal service agreements, retainer letters, FDIC and RTC guidelines, polices and regulations (12 C.F.R. Part 1606). One such agreement between the FDIC/RTC reads, in pertinent part, The general responsibilities of the Firm, including reporting requirements and billing information are set forth in the Guide for Legal Representation (Guide) dated June 1992[.] It is the Firm's responsibility to ensure that the Guide is followed by each person who works on FDIC matters. The FDIC periodically changes and/or modifies the Guide and may also issue clarifications and supplementary instructions, and the Firm hereby expressly agrees to be bound by any such changes, modifications, clarifications, and supplementary instruction." Legal Services Agreement, dated December 12, 1990 (attached to Opp. Mem. as Exhibit E) (emphasis added).

[**25] **2. The Merger of the RTC and the FDIC**

H&W argues that the duties and responsibilities of OIG-RTC, including the issuance of the subpoena, ended when Congress terminated the RTC and transferred its operations to the FDIC. The plain statutory language of the RTC Completion Act indicates, however, that Congress intended that the function and duties of the OIG-RTC would be transferred to the OIG-FDIC and that any residual activities of the OIG-RTC would be assumed and carried out to completion by the OIG-FDIC.

On December 17, 1993, Congress enacted the RTC Completion Act to serve as a transition plan for the transfer of RTC operations and resources to the FDIC. [19] Section 6 of the Act required the FDIC and the RTC to establish an inter-agency task force (the FDIC-RTC Transition Task Force) to coordinate "the transfer of assets, personnel and the operations of the RTC to the FDIC or the FSLIC Resolution Funds, as the case may be, in a coordinated fashion." Pub. L. 103-204 § 6, 107 Stat. 2382, codified at statutory note to 12 U.S.C.A. § 1441a, at 235-6 (1995). [20] Section 6(e) of the Act required the FDIC to submit a report describing which of the Task Force recommendations [**26] they were going to adopt. Appendix C to this report states that:

> 19 The sunset date of the RTC was set at December 31, 1995. Pub. L. 103-204 § 6, 107 Stat. 2382, codified at statutory note to 12 U.S.C.A. § 1441a, at 235-6 (1995).
>
> 20 [HN7]The Completion Act gave the Task force five duties:
>
> > (1) Examine the operations of the Federal Deposit Insurance Corporation and the Resolution Trust Corporation to identify, evaluate, and resolve differences in the operations of the corporations to facilitate an orderly merger of such operations.
> >
> > (2) Recommend which of the management, resolution or asset disposition systems of the Resolution Trust Corporation should be preserved for use by the Federal Deposit Insurance Corporation.
> >
> > (3) Recommend procedures to be followed by the Federal Deposit Insurance Corporation and the Resolution Trust Corporation in connection with the transition which will promote--
> >
> > > (A) coordination between the corporations before the termination of the Resolution Trust Corporation; and
> > >
> > > (B) an orderly transfer of assets,

personnel, and operations

[HN8](4) Evaluate the management enhancement goals applicable to the Resolution Trust Corporation under section 21A(p) of the Federal Home Loan Bank Act and recommend which goals should apply to the Federal Deposit Insurance Corporation.

(5) Evaluate the management reforms applicable to the Resolution Trust Corporation under section 21A(w) of the Federal Home Loan Bank Act and recommend which of such reforms should apply to the Federal Deposit Insurance Corporation. Pub. L. 103-204 § 6, 107 Stat. 2382, codified at statutory note to 12 U.S.C.A. § 1441a, at 235-6 (1995).

[**27]

[The] responsibility for the functions of RTC's Office of the Inspector General, and the residual workload associated with those functions, will be transferred to FDIC's Office of the Inspector General on December 31, 1995. [21]

21 Memorandum from Ricki Tigert, Chairman of the FDIC to all FDIC/RTC Employees, December 20, 1994, Appendix C to the FDIC Final Report On the FDIC Transition submitted to the House Comm. on Banking & Financial Services and Senate Comm. on Banking, Housing & Urban Affairs (attached to Pet. Reply Mem. as Exhibit 2).

[*853] It is thus clear from the Act's provisions that Congress specifically intended that the RTC's core functions, operations and programs, including those of its OIG, be assumed by the FDIC.

Fiscal Year 1996 funding submissions for the RTC reveal additional congressional as well as presidential support for the merger of the operations of the OIG-RTC and the OIG-FDIC. The Senate Appropriations Committee report states that "the office of the Inspector General [**28] of the RTC will be merged with the FDIC-OIG when the RTC terminates operations at the end of this calendar year." S. Rep. No. 140, 104th Cong., 1st Sess. 139 (1995). The presidential budget submissions for Fiscal Year 1996 also take into account that "in accordance with the RTC Completion Act, the FDIC-OIG will be merged with the RTC-OIG after the RTC sunsets on December 31, 1995." [22]

22 Budget of the United States Government, Fiscal Year 1996, Office of the Management and Budget, Appendix at 1051.

The legislative record similarly demonstrates that when Congress merged the RTC into the FDIC. it did not intend that the RTC's ongoing activities immediately cease. Instead, it called for an "orderly transfer" of operations that would be as important to the FDIC in its continued work to solve the problems of the failed S&L institutions as they were to the RTC. Pub. L. 103-204 at 12 U.S.C.A. 1441a pmbl., § 6(c)(1), (c)(3)(B). [23] The OIG-RTC's issuance of the subpoena to H&W falls within this transfer of operations. [**29] The FDIC has a duty as well as an important interest in obtaining enforcement of the subpoena and completing the H&W audit.

23 [HN9]The preamble to the RTC Completion Act reads, in pertinent part:

> An Act to provide for the remaining funds needed to assure that the United States fulfills its obligation for the protection of depositors at savings and loan institutions, to improve the management of the Resolution Trust Corporation (RTC) in order to assure the taxpayers the fairest and most efficient disposition of savings and loan assets, to provide for a comprehensive transition plan to assure an orderly transfer of RTC resources to the Federal Deposit Insurance Corporation, to abolish the RTC, and for other purposes.

Pub. L. 103-204 at 12 U.S.C.A. 1441a pmbl. (emphasis added).

Furthermore, nothing in the case law suggests that the merger of the RTC and the FDIC terminated the subpoena power of the OIG-RTC. Drawing somewhat of a tenuous comparison H&W asserts that the OIG, like a

grand jury, loses [**30] its investigatory power once its term expires. [24] Although courts have drawn the analogy between the subpoena power of a grand jury and that of an administrative agency, it is generally to underscore the similarity between the two bodies' extensive powers of inquiry, not, as H&W suggests, in order to delineate the duration of such investigative authority. [25]

24 Many of the cases H&W cites are not only factually distinguishable from the present case but do not even make the link between the administrative agency subpoena power and that of a grand jury. Both Shillitani v. United States, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966) and Loubriel v. United States, 9 F.2d 807 (2nd Cir. 1926), involved the subpoena and coercive imprisonment of contumacious witnesses. In these cases, the courts concluded that the witnesses could no longer be confined once the grand jury expired because they would no longer have the opportunity to purge themselves of contempt.

25 For example, in Morton Salt, the Supreme Court drew the comparison in order to highlight the broad power that both a grand jury and an administrative agency have to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." 338 U.S. at 642-3; see also Thornton, 41 F.3d at 1543.

[**31] Finally, the OIG-RTC's term did not essentially "expire" when the agency merged with the FDIC. As discussed above, its duties and operations, including any "residual work" such as the H&W audit, were assumed by the OIG-FDIC. [26] Requiring the FDIC to re-issue the subpoena is judicially inefficient. As the Tenth Circuit held in In re Grand Jury Proceedings, 658 F.2d 782 (10th Cir. 1981), where documents had been subpoenaed from an attorney, requiring the issuance of a second subpoena after the first subpoena expired "would simply result in a [*854] complete waste of judicial time." In re Grand Jury Proceedings, 658 F.2d at 784. [27] Since the OIG-FDIC maintains the same interest in detecting fraud and abuse among any outside law firms that are working or have worked on S&L matters in the past, there is no reason why the FDIC should have to re-issue the subpoena. The changed circumstances of the RTC have not affected the validity of its subpoena.

26 See discussion, § II(A)(1)(b), supra.

27 There is case law specifically supporting [HN10]the ability of a successor agency to enforce a subpoena issued by its predecessor. In United States v Wickland, 619 F.2d 75 (Temp. Emer. Ct. App. 1980), the district court of the Eastern District of California enforced a subpoena issued by the Federal Energy Administration (FEA) even though at the time of the enforcement hearing, the FEA's duties and responsibilities had been merged into those of the newly created Department of Energy (DOE).

[**32] **B. Relevance**

[HN11]It is well settled that a district court must enforce an administrative subpoena if the information sought is "reasonably relevant" to a lawful investigation. FTC v. Invention Submission Corp. 296 U.S. App. D.C. 124, 965 F.2d 1086, 1089 (D.C. Cir. 1992), cert. denied, 507 U.S. 910, 122 L. Ed. 2d 654, 113 S. Ct. 1255 (1993) (quoting Texaco, 555 F.2d at 872). "Reasonably relevant" means "merely 'that the information must be relevant to *some* (any) inquiry that the [agency] is authorized to undertake." United States v. Oncology Service, 60 F.3d 1015, 1020 (3d Cir. 1995) (internal citations omitted) (emphasis in original). The court must defer to the agency's appraisal of relevancy in connection with an investigative subpoena as long as it is not "obviously wrong." See e.g., Invention Submission Corp. 965 F.2d at 1089; Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 877 n.32; RTC v. Walde, 305 U.S. App. D.C. 183, 18 F.3d 943, 946 (D.C. Cir. 1994); FTC v. Carter, 205 U.S. App. D.C. 73, 636 F.2d 781, 787-788 (D.C. Cir. 1980). The information sought cannot be "plainly incompetent or irrelevant to any lawful purpose of the cy." Morton Salt, 338 U.S. at 652 (quoting Endicott Johnson Corp v. Perkins, 317 U.S. 501, 509, 87 L. Ed. 424, 63 S. Ct. 339 (1943)). [28] The Government [**33] has successfully demonstrated that the information sought by the subpoena is indeed relevant to the OIG-RTC's investigation.

28 The court rejects H&W's argument that as to a determination of whether or not the subpoena was reasonably relevant, the court should apply the "arbitrary and capricious" standard set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) (1988) rather than the standard set forth in controlling Supreme Court and D.C. Circuit cases. Indeed, H&W presents no compelling reason-- no reason at all, in fact-- why the well-established precedent of according broad deference to an agency determination of relevance should be ignored by the court. The question is whether the OIG-RTC's issuance of the subpoena was reasonably relevant to its initial, lawful audit of H&W, not whether its decision was arbitrary and capricious.

The OIG-RTC's determination that the subpoenaed information is relevant to its investigative audit of H&W

is far from being "obviously wrong." The OIG-RTC [**34] must be able to ascertain that H&W in fact revealed all conflicts of interest based on the results of its own investigation rather than merely on H&W's representations. To that end, the OIG-RTC's ability to review the original conflicts documentation as opposed to carefully selected samples or summaries of such information is not only relevant but essential since such material constitutes the most reliable source of evidence as to whether H&W complied with the RTC's conflicts rules. [29] The most effective manner for the OIG-RTC to identify whether a contractor is truly complying with the relevant policies is to conduct routine audits and to review information such as the data requested by the subpoena.

H&W asserts that the subpoena is not reasonably relevant to the audit because it seeks information from unrelated third-parties. In support of this contention, H&W relies on several cases where subpoenas were enforced except to the extent that they requested personal information from such unrelated [*855] third parties or that they requested information for some purpose irrelevant to the agency's initial, lawful investigation. [30] In this case, however, the subpoena seeks information directly [**35] from H&W, a government contractor and a recipient of federal funds, not unrelated third-parties. The subpoena requests neither personal information regarding H&W clients nor any information regarding the nature of H&W's representation or consultation of the same; it merely asks that H&W reveal the names of those clients appearing on the timesheets and conflicts questionnaires. This information is clearly relevant to an audit designed to detect fraud or abuse relating to the disclosure of conflicts by outside contractors. [31]

29 Government Auditing Standards require auditors to review the original documents used by the firm to discover and identify conflicts of interest in connection with this audit. To meet Government Auditing standards, auditors must review the timesheets to support the invoices comprising the name of the attorney and/or any other professional providing the services in question, the date upon which the services were provided and the identity of the client for whom the services were provided. Vander Vennet Decl. at P21 (emphasis added).

30 H&W relies on three cases. In RTC v Walde, 305 U.S. App. D.C. 183, 18 F.3d 943, 944 (D.C. Cir. 1994), the court refused to enforce a subpoena that requested personal financial information from directors and officers of failed S&L institutions "for the sole purpose of determining the subpoenaed person's net worth." In Thorton, 41 F.3d at 1541, the court held that an agency's "authority to subpoena documents from a partnership solely to ascertain the cost-effectiveness of litigation did not survive the agency's filing of suit." In In Re McVane, 44 F.3d 1127, 1131, 1138 (2nd Cir. 1995), the court enforced subpoenas except to the extent that they sought extensive personal financial information from directors' spouses and family members. These cases are clearly distinguishable from this case. H&W also argues that the Fourth Amendment grants individuals greater protection than corporations in personal matters, including "exemption of his private affairs...and papers from the inspection and scrutiny of others." Yet the revelation of an individual's identity pursuant to a lawfully issued government subpoena hardly qualifies as an unreasonable intrusion into the private affairs of a H&W client.

[**36]

31 H&W also posits that the information is not "inevitably necessary" to the audit. The issue presented, however, is whether the information is "reasonably relevant" to the investigation at hand.

C. Undue Burden

The enforcement of the subpoena would not, the court concludes, pose an undue burden upon H&W. [HN12]The "burden of showing that a subpoena request is unreasonable is on the subpoenaed party." Texaco, 555 F.2d at 882; Appeal of FTC Line of Business Report Litig, 193 U.S. App. D.C. 300, 595 F.2d 685, 703 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978) (reasonableness of request is "presumed" absent showing of undue burden or disruption). This burden "is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." Texaco, 555 F.2d at 882. Moreover, agencies are accorded "extreme breadth" in conducting their investigations. Linde Thompson, 5 F.3d at 1517. In this instance, H&W has failed to meet its burden.

H&W protests that compliance with the subpoena is unduly burdensome because it would require the firm [**37] to obtain consent from a "substantial number" of clients. The OIG, however, has voluntarily narrowed the subpoena to require H&W to produce a client list for only those attorneys that worked on RTC matters, or, in the alternative, to produce the attorney timesheets corresponding to the 40 invoices that comprised the audit sample. While H&W must disclose all client names on these timesheets, the subpoena allows H&W to redact all information regarding the nature and substance of any representation. Thus, the subpoena, as narrowed, would require H&W to contact only those clients whose names appear on the set of timesheets in order to inform them that their identities must be revealed in connection with a

government subpoena. Such an imposition, the court concludes, is not unduly burdensome. [32]

32 Courts have enforced subpoenas imposing far greater burdens upon the parties. See, e.g., United States v. Firestone Tire and Rubber Co., 455 F. Supp. 1072, 1083 (D.D.C. 1978), where the court enforced a subpoena although Firestone alleged that compliance would require 100,000 man hours; and Oklahoma Press Club v. Walling, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946), where the court enforced a subpoena requiring the production of all of the trading records that had been compiled during the company's history.

H&W further argues that requiring it to reveal client identities is unduly burdensome because doing so will cause a "chilling" effect on its client relationships. The role of the court in determining whether to enforce an administrative subpoena is "strictly limited." Texaco, 555 F.2d at 871-72, (citing Endicott Johnson 317 U.S. at 501). It is therefore well beyond the scope of this court's authority to determine what, if any effect the disclosure of such information will have on the firm's client relationships. The court notes, however, that any effect on H&W's client relationships should be minimal since it is being judicially ordered to comply with a subpoena.

[**38] [*856] **III. Confidentiality of Client Identities**

H&W contends that Virginia law relating to the issue of privilege prevents it from disclosing the identities of any non-related RTC clients for whom it has not obtained consent. H&W argues that the identity of its clients is protected by Virginia Disciplinary Rule DR 4-101, which requires lawyers to protect the confidences and secrets of clients "when read in conjunction with certain Virginia State Bar opinions." [33] Federal law, however, not state law, applies in this instance so H&W may not use any state law to prevent disclosure of the subpoenaed information. [HN13]Questions of privilege are governed by federal law where the underlying action arises under federal, as opposed to state law, as in this case. Fed.R.Ev. 501; see also United States v. Zolin, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989). Moreover, the D.C. Circuit has stated that "[HN14]the nature of a subpoena enforcement proceeding, under common sense and precedents in this circuit and elsewhere []rests soundly in federal law, and federal law of privilege governs any restrictions on its scope." Linde Thompson, 5 F.3d at 1513. Importantly, the court in Linde Thompson, rejected arguments [**39] that state law concerning privilege should apply. The court declined "the opportunity to adopt a particular state's privilege law where, as here, the documents in question are sought by a governmental agency with a nationwide mandate to redress matter of pressing public concern." Id. at 1514.

33 The Virginia State Bar Opinions that H&W cite interpret DR-4-101 to include the protection of client identity as matter of privilege where: (1) there is a case of double identity involved in the representation of a client (Va. Legal Ethics Op. 1270); (2) the client has specifically requested that such information be held "secret or inviolate" (Va. Legal Ethics Op. 1285); and (3) the client is recipients of legal aid and has had its case closed either through negotiated settlements or by administrative decision (Va. Legal Op. 1300).

H&W's argument is considerably weakened by the fact that, as it so acknowledges, DR 4-101 does not specifically prohibit the disclosure of client identities as a matter of privilege and also by the fact that the Virginia State Bar Opinions it cites apply to narrow circumstances distinguishable from this matter.

[**40] Federal courts have found that, absent special circumstances, client-identity is not protected by the attorney-client privilege. See e.g., Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992); United States v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991). These courts have found that client identity does not constitute a privileged communication because it does not reveal a "fundamental communication in the attorney-client relationship." See, e.g., Clarke, 974 F.2d at 129. Although "portions of bills, ledgers, statements and time records that reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided. . .[do] fall within the privilege," [34] the instant subpoena does not require H&W to disclose such information. Consequently, H&W's clients' identities are not privileged. Moreover, as H&W additionally concedes, if the court enforces the subpoena, H&W's "legal obligation to comply with a court order would override its ethical duties to its client." [35]

34 Clarke, 974 F.2d at 129.

[**41]

35 Opp. Mem. at 13 n.13, citing Va. DR 4-101(c)(ii); accord ABA Model Code of Professional Responsibility DR 4-101(C)(2).

The court, however, recognizes that H&W's clients, particularly those who have no relationship to any

RTC/FDIC matter, have a privacy interest that should be judicially protected. The enforcement of a subpoena is an independent judicial action, and the court is "free to change the terms of an agency subpoena as it sees fit." Adair, 867 F. Supp. at 1118-9, (quoting United States v. Exxon Corp., 202 U.S. App. D.C. 70, 628 F.2d 70, 77 (D.C. Cir.), cert. denied, 446 U.S. 964, 64 L. Ed. 2d 823, 100 S. Ct. 2940 (1980)). It therefore falls within the discretion of the court to go beyond the scope of the subpoena in order to provide measures of confidentiality if it finds "that the agency... has not provided safeguards sufficient to protect the interests [*857] of [the parties] at risk." Id., (citing FTC v. Owens-Coming Fiberglass Corp., 626 F.2d 966, 974, 200 U.S. App. D.C. 102 (D.C. Cir. 1980)). Indeed, "in appropriate circumstances, [the court] may modify a subpoena []to incorporate a confidentiality agreement." Id. (citing [**42] Exxon Corp., 628 F.2d at 71).

Presently, the Government has made no assurances that it will protect the information (including the identities of clients) disclosed by H&W (or any other information for that matter). In light of the fact that Congress has found that confidential information obtained by the RTC has "leaked" in the past, it is appropriate for the court to ensure that the confidential information of innocent parties be protected. [36] Parties have a legitimate expectation that "even the fact of their engagement will not become a matter of public knowledge." Id., (citing October 20, 1994, Hearing Transcript at 35-44). The court shall therefore order the parties to enter into a confidentiality agreement. The parties are to attempt to reach this agreement between themselves. In that regard they are referred to the agreements appended to the Adair decision as Appendices A and B.

36 At a 1994 Senate Hearing before the Senate Banking, Housing and Urban Affairs Committee, the Interim Deputy Chief Executive Officer of the RTC, John E. Ryan admitted that "we haven't been keeping those matters confidential. 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[.] And we've had a lot of premature leaks of very sensitive information." Ryan stating that although "the RTC has a responsibility to keep... information confidential... [the RTC] breached that responsibility." Adair, 867 F. Supp. at 1119 (citing Hearings Relating to Madison Guaranty S&L Before the Sen. Comm. on Banking, Housing & Urban Affairs, 103d Cong., 2d Sess. 48-49 (1994)).

[**43] **IV. Conclusion**

The government has successfully demonstrated that the subpoena has been issued for a lawful purpose, is reasonably relevant to such purpose and is not unduly burdensome on H&W.

Accordingly, it is this 3 day of January 1997,

ORDERED that the Petitioners' motion to enforce the subpoena duces tecum be and is hereby **granted**; and it is

FURTHER ORDERED that the parties report to the court 30 days from the date of this order regarding their progress in executing a confidentiality agreement. [37]

37 The parties shall file a joint status report.

SO ORDERED.

Ricardo M. Urbina

United States District Judge

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

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, Inspector General of the Resolution Trust Corporation, filed for summary enforcement of an administrative subpoena duces tecum in the United States District Court for the District of Columbia. Respondent law firm also filed a motion for a protective order.

OVERVIEW: Respondent law firm had entered several legal service agreements with the Federal Deposit Insurance Corporation and the Resolution Trust Corporation (RTC) to provide them with legal services with respect to a number of failed thrift institutions. These service agreements had imposed obligations on the law firm to disclose, and to certify that it had disclosed, all actual or potential conflicts of interest to the FDIC and the RTC. The Inspector General (IG) had initiated an investigation of the law firm and sought to identify conflicts of interest by reviewing and comparing the identities of its clients against the records of the RTC. The firm argued the Inspector General's subpoena exceeded his statutory authority. The court disagreed and found that respondent failed to carry its burden of proving that the subpoena exceeds the statutory authority of the Inspector General.

OUTCOME: The court granted petitioner's subpoena because respondent failed to carry its burden of proving that the subpoena exceeded the IG's statutory authority.

CORE TERMS: subpoena, confidentiality, law firms, conflicts of interest, disclosure, entity, notice, disclose, confidential, contractor, alpha, protective order, investigate, General Act, recipient, audit, leak, seal, data base, requesting, federal funds, prior notice, privacy, statutory authority, thrift, redacted, documents produced, legislative history, recommendations, burdensomeness

LexisNexis(R) Headnotes

Banking Law > Federal Acts > Financial Institutions Reform, Recovery & Enforcement Act > General Overview
Real Property Law > Financing > Federal Regulations > General Overview

[HN1]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.S.§ 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.S. § 1441a(b)(10)(A).

Administrative Law > Agency Investigations > Scope > Subpoenas

Banking Law > Federal Acts > Financial Institutions Reform, Recovery & Enforcement Act > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
[HN2]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.

Administrative Law > Agency Investigations > General Overview
Banking Law > Federal Acts > Financial Institutions Reform, Recovery & Enforcement Act > General Overview
[HN3]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.S. App. 3 § 4(a)(1).

Banking Law > Federal Acts > Financial Institutions Reform, Recovery & Enforcement Act > General Overview
[HN4]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.S. App. 3 § 2. Sections 4(a)(2) through 4(a)(5) grant to Inspectors General the responsibility for conducting reviews and making recommendations regarding fraud, abuse and waste in programs administered or financed by the agency. 5 U.S.C.S. App. 3 §§ 4a(2)-(a)(5). Section 5 requires the IG to prepare reports regarding its activities, including its findings regarding fraud, abuse and waste in programs of the agency. 5 U.S.C.S. App. 3 § 5.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
[HN5]Since the enforcement of 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. 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. In appropriate circumstances, it may modify a subpoena it is asked to enforce to incorporate such confidentiality provisions.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas
[HN6]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. 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. 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.

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

OPINION BY: 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). [1] [HN1]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).

1 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. [2] Rose certified that it had found no conflicts of interest that had not already been waived. Adair Decl. P 4; Blight Decl. P 6.

2 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 Of The Inspector General [**9]

[HN2]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. [3]

> 3 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.

[HN3]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.

[HN4]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 en-

> courage 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. [4] 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 self." Burlington Northern R.R. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d at 642, 643.

> 4 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 argued 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. [HN5]"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.

[HN6]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. [5]

5 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. [6] 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.

> 6 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

Positive
As of: Mar 18, 2011

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff government contractor filed the motion for summary judgment in the action to enjoin defendant United States General Services Administration (GSA) from withholding audit materials pursuant to the Freedom of Information Act (FOIA), 5 U.S.C.S. § 552. The GSA submitted a motion for summary judgment in reliance upon FOIA Exemption 7(A), 5 U.S.C.S. § 552(b)(7)(A), permitting nondisclosure of records compiled for law enforcement purposes.

OVERVIEW: The government contractor sought disclosure under the FOIA of post-award audit reports prepared by the GSA. The court first held that the law enforcement proceeding against the government contractor started as a non-routine investigation of the government contractor within the GSA Office of Audits. Until the audit process was complete, it was cloaked with protection from disclosure under Exemption 7 of the FOIA, 5 U.S.C.S. § 552(b)(7)(A). The court also held that Exemption 7 permitted the GSA to withhold materials compiled or incorporated into a law enforcement investigatory file, even if they were originally collected for benign purposes. Because the final audit reports sought by the government contractor were made part of the law enforcement investigation file and disclosure of the reports reasonably could be expected to interfere with the ongoing criminal investigation, the reports were exempt from disclosure under Exemption 7. Amendments to the FOIA did not compel disclosure of the audit reports. The court granted summary judgment in favor of the GSA.

OUTCOME: The court granted the GSA's motion for summary judgment in the action brought by the government contractor to compel disclosure of audit materials under the FOIA. The court dismissed the proceeding.

CORE TERMS: exemption's, law enforcement purposes, audit, compiled, investigatory, routine, disclosure, audit reports, enforcement proceedings, interfere, summary judgment, post-award, criminal investigation, ongoing, pre-award, auditing, exempt, law enforcement, threshold, housing, investigative, integral part, requested materials, qualify, violation of law, enforcement agency, investigator, withholding, suspected, discovery

LexisNexis(R) Headnotes

Administrative Law > ***Governmental Information*** > ***Freedom of Information*** > ***Defenses & Exemptions*** > ***General Overview***
Administrative Law > ***Governmental Information*** > ***Freedom of Information*** > ***Disclosure Requirements*** > ***General Overview***
[HN1]The Freedom of Information Act requires disclosure of requested records and documents unless the requested material fits within one of the nine statutory exemptions set out in 5 U.S.C.S. § 552(b).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Enforcement Proceedings
[HN2]The seventh exemption of the Freedom of Information Act provides in relevant part that the section does not apply to matters that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C.S. § 552(b)(7)(A) (amended 1986).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Enforcement Proceedings
[HN3]In order to fall within Freedom of Information Act 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.S. § 552 (b)(7)(A).

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN4]Determining whether records have been compiled for law enforcement purposes often requires a careful analysis of the functions of the agency involved. It is important to distinguish an agency serving principally the cause of criminal law enforcement from one having an admixture of law enforcement and administrative functions.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN5]When an agency's primary function is law enforcement, agency claims of satisfaction of Freedom of Information Act Exemption 7's threshold requirement call for less rigorous scrutiny. 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN6]If records are accumulated or generated in the course of an inquiry as to an identifiable possible violation of law, then they are eligible for protection under Freedom of Information Act Exemption 7, 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN7]The Office of the Inspector General is a "mixed function agency." Each of its 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.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN8]Differentiating records generated pursuant to routine administrative functions from records compiled as part of an inquiry into specific suspected violations of law has become the accepted method for determining whether or not records of a mixed function agency qualify for Freedom of Information Act Exemption 7, 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN9]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 Freedom of Information Act Exemption 7 protection. 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN10]At no time has the plain meaning of the Freedom of Information Act (FOIA) required an exclusive focus on whether records or information was originally compiled for law enforcement purposes. Rather, in determining whether materials can be covered under Exemption 7, the FOIA 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.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN11]Materials originally drafted, generated or even compiled for one purpose, even if that purpose is benign, subsequently can be "compiled for law enforcement purposes."

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN12]The fact that the source of the requested 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 Freedom of Information Act Exemption 7, 5 U.S.C.S. § 552(b)(7), once they hold an important office in an ongoing criminal investigation. 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.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN13]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."

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN14]Information 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 the Freedom of Information Act (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. 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN15]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 the Freedom of Information Act, those materials, once combined and incorporated in a law "enforcement "mosaic," may well be entitled to Exemption 7, 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN16]The process of determining 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 Freedom of Information Act 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.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN17]Congress amended Freedom of Information Act Exemption 7 in order to respond to four decisions 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. 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN18]The thrust of congressional concern in its amendment of Freedom of Information Act Exemption 7 was to make clear that the Exemption did not protect

material simply because it was in an investigatory file. 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN19]The debate over the 1974 amendments to the Freedom of Information Act indicates they were never intended to permit the release of materials in investigatory files if such release would undercut law enforcement efforts.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Enforcement Proceedings
[HN20]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 Freedom of Information Act Exemption 7(A). 5 U.S.C.S. § 552(b)(7)(A).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > Enforcement Proceedings
[HN21]The government has the burden of establishing that release of the requested records could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C.S. § 552(b)(7)(A).

JUDGES: Stanley Sporkin, United States District Judge.

OPINION BY: 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. [1] 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."

> 1 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, [2] 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.

2 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. [3]

3 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. [4] 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. [5]

4 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]

5 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. [6] 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. [7]

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

7 *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. [8] 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.

8 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]." [9] 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. [10] 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] [11] plaintiff filed this action on May 15, 1987.

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

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

11 *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)). [HN1]The FOIA requires disclosure of requested records and documents unless the requested ma-

terial fits within one of [**10] the nine statutory exemptions set out in subsection (b), 5 U.S.C. § 552(b). [12]

> 12 *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. [HN2]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). [HN3]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**

[HN4]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. [HN5]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). [13] In reaching that conclusion, the court emphasized that, "the purpose of the 'investigatory files' is thus the crucial factor." *Id.* at 82. [14] [HN6]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.

> 13 *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]

> 14 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. [15] 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)." [16]

> 15 *See* Plaintiff's Summary Judgment Brief at 8.
>
> 16 *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, [HN7]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" [17] 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.

17 [HN8]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. [18]

18 *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, [19] 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. [20] 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.

19 *See* Transcript of Oral Argument at 39-42, 47-48.

20 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)). [21]

21 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. [22] An investigation was underway.

22 *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).

[HN9]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 [HN10]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 construction 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, [HN11]materials originally drafted, generated or even compiled for one purpose -- even if that purpose is benign -- subsequently can be "compiled for law enforcement purposes."

[HN12]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. [HN13]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.

[HN14]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, [HN15]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. [23]

> 23 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 ex-

pense and effort of separating out materials based on the manner and context in which they were originally obtained or generated by the government. [24]

24 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.

[HN16]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. [25] 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.

25 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. [26]

26 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), [HN17]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. [27] 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, [HN18]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). [28]

27 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]

28 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, [HN19]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 es, *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." [29] 556 F. Supp. at 335.

> 29 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. [30] In short, [HN20]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).

30 *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. [31]

31 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. [32] 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.

32 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*

[HN21]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). [33] 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. [34]

> 33 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.
>
> 34 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. [35] The documents also contain the opinions and reasoning of the principal auditor, Duvernay, regarding his suspicions of fraud. [36]

> 35 *See* Cavallo Declaration at para. 7.
>
> 36 *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. [37]

> 37 *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. [38] 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.

38 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

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, PETITIONERS v. JOHN DOE CORPORATION

No. 88-1083

SUPREME COURT OF THE UNITED STATES

493 U.S. 146; 110 S. Ct. 471; 107 L. Ed. 2d 462; 1989 U.S. LEXIS 5837; 58 U.S.L.W. 4067; 17 Media L. Rep. 1225; 35 Cont. Cas. Fed. (CCH) P75,737

October 2, 1989, Argued
December 11, 1989, Decided

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

DISPOSITION: 850 F.2d 105, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner government agencies sought a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit wherein the court held that Exemption 7 of the Freedom of Information Act, 5 U.S.C.S. § 552(b)(7), did not protect records from disclosure that were originally compiled for non-law enforcement purposes but had since acquired investigative significance.

OVERVIEW: Respondent defense contractor received a grand jury subpoena requesting documents from an audit performed by a government agency seven years earlier. Respondent requested the documents from the agency under the Freedom of Information Act, 5 U.S.C.S. § 552. The agency denied the request under Exemptions 7(A) and (E) of the Act claiming that compliance would interfere with the grand jury proceeding and provide respondent with information that could be useful to it in connection with the anticipated criminal litigation. The district court ruled for the government and the appeals court reversed explaining that the documents were not exempt under § 552(b)(7) because they were not originally compiled for law enforcement purposes but rather as part of an audit. The United States Supreme Court reversed and held that Exemption 7 of the Act did not require that a record be compiled for law enforcement purposes from the outset in order to be protected by the Exemption. Rather, the plain language of the statute as well as its legislative history indicated that the documents need only to have been compiled for a law enforcement purpose when the response to the request under the Act was made.

OUTCOME: The court reversed and remanded holding that exemption under the Freedom of Information Act did not require that a record be compiled for law enforcement purposes from the outset in order to be protected by the exemption. Rather, the plain language of the statute and its legislative history showed that the documents need only to have been compiled for a law enforcement purpose when the response to the request under the Act was made.

CORE TERMS: exemption, compiled, law enforcement purposes, disclosure, investigatory, workable, exempt, audit, compile, non-law-enforcement, assembled, gathered, disclose, grand jury, transferred, Freedom of Information Act FOIA, different purpose, legislative history, correspondence, confidential, accounting, collected, gathering, interfere, subpoena, narrowly, invoked, invoke, requested documents, threshold requirement

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN1]See 5 U.S.C.S. § 552(b)(7).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > General Overview
Administrative Law > Governmental Information > Freedom of Information > Enforcement > Burdens of Proof
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
[HN2]Without question, the Freedom of Information Act, 5 U.S.C.S. § 552 is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. The Act's basic purpose reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. There are, to be sure, specific exemptions from disclosure set forth in the Act. But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. Accordingly, these exemptions must be narrowly construed. Furthermore, the burden is on the agency to sustain its action. 5 U.S.C.S. § 552(a)(4)(B).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
Administrative Law > Governmental Information > Freedom of Information > Enforcement > Burdens of Proof
Evidence > Procedural Considerations > Burdens of Proof > General Overview
[HN3]Before it may invoke Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C.S. § 552(b)(7), the Government has the burden of proving the existence of such a compilation for such a purpose. In deciding whether Exemption 7 applies, moreover, a court must be mindful that the FOIA was not intended to supplement or displace rules of discovery.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN4]Under Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C.S. § 552(b)(7), documents need only to have been compiled when the response to the FOIA request must be made.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Law Enforcement Records > General Overview
[HN5]Exemption 7 of the Freedom of Information Act, 5 U.S.C.S. § 552(b)(7), requires the government to demonstrate that a record is compiled for law enforcement purposes and that disclosure would effectuate one or more of the six specified harms.

DECISION:

Freedom of Information Act exemption from disclosure for records "compiled for law enforcement purposes" held not to exclude documents originally collected for non-law-enforcement purposes.

SUMMARY:

In 1978, an exchange of correspondence took place between the Defense Contract Audit Agency (DCAA)--the accounting branch of the United States Department of Defense--and a defense contractor, in connection with an audit. The DCAA claimed, in its letter, that the contractor had misallocated some of its costs. The contractor defended its allocation in a return letter. No further action regarding the cost allocation was taken by the correspondents for several years. In 1985, pursuant to an investigation by the United States Attorney for the Eastern District of New York into possible fraudulent practices by the contractor, a federal grand jury issued a subpoena to the contractor. The subpoena requested documents which related to the contractor's 1978 cost-allocation dispute with the DCAA. When the contractor submitted to the DCAA a request, pursuant to the Freedom of Information Act (FOIA) (5 USCS 552), for any documents that were related in any way to the subject matter of the 1978 correspondence, the DCAA denied the request, on the ground that such documents were exempted from disclosure under the FOIA. Shortly thereafter, the DCAA transferred the documents which the contractor had requested to the Federal Bureau of Investigation (FBI). The contractor then renewed its document request with the FBI, but the FBI also denied the request, upon which the contractor, seeking review of its requests, filed an action in the United States District Court for the Eastern District of New York against both federal agencies. The District Court ordered the Federal Gov-

ernment to prepare an index which briefly described each requested document and the government's reason for denying disclosure. Following in-chambers review of the index, the District Court, stating that there was a substantial risk that disclosure would jeopardize the grand jury proceeding, ruled that the agencies were not required to turn over the documents to the contractor and dismissed the contractor's complaint. On appeal, the United States Court of Appeals for the Second Circuit, reversing, expressed the view that Exemption 7 of the FOIA (5 USCS 552(b)(7))--which exempted from disclosure records or information "compiled for law enforcement purposes"--did not protect the requested documents from disclosure, because the agencies' records had been compiled several years before the federal criminal investigation began, and a governmental entity could not withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled had since acquired investigative significance (850 F2d 105).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Blackmun, J., joined by Rehnquist, Ch. J., and Brennan, White, O'Connor, and Kennedy, JJ., it was held that Exemption 7 did not permit a distinction between documents that originally were assembled for law enforcement purposes and documents that were not so originally assembled but were gathered later for such purposes, and thus that Exemption 7 covered documents which had already been collected by the Federal Government originally for non-law-enforcement purposes, because (1) the plain words in the phrase "compiled for law enforcement purposes" contained no requirement that compilation be effected at a specific time, since a compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents, (2) the legislative history of Exemption 7 as amended said nothing about limiting Exemption 7 to those documents originating as law enforcement records, and (3) the "compiled for law enforcement purposes" provision was not to be construed in a nonfunctional way.

Blackmun, J., in a separate statement, also expressed the view that, although there was a potential for abuse in situations of the kind presented in the case at hand, he perceived no abuse by the Federal Government in the case at hand.

Brennan, J., concurring, joined the opinion of Blackmun, J., and expressed the view that (1) the question presented in the case at hand was limited to whether materials gathered for a law enforcement purpose, but not originally created for such a purpose, were "compiled" for law enforcement purposes within the meaning of Exemption 7; and (2) the issue of when a document must be compiled in order to be exempt from disclosure under Exemption 7 was not before the court.

Stevens, J., dissenting, expressed the view that (1) the Federal Government had not met its burden in the case at hand of demonstrating either (a) that the requested records and information were originally compiled for law enforcement purposes, or (b) that such records and information, even though they had been generated for other purposes, were subsequently recompiled for law enforcement purposes; and (2) there was no reason why the government should be given a second opportunity to prove its case.

Scalia, J., joined by Marshall, J., dissenting, expressed the view that (1) the phrase "records or information compiled for law enforcement purposes" in Exemption 7 meant material that the Federal Government had acquired or produced for those purposes, and not material acquired or produced for other reasons and later placed into a law enforcement file; and (2) even if such a construction of the term "compiled" was not necessarily the preferable one, it was a reasonable one, which thus created an ambiguity in the language used--and such ambiguity should have been resolved in favor of the disclosure of the requested materials, pursuant to the doctrine that FOIA exemptions should be narrowly construed.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ADMINISTRATIVE LAW §64

STATUTES §81

Freedom of Information Act -- disclosure of records "compiled for law enforcement purposes" -- documents not originally collected for law enforcement purposes --

Headnote:[1A][1B][1C][1D][1E][1F]

Exemption 7 of the Freedom of Information Act (FOIA) (5 USCS 552(b)(7))--which provision exempts from disclosure under the FOIA (5 USCS 552) certain records or information "compiled for law enforcement purposes"--does not permit a distinction between documents that originally were assembled for law enforcement purposes and documents that were not so originally assembled but were gathered later for such purposes, and thus Exemption 7 covers documents which have already been collected by the Federal Government originally for non-law-enforcement purposes, because (1) the plain words in the phrase "compiled for law enforcement purposes" contain no requirement that compilation be effected at a specific time, since a compilation, in its ordinary meaning, is something composed of materials col-

lected and assembled from various sources or other documents, (2) the legislative history of Exemption 7 as amended says nothing about limiting Exemption 7 to those documents originating as law enforcement records, and (3) the "compiled for law enforcement purposes" provision is not to be construed in a nonfunctional way. (Stevens, Scalia, and Marshall, JJ., dissented from this holding.)

[***LEdHN2]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- purpose --

Headnote:[2]

The Freedom of Information Act (FOIA) (5 USCS 552) is broadly conceived, seeking to permit access to official information long shielded unnecessarily from public view and attempting to create a judicially enforceable public right to secure such information from possibly unwilling official hands; the basic purpose of the FOIA--reflecting a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language--is to insure an informed citizenry, vital to the functioning of a democratic society and necessary to check against corruption and to hold the governors accountable to the governed.

[***LEdHN3]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- exemptions from disclosure --

Headnote:[3A][3B]

The specific exemptions from disclosure set forth in the Freedom of Information Act (FOIA) (5 USCS 552) do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the FOIA, and, accordingly, such exemptions--while intended to have meaningful reach and application--must be narrowly construed; the FOIA's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present a workable balance which Congress has struck between the right of the public to know and the need of the Federal Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.

[***LEdHN4]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- effect on discovery --

Headnote:[4]

The Freedom of Information Act (5 USCS 552) is not intended to supplement or displace rules of discovery.

[***LEdHN5]

STATUTES §164

construction -- language used --

Headnote:[5]

It is the custom of the United States Supreme Court, in construing a statute, to look initially at the language of the statute itself.

[***LEdHN6]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- judicial review -- pendency of grand jury proceedings --

Headnote:[6A][6B]

The pendency--at the time that a corporation requested, pursuant to the Freedom of Information Act (FOIA) (5 USCS 552), the disclosure of certain documents by federal agencies--of a federal grand jury investigation into possible fraudulent practices by the corporation serves to negate any inference by a reviewing court that the chronology of the case raises a question about the bona fides of the Federal Government's claim that any compilation of documents was not made solely in order to defeat the FOIA request.

[***LEdHN7]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- exemption for law enforcement records -- nature of documents --

Headnote:[7]

Exemption 7 of the Freedom of Information Act (FOIA) (5 USCS 552(b)(7))--which provision exempts from disclosure under the FOIA (5 USCS 552) records or information "compiled for law enforcement purposes" to the extent that disclosure would effectuate one or more of six specified harms--requires consideration of the nature of each particular document as to which such exemption is claimed.

[***LEdHN8]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- exemptions from disclosure requirements --

Headnote:[8]

In determining whether the Federal Government has properly invoked a particular exemption from the disclosure requirements of the Freedom of Information Act (5 USCS 552), the United States Supreme Court looks to the reasons for such exemption.

SYLLABUS

In connection with a 1978 periodic audit, respondent defense contractor and petitioner Defense Contract Audit Agency (DCAA) corresponded concerning respondent's accounting treatment of certain costs. Eight years later, a federal grand jury investigating possible fraudulent practices by respondent issued a subpoena requesting respondent's documents relating to the 1978 cost allocation question. Respondent submitted to the DCAA a Freedom of Information Act (FOIA) request for any documents relating to the subject matter of their correspondence. The DCAA denied the request citing, *inter alia,* Exemption 7(A) of the FOIA, which exempts from disclosure "records or information compiled for law enforcement purposes" under certain circumstances. Two days later the requested records were transferred to petitioner Federal Bureau of Investigation, which denied respondent's renewed FOIA request, citing Exemption 7(A). Respondent sought review in the District Court, which ruled that petitioners were not required to turn over any of the documents and dismissed the complaint, stating that disclosure would jeopardize the grand jury proceeding. The Court of Appeals reversed, ruling that the Government may not invoke Exemption 7 to protect from disclosure materials that were not investigatory records when originally collected but have since acquired investigative significance.

Held: Exemption 7 may be invoked to prevent the disclosure of documents not originally created for, but later gathered for, law enforcement purposes. The plain words of the statute contain no requirement that compilation be effected at a specific time, but merely require that the objects sought be compiled when the Government invokes the Exemption. The Court of Appeals erred in interpreting the word "compile" to mean "originally compiled," since "compiled" naturally refers to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. This reading of the statute recognizes the balance struck by Congress between the public's interest in greater access to information and the Government's need to protect certain kinds of information from disclosure and is supported by the FOIA's legislative history. Pp. 153-158.

COUNSEL: Edwin S. Kneedler, argued the cause for petitioners. On the briefs were Solicitor General Starr, Acting Solicitor General Bryson, Assistant Attorney General Bolton, Deputy Solicitor General Wallace, Roy T. Englert, Jr., Leonard Schaitman, and John C. Hoyle.

Milton Eisenberg, argued the cause for respondent. With him on the brief were Arthur Lazarus, Jr., and John T. Boese. *

* Patti A. Goldman and David C. Vladeck filed a brief for Public Citizen et al. as amici curiae urging affirmance.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, O'CONNOR, and KENNEDY, JJ., joined. BLACKMUN, J., also filed a separate statement, *post*, p. 158. BRENNAN, J., filed a concurring opinion, *post,* p. 158. STEVENS, J., filed a dissenting opinion, *post,* p. 159. SCALIA, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 160.

OPINION BY: BLACKMUN

OPINION

[*147] [***468] [**472] JUSTICE BLACKMUN delivered the opinion of the Court.

[***LEdHR1A] [1A]Once again, we are faced with an issue under the [HN1]Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552. This time, we are concerned with the Act's Exemption 7, § 552 (b)(7). That provision exempts from disclosure

"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, (B) would deprive [**473] a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting [*148] a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . ."

Our focus is on the Exemption's threshold requirement that the materials be "records or information compiled for law enforcement purposes."

I

Respondent John Doe Corporation (Corporation) is a defense contractor. As such, it is subject to periodic audits by the Defense Contract Audit Agency (DCAA), the accounting branch of the Department of Defense. [1] [***469] See 32 CFR §§ 357.2 and 357.4 (1988). In 1978, in connection with an audit, an exchange of correspondence took place between the DCAA and the Corporation concerning the proper accounting treatment of certain costs. The Government auditor, by letter dated May 2 of that year, claimed that the costs should have been charged to identifiable programs instead of to a technical overhead account. About $ 4.7 million in 1977 costs were discussed. The Corporation, by letter dated July 11, 1978, replied and defended its allocation. App. 22-28. No [*149] further action regarding the allocation of those costs was taken by the DCAA or the Corporation during the next eight years.

1 All the names in the caption of this case -- "John Doe Agency" and "John Doe Government Agency," petitioners, and "John Doe Corporation," respondent, are pseudonyms. John Doe Agency, however, is the DCAA, and John Doe Government Agency is the Federal Bureau of Investigation. John Doe Corporation is a private corporation; it tells us, Brief for Respondent 1, n. 1, that its identity is revealed in materials filed under seal with the Court of Appeals.

The Solicitor General's office states, Brief for Petitioners ii; Tr. of Oral Arg. 26, that the Government has no objection to public disclosure of petitioners names. Accordingly, in this opinion we use the real name of each "Agency." We adhere, however, to the use of respondent's pseudonym.

In 1985, the office of the United States Attorney for the Eastern District of New York instituted an investigation into possible fraudulent practices by the Corporation. A subpoena was issued to the Corporation by a grand jury on February 21, 1986. It requested documents relating to the cost allocation question which was the subject of the 1978 correspondence. On September 30, 1986, the Corporation submitted to the DCAA a request under the FOIA for any documents "that are related in any way to the subject matter" of the 1978 correspondence. *Id.*, at 19. Upon the advice of an Assistant United States Attorney, the DCAA denied the request on November 18, citing Exemptions 7(A) and (E) of the Act. App. 29. Two days later the requested records were transferred to the Federal Bureau of Investigation (FBI). *Id.*, at 92.

On February 3, 1987, the Corporation renewed its FOIA request but this time directed it to the FBI. *Id.*, at 46. That agency denied the request, citing only Exemption 7(A). *Id.*, at 49.

After exhausting its administrative remedies, the Corporation instituted the present litigation, seeking review of the withholding of the requested documents, in the United [**474] States District Court for the Eastern District of New York. *Id.*, at 6, 11. In due course, the Corporation moved to compel the preparation of a "*Vaughn* Index." [2]

2 "*Vaughn* Index" is a term derived from *Vaughn* v. *Rosen*, 157 U.S. App. D. C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977 (1974). The "Index" usually consists of a detailed affidavit, the purpose of which is to "permit the court system effectively and efficiently to evaluate the factual nature of disputed tion." 157 U.S. App. D. C., at 346, 484 F. 2d, at 826.

The Government opposed disclosure, the preparation of the Index, and answers to propounded interrogatories on the [*150] ground that compliance with any of these would interfere with the grand jury proceeding and would provide the Corporation with information that might be useful to it in connection with anticipated criminal litigation. The District [***470] Court ordered the Government to prepare a *Vaughn* Index and to answer the interrogatories. It ordered *sua sponte*, however, that this material be submitted to the court for examination *in camera* rather than be given directly to the Corporation. *Id.*, at 62, 66.

After conducting its examination without a hearing, the District Court ruled that petitioners were not required to turn over any of the contested documents to the Corporation. It then dismissed the complaint, stating: "We are satisfied that there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [the] interrogatories, would jeopardize the grand jury proceeding." App. to Pet. for Cert. 13a-14a.

The Corporation appealed to the United States Court of Appeals for the Second Circuit. That court reversed and remanded the case. 850 F.2d 105, 110 (1988). It ruled that the law enforcement Exemption 7, upon which the District Court implicitly relied, did not protect the records from disclosure because they were not "compiled for law enforcement purposes." *Id.*, at 109. It observed that the records "were compiled in 1978, seven years before the investigation began in 1985," *id.*, at 108, and

that the 1974 amendments to the Act "make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance." *Id.*, at 109. The Court of Appeals acknowledged that compliance with the FOIA may compel disclosure of materials that ordinarily are beyond the scope of discovery in a criminal investigation, and thus may enable a potential defendant to prepare a response and construct a defense to a criminal charge. The court concluded, however, that this concern was more properly addressed [*151] to Congress. [3] *Ibid*. The court ruled, nonetheless, that on remand the Government was to be allowed to bring to the District Court's attention "any particular matter that would, if disclosed, expose some secret aspect of the grand jury's investigation." *Id.*, at 110.

3 As to this conclusion, see also *North v. Walsh*, 279 U.S. App. D. C. 373, 382, 881 F.2d 1088, 1097 (1989).

The court refused to stay its mandate; it was issued on November 28, 1988. App. to Pet. for Cert. 15a. On remand, the District Court concluded that the Second Circuit's opinion required that the *Vaughn* Index be turned over to the Corporation. App. 86. The Court of Appeals on January 10, 1989, refused to stay the District Court's order requiring the furnishing of the Index, *id.*, at 96, but later that same day the Circuit Justice entered a temporary stay pending a response from the Corporation. On January 30, the Circuit Justice granted a full stay. See 488 U.S. 1306 (Marshall, J., in chambers).

Because of the importance and sensitivity of the issue and because of differing interpretations of the pertinent language of Exemption 7, [4] [***471] we granted certiorari. 489 U.S. 1009 (1989).

4 See *New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 386 (CA1 1976); *Gould Inc. v. General Services Administration*, 688 F. Supp. 689, 699 (DC 1988); *Hatcher v. United States Postal Service*, 556 F. Supp. 331 (DC 1982); *Fedders Corp. v. FTC*, 494 F.Supp. 325, 328 (SDNY), aff'd, 646 F.2d 560 (CA2 1980); *Gregory v. FDIC*, 470 F.Supp. 1329, 1333-1334 (DC 1979). See also *Crowell & Moring v. Department of Defense*, 703 F.Supp. 1004, 1009 (DC 1989).

[**475] II

[***LEdHR2] [2] [***LEdHR3A] [3A]This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. [HN2]"Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 [*152] (1973). The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). See also *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772-773 (1989). There are, to be sure, specific exemptions from disclosure set forth in the Act. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S., at 361. Accordingly, these exemptions "must be narrowly construed." *Ibid*. Furthermore, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

[***LEdHR3B] [3B]Despite these pronouncements of liberal congressional purpose, this Court has recognized that the statutory exemptions are intended to have meaningful reach and application. On more than one occasion, the Court has upheld the Government's invocation of FOIA exemptions. See *EPA v. Mink, supra*; *Robbins Tire, supra*; *Reporters Committee, supra*; *FBI v. Abramson*, 456 U.S. 615 (1982). In the case last cited, the Court observed: "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," and therefore provided the "specific exemptions under which disclosure could be refused." *Id.*, at 621. Recognizing past abuses, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 6 (1966). See also *EPA v. Mink*, 410 U.S., at 80. [*153] The Act's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the "balance" Congress has struck.

III

[***LEdHR4] [4]We have noted above that our [***472] focus here is on § 552(b)(7)'s exemption from production of "records or information compiled for law enforcement purposes" to the extent that such production meets any one of six specified conditions or enumerated

harms. [HN3]Before it may invoke this provision, the Government has the burden of proving the existence of such a compilation for such a purpose. In deciding whether Exemption 7 applies, moreover, a court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery. See *Robbins Tire*, 437 U.S., at 236-239, 242; *id.*, at 243 (STEVENS, J., [**476] concurring). See also *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984). Indeed, the Court of Appeals acknowledged that this was not a principal intention of Congress. 850 F.2d, at 108.

[***LEdHR1B] [1B] [***LEdHR5] [5]As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. See *Gould Inc.* v. *General Services Administration*, 688 F.Supp. 689, 698 (DC 1988).

[*154] The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." See 850 F.2d, at 109. [5] We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement. This Court itself has used the word "compile" naturally to refer even to the process of gathering at one time records and information that were generated on [***473] an earlier occasion and for a different purpose. See *FBI* v. *Abramson*, 456 U.S., at 622, n. 5; *Reporters Committee*, *supra*.

> 5 There is disagreement between the parties as to how the opinion of the Court of Appeals is to be read. The then Acting Solicitor General states that the Second Circuit unequivocally held that a document must originally be compiled for law enforcement purposes in order to qualify for protection under Exemption 7. Brief for Petitioners 15. Respondent disagrees and says: "The court of appeals had no occasion to rule in this case on whether records 'originally compiled' for non-law-enforcement purposes but later recompiled for law-enforcement purposes could meet the threshold requirement of Exemption 7." Brief for Respondent 13-14. Instead, argues were never "compiled" for law enforcement, originally or subsequently, and "no other result was possible based on the facts of this case." *Id.*, at 14.
>
> We agree with the then Acting Solicitor General. The Court of Appeals stated:
>
> "In the instant case, the documents requested were generated by [the DCAA] independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not 'compiled for law-enforcement purposes' and are not exempted by Subsection (b)(7)." 850 F.2d 105, 108-109 (CA2 1988).
>
> The court's use of the word "thus" suggests that it believed a record had to be compiled for law enforcement purposes from the outset in order to be protected by Exemption 7.

Respondent, too, has used the word "compile" in its ordinary sense to refer to the assembling of documents, even though those documents were put together at an earlier time [*155] for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent asked that the requested materials be furnished as soon as they were available, and that the response to the request "not await a compilation of all the materials requested." App. 21, 47-48. This was a recognition, twice repeated, that the documents having been compiled once for the purpose of routine audits were not disqualified from being "compiled" again later for a different purpose.

[***LEdHR1C] [1C] [***LEdHR6A] [6A]We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language [**477] of Exemption 7 does not permit such a distinction. [HN4]Under the statute, documents need only to have been compiled when the response to the FOIA request must be made. [6]

> 6 In the instant case, it is not clear when compilation took place. The record does disclose that the documents were transferred from the DCAA to the FBI shortly after the DCAA denied the FOIA request. The timing of the transfer, however, was not stressed by the Court of Appeals or treated by that court as dispositive. Instead, as noted above, the Court of Appeals ruled that Exemption 7 was not available because the

documents were obtained originally for non-law-enforcement purposes.

[***LEdHR6B] [6B]

While we leave to the lower courts the determination whether these documents were "compiled for law enforcement purposes" when the Government invoked Exemption 7, we do note that the pendency of the grand jury investigation serves to negate any inference that the chronology of this case raises a question about the bona fides of the Government's claim that any compilation was not made solely in order to defeat the FOIA request. See *Goldberg v. United States Department of State*, 260 U.S. App. D. C. 205, 211, 818 F.2d 71, 77 (1987), cert. nied, 485 U.S. 904 (1988); *Miller v. United States Department of State*, 779 F.2d 1378, 1388 (CA8 1985).

[***LEdHR1D] [1D]If, despite what we regard as the plain meaning of the statutory language, it were necessary or advisable to examine the legislative history of Exemption 7, as originally enacted and as amended in 1974, we would reach the same conclusion. JUSTICE MARSHALL, writing for the Court in *Robbins Tire*, [*156] 437 U.S., at 224-236, discussed this legislative history in detail. In its original 1966 form, Exemption 7 permitted nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. 89-487, § 3(e)(7), 80 Stat. 251. But the Court in *Robbins Tire* observed: "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases." 437 U.S., at 224.

To accommodate these needs, Congress in 1974 amended the Act in several respects. See *id.*, at 226-227. Concern was expressed on the Senate floor that four recent decisions in [***474] the United States Court of Appeals for the District of Columbia Circuit had permitted Exemption 7 to be applied whenever an agency could show that the document sought was an investigatory *file* compiled for law enforcement purposes. [7] Congress feared that agencies would use that rule to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for all the contents.

7 The cases were *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 (1974); *Aspin v. Department of Defense*, 160 U.S. App. D. C. 231, 491 F.2d 24 (1973); *Ditlow v. Brinegar*, 161 U.S. App. D. C. 154, 494 F.2d 1073 (1974); and *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 163 U.S. App. D. C. 368, 502 F.2d 370 (1974).

[***LEdHR1E] [1E] [***LEdHR7] [7]The aim of Congress thus was to prevent commingling. This was accomplished by two steps. The first was to change the language from investigatory "files" to investigatory "records." The second was to make the compilation requirement necessary rather than sufficient. As amended, [HN5]Exemption 7 requires the Government to demonstrate that a record is "compiled for law enforcement purposes" *and* that disclosure would effectuate one or more of the six specified harms. See *Robbins Tire*, 437 U.S., at 221-222, 229-230, 235. [*157] These changes require consideration of the nature of each particular document as to which exemption was claimed. *Id.*, at 229-230. Evasional commingling thus would be prevented. The legislative history of the 1974 amendments says nothing about limiting Exemption 7 to those documents originating as law enforcement records.

A word as to *FBI v. Abramson*, 456 U.S. 615 (1982), is in order. There the Court was faced with the issue whether information originally compiled [**478] for law enforcement purposes lost its Exemption 7 status when it was summarized in a new document not created for law enforcement purposes. See *id.*, at 623. The Court held that such information continued to meet the threshold requirements of Exemption 7. But we do not accept the proposition, urged by respondent, that the converse of this holding -- that information originally compiled for a non-law-enforcement purpose cannot become exempt under Exemption 7 when it is recompiled at a future date for law enforcement purposes -- is true. See Brief for Respondent 20.

[***LEdHR1F] [1F] [***LEdHR8] [8]This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. See *e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-154 (1975). In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect. *Robbins Tire*, 437 U.S., at 242-243; [***475] *Abramson*, 456 U.S., at 625. See so *Department of State v. Washington Post Co.*, 456 U.S.

595 (1982). The statutory provision that records or information must be "compiled for law enforcement purposes" is not to be construed in a nonfuctional way.

[*158] The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Statement of JUSTICE BLACKMUN.

I add on my own account a word of caution. Simply because a party is a defense contractor does not mean that all doubts automatically are to be resolved against it and those in any way associated with it. A situation of the kind presented by this case can be abused, and after-the-fact acknowledgment of abuse by the Government hardly atones for the damage done by reason of the abuse. The recent *General Dynamics* case * and the sad consequences for a former National Aeronautics and Space Administration administrator whose indictment was dismissed before trial ("because the Justice Department concedes it had no case," Washington Post, June 24, 1987, p. A24, col. 1) are illustrative. Petitioners themselves, see Reply Brief for Petitioners 11, "recognize the theoretical potential for abuse." I perceive no abuse in the present case, however, that would make it resemble *General Dynamics*.

* *General Dynamics Corp.* v. *Department of Army*, Civ. Action No. 86-522-FFF (CD Cal.), filed January 9, 1986. See Washington Post, June 23, 1987, p. A1, col. 1; N. Y. Times, June 23, 1987, p. A1, col. 3; Washington Post, June 24, 1987, p. A24, col. 1 (editorial: "It is hard to understand how this case was brought in the first place").

CONCUR BY: BRENNAN

CONCUR

JUSTICE BRENNAN, concurring.

I join the Court's opinion. I write separately only to note that the question presented is limited to whether materials gathered for a law enforcement purpose, but not originally created for such a purpose, are "compiled" for law enforcement purposes within the meaning of the Freedom of Information Act. The issue of *when* a document must be "compiled" in order to be exempt from disclosure under Exemption 7, see *ante*, at 153, 155, and n. 6, is not before us today. With [*159] the understanding that we do not reach this question, I join the Court's opinion.

DISSENT BY: STEVENS; SCALIA

DISSENT

JUSTICE STEVENS, dissenting.

In order to justify the application of Exemption 7 of the Freedom of Information Act [**479] (FOIA), the Government has the burden of demonstrating that a request calls for "records or information compiled for law enforcement purposes." The Government can sustain that burden in either of two ways: (1) by demonstrating that the requested records and information were *originally* compiled for law enforcement purposes, or (2) by demonstrating that even though they had been generated for other purposes, they were subsequently recompiled for law enforcement purposes.

The Court states the correct standard for a "compilation," but then inexplicably fails to apply it to the facts of this case. *Ante*, at 155, n. 6. [***476] A compilation is "something composed of materials collected and assembled from various sources or other documents." *Ante*, at 153. It is not sufficient that the Government records or information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The Exemption is primarily designed to protect law enforcement agencies from requests for information that they have gathered for law enforcement purposes. Therefore, under the FOIA, records or information whose production would interfere with enforcement proceedings are exempt only when, by virtue of their "incorporation in a law enforcement 'mosaic,'" *Gould Inc. v. General Services Administration*, 688 F.Supp. 689, 698 (DC 1988), they take on law enforcement significance. In this case, the proper application of these principles is clear.

It is undisputed that the original FOIA request to the Defense Contract Audit Agency (DCAA) called for documents that had been compiled by that agency for non-law-enforcement purposes and that the documents were still in the possession of the agency at the time the request was received. Indeed, they were still in the DCAA's possession on [*160] November 18, 1986, when the request was denied. The claim that the documents were "compiled" is supported only by a letter stating that the DCAA had been advised by the United States' Attorney's Office that the documents were exempt under the law enforcement Exemption and an averment in an affidavit of counsel that the documents were transferred to the FBI's custody on November 20, 1986, after the Government had invoked the Exemption. *

* The Government also submitted a declaration of an Assistant United States Attorney in response to the Corporation's FOIA action. However, that declaration, which states that the re-

quested documents were compiled by DCAA, also states incorrectly that they had been transferred to the FBI prior to the original FOIA request. App. 61.

The Court has repeatedly emphasized, what is explicit in the terms of the FOIA, that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); see *ante*, at 152; *Department of Justice* v. *Tax Analysts*, 492 U.S. 136, 142, n. 3 (1989); *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 755 (1989). The basic policy of the Act "is in favor of disclosure." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978). As I understand the record in this case, the Government has at most established a request by a prosecutor that the requested documents be kept secret and a naked transfer of otherwise nonexempt documents from a civilian agency to the FBI. Such a transfer is not a compilation. That is what I understand to be the Court of Appeals' holding, and I am persuaded that it was entirely correct. The Government has not met its burden under the FOIA and there is no reason why it should be given a second opportunity to prove its case.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE MARSHALL joins, dissenting.

I fear today's decision confuses [***477] more law than it clarifies. From the prior opinions of this Court, I had thought that at least this [**480] much about the Freedom of Information Act was [*161] clear: its exemptions were to be "narrowly construed." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988); *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982); *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); cf. *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 773 (1989) (Act mandates "full agency disclosure unless information is exempted under clearly delineated statutory language" (citations and inner quotations ted)); *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 351-352 (1979). We use the same language again today, *ante*, at 152, but demonstrate by our holding that it is a formula to be recited rather than a principle to be followed.

Narrow construction of an exemption means, if anything, construing ambiguous language of the exemption in such fashion that the exemption does not apply. The word "compiled" is ambiguous -- not, as the Court suggests (and readily dismisses), because one does not know whether it means "originally compiled" or "ever compiled," see *ante*, at 154-155. Rather, it is ambiguous because "compiled" does not always refer simply to "the process of gathering," or "the assembling," *ante*, at 154, but often has the connotation of a more creative activity. When we say that a statesman has "compiled an enviable record of achievement," or that a baseball pitcher has "compiled a 1.87 earned run average," we do not mean that those individuals have pulled together papers that show those results, but rather that they have *generated* or *produced* those results. Thus, Roget's Thesaurus of Synonyms and Antonyms includes "compile" in the following listing of synonyms: "compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw; set up *(printing);* enter into the composition of etc. *(be a component)*." Roget's Thesaurus 13 (S. Roget rev. 1972).

If used in this more generative sense, the phrase "records or information compiled for law enforcement purposes" would mean material that the Government has acquired or produced for those purposes -- and not material acquired or produced [*162] for other reasons, which it later shuffles into a law enforcement file. The former meaning is not only entirely possible; several considerations suggest that it is the preferable one. First of all, the word "record" (unlike the word "file," which used to be the subject of this provision, see Freedom of Information Act Amendments of 1974, Pub. L. 93-502, § 2(b), 88 Stat. 1563-1564) can refer to a single document containing a single item of information. There is no apparent reason to deprive such an item of Exemption 7 protection simply because at the time of the request it happens to be the only item in the file. It is unnatural, however, to refer to a single item as having been "compiled" in the Court's sense of "assembled" or "gathered" -- though quite natural to refer to it as having been "compiled" in the generative or acquisitive sense I have described.

[***478] Secondly, the regime that the Court's interpretation establishes lends itself to abuse so readily that it is unlikely to have been intended. The only other documents I am aware of that can go from being available under FOIA to being unavailable, simply on the basis of an agency's own action, are records containing national defense or foreign policy information. Exemption 1 is inapplicable to records of that description that have not been classified, but it can be rendered applicable, even after the FOIA request has been filed, by the mere act of classification. See, *e. g.*, *Goldberg* v. *United States Department of State*, 260 U.S. App. D. C. 205, 211, 818 F.2d 71, 77 (1987), cert. denied, 485 U.S. 904 (1988). In that context, however, Congress has greatly reduced the possibility of abuse by providing that the classification must *be proper under criteria established* [**481] *by Executive order*. There is no such check upon sweeping requested material into a "law enforcement" file -- which term may include, I might note, not just criminal enforcement but civil and regulatory enforcement as well.

See, *e. g.*, *Pope* v. *United States*, 599 F.2d 1383, 1386 (CA5 1979). I suppose a court could disregard such a "compilation" that has been made in [*163] bad faith, but it is hard to imagine what bad faith could consist of in this context, given the loose standard of need that will justify opening an investigation, and the loose standard of relevance that will justify including material in the investigatory file. Compare *Pratt* v. *Webster*, 218 U.S. App. D. C. 17, 29-30, 673 F.2d 408, 420-421 (1982) (FBI acts for "law enforcement purpose[s]" when its investigation concerns "a possible security risk or violation of federal law" and has "at least 'a colorable claim' of its rationality"), with *Williams* v. *FBI*, 730 F.2d 882, 883 (CA2 1984) (FBI's investigatory records are exempt from disclosure "whether or not the reviewing judicial tribunal believes there was a sound law enforcement basis for the particular investigation"); cf. *United States* v. *Bisceglia*, 420 U.S. 141, 148-151 (1975) (IRS investigative authority includes power to subpoena bank records even in the absence of suspicion that a particular taxpayer has broken the law); *Blair* v. *United States*, 250 U.S. 273, 282 (1919) (grand jury subpoena cannot be resisted by raising "questions of propriety or forecasts of the probable result of the investigation, or . . . doubts whether any particular individual will be found properly subject to an accusation of crime"). It is particularly implausible that Congress was creating this potential for abuse in its revision of Exemption 7 at the same time that it was adding the "properly classified" requirement to Exemption 1 in order to eliminate the potential for similar abuse created by our decision in *EPA* v. *Mink*, 410 U.S. 73 (1973). The Court's only response is that "evasional commingling . . . would be prevented" by the requirement that a document cannot be withheld under Exemption 7 unless, if disclosed, it "would effectuate one or more of the six specified harms." *Ante*, at 156-157. But that begs the question. Congress did not extend protection to *all* documents that produced one of the six specified harms, but only to such documents "compiled for law enforcement purposes." The latter requirement is readily evaded (or illusory) [***479] if it requires nothing more than gathering up documents the Government [*164] does not wish to disclose, with a plausible law enforcement purpose in mind. That is a hole one can drive a truck through.

But even if the meaning of "compiled" I suggest is not necessarily the preferable one, it is unquestionably a reasonable one; and that creates an ambiguity; and our doctrine of "narrowly construing" FOIA exemptions requires that ambiguity to be resolved in favor of disclosure. The Court asserts that we have "consistently . . . taken a practical approach" to the interpretation of FOIA, by which it means achieving "a workable balance between the interests of the public . . . and the needs of the Government." *Ante*, at 157. It seems to me, however, that what constitutes a workable balance is Congress' decision and not ours; and that the unambiguous provisions of FOIA are so remote from establishing what most people would consider a *reasonable* "workable balance" that there is no cause to believe such a standard permeates the Act. Consider, for example, FOIA's disequilibrous disposition with regard to information that "could reasonably be expected to endanger the life or physical safety of any individual" -- namely, that such information is not withholdable in *all* cases, but only if it has been "compiled for law enforcement purposes." See 5 U.S.C. § 552(b)(7)(F). "Workable balance" is not a workable criterion in the interpretation of this law. In my view, a "practical approach" to FOIA consists of following the clear provisions of its text, and adhering to the rules we have enunciated regarding interpretation of the unclear ones -- thereby reducing the volume of litigation, and making it inescapably clear to Congress what changes need to be [**482] made. I find today's decision most impractical, because it leaves the lower courts to guess whether they must follow what we say (exemptions are to be "narrowly construed") or what we do (exemptions are to be construed to produce a "workable balance").

I respectfully dissent.

REFERENCES

2 Am Jur 2d, Administrative Law 232; 66 Am Jur 2d, Records and Recording Laws 41

15 Federal Procedure, L Ed, Freedom of Information 38:128

1 Federal Procedural Forms, L Ed, Administrative Procedure 2:53.3, 2:175, 2:175.5, 2:192

2 Am Jur Trials 409, Locating Public Records

5 USCS 552(b)(7)

US L Ed Digest, Administrative Law 64

Index to Annotations, Federal Bureau of Investigation; Freedom of Information Acts; Police and Law Enforcement Officers

Annotation References:

Use of Freedom of Information Act (5 USCS 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal ,or administrative proceedings. 57 ALR Fed 903.

What constitute investigatory files exempt from disclosure under Freedom of Information Act (5 USCS 552(b)(7)). 17 ALR Fed 522.

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

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner United States, on behalf of the Inspector General of the General Services Administration (inspector general), filed a motion to enforce a subpoena duces against respondents, a corporation and its subsidiary. The subpoena sought the production of tax and business records in connection with an investigation of fraudulent practices by government contractors. Respondents were ordered to show cause why the subpoena should not be enforced.

OVERVIEW: The court rejected respondents' argument that the subpoena could not be enforced because there was an ongoing parallel criminal investigation of the corporation, holding that the mere likelihood or even the imminence of criminal proceedings did not bar enforcement of a civil subpoena so long as: (1) the agency in question had not itself made a formal recommendation to the United States Justice Department to prosecute; and (2) the subpoena had a civil purpose.The court found no evidence that the inspector general had formally recommended that the Justice Department prosecute the corporation. In addition, respondents failed to carry their burden of disproving that the inspector general's subpoena had a civil purpose. The court rejected respondents' other arguments as well, holding that enforcement would not violate the public policy manifested in I.R.C. § 6103, that the subpoenaed documents were not beyond the scope of the inspector general's subpoena power, and that the inspector general could proceed against the subsidiary company as well as against the corporation, even though the subsidiary was not an express party to the GSA contracts.

OUTCOME: The court granted the inspector general's motion to enforce the subpoena duces tecum, which ordered the corporation and its subsidiary to produce tax and business records in connection with the GSA's investigation of fraudulent practices by government contractors.

CORE TERMS: subpoena, summons, subpoena power, summonses, tax returns, public policy, criminal proceedings, recommended, imminence, party opposing, administrative subpoena, criminal process, criminal investigation, civil discovery, return information, recommendation, subpoenaed, disclosure, prosecute, supervise, resisting, formally, lawful, contractor

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN1]The mere likelihood or even the imminence of criminal proceedings does not bar enforcement of a civil summons or subpoena issued by a federal agency so long as (1) the agency in question has not itself made a formal recommendation to the United States Justice Department to prosecute; and (2) the summons or subpoena has a civil purpose.

Administrative Law > Agency Investigations > Scope > Subpoenas
Governments > Courts > Judges
Tax Law > Federal Tax Administration & Procedure > Settlements > Closing Agreements & Compromises (IRC secs. 7121-7124) > Compromises
[HN2]The Inspector General of the General Services Administration (GSA) 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. 5 U.S.C.S. App. I § 4(a)(1) & (3). Unlike the Internal Revenue Service (IRS), which by statute loses its power to continue civilly once the United States Justice Department begins to move criminally, the inspector general's powers are not so limited. 5 U.S.C.S. 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, which historically has been an extremely close one. Given the inspector general's relative independence, the court concludes that the likelihood or imminence of criminal proceedings to be commenced independently (and not at the behest) of the GSA is no bar to enforcement of a GSA subpoena in a civil case.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Disclosure of Returns & Return Information
[HN3] Section 6103 of the Internal Revenue Code 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 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. In short, § 6103 is not triggered until after the United States comes into possession of tax returns or return.

Administrative Law > Agency Investigations > Scope > Subpoenas
Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Tax Law > State & Local Taxes > Sales Tax > General Overview
[HN4]The Inspector General Act gives the Inspector General of the General Services Administration (GSA) has 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.S. 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN5]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.

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.

OPINION BY: 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 recommended 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 [HN1]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. [HN2]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.

[HN3]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. [HN4]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. [HN5]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.

GREATER NEW YORK HOSPITAL ASSOCIATION, MOUNT SINAI SCHOOL OF MEDICINE OF THE CITY UNIVERSITY OF NEW YORK, THE MOUNT SINAI HOSPITAL, NEW YORK UNIVERSITY SCHOOL OF MEDICINE, BETH ISRAEL MEDICAL CENTER, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK ON BEHALF OF ITS FACULTY OF MEDICINE, CORNELL UNIVERSITY AND SLOAN KETTERING CANCER CENTER, Plaintiffs, -against- THE UNITED STATES OF AMERICA, Defendant.

98 Civ. 2741 (RLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1999 U.S. Dist. LEXIS 17391

November 9, 1999, Decided
November 9, 1999, Filed

DISPOSITION: [*1] Plaintiffs' claims under APA dismissed for lack of subject matter jurisdiction and claims for declaratory relief dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant moved to dismiss plaintiffs' Administrative Procedure Act claims regarding hospital reimbursement practices pursuant to Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. Defendant argued that plaintiffs' Declaratory Judgment Act claims, 28 U.S.C.S. § 2201, were not ripe.

OVERVIEW: Plaintiff hospitals challenged defendant government's audits of plaintiffs' reimbursement practices for medical care. Defendants challenged whether sufficient facts existed for the court to determine that it had subject matter jurisdiction. Plaintiffs argued that defendant's decision to conduct audits was final because it subjected them to the risk of "total destruction" based on their potential liability. The court held that the agencies involved were not at the end of their decision-making processes about the audits. Therefore the audits were not a final agency decision. Plaintiffs were not charged, but merely informed that they would be audited. The audits did not involve definitive statutes, orders or regulations or a consistent pattern of agency action eligible for pre-enforcement review. Plaintiffs failed to demonstrate injury by a final agency action for which they have no adequate remedy in court; therefore the court declined to exercise subject matter jurisdiction.

OUTCOME: Plaintiffs' claims under Administrative Procedure Act dismissed for lack of subject matter jurisdiction because defendant's actions were not a final agency action; dismissed claims for declaratory relief as not ripe for review.

CORE TERMS: audit, patient, reimbursement, attending physician, agency decision, doctor, agency action, judicial review, teaching hospitals', attending, announced, hardship, carrier, subject matter jurisdiction, residents, statutory authority, announcement, nationwide, teaching, subpoena, declaratory relief, promulgated, notice, ripe, coding, physician services, ultra vires, pre-enforcement, identifiable, declaratory

LexisNexis(R) Headnotes

Administrative Law > Informal Agency Actions

Civil Procedure > Counsel > General Overview
[HN1]The Office of Inspector General has the power, upon determining that a hospital fails its Physicians At Teaching Hospitals audit, to refer the hospital's case to the United States Attorney's Office for potential criminal or civil sanctions; if the United States Attorney's Office declines to accept the case for prosecution, the matter may be pursued by the Department of Health and Human Services for administrative recoupment proceedings.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN2]In reviewing a factual challenge to subject matter jurisdiction, the court may rely on the plaintiff's complaint, as well as look to extrinsic evidence, such as affidavits, to support its determinations. However, no presumption of truthfulness attaches to the complaint's jurisdictional allegations, and the burden is on the plaintiff to satisfy the court as fact-finder of the jurisdictional facts.

Administrative Law > Agency Adjudication > General Overview
Administrative Law > Judicial Review > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN3]The Administrative Procedure Act provides for judicial review of a final agency action for which there is no other adequate remedy in court.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN4]Two conditions must be satisfied for an agency action to be final: First, the action must mark the consummation of the agency's decision-making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations are determined or from which legal consequences will follow.

Administrative Law > Agency Adjudication > Decisions > General Overview
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN5]An agency's announcement may be treated as a final agency decision when legal consequences, such as sanctions, flow from the announcement. Also, when officials have no discretionary power to alter the announcement's directives and provisions for sanction, it may be considered a final decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN6]When announced regulations have the force of law before their sanctions are invoked, these regulations may be a final agency decision reviewable under the Administrative Procedure Act.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN7]When an agency refuses to change its policy despite administrative proceedings adjudicating the fact that its policies violate persons' rights, the court will treat its announced policy as a final agency decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Public Health & Welfare Law > Social Security > Medicare > Providers > Reimbursement > General Overview
[HN8]Physicians At Teaching Hospitals (PATH) audit standards are not exactly "tentative or interlocutory" in nature; however, the agencies involved are not at the end of their decision-making processes about the audits. Therefore, the announced PATH audits cannot be treated as a final agency decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN9]An agency's decisions about the promulgation and enforcement of its regulations are not "final" unless the process of administrative decision-making reaches a stage where judicial review will not be disruptive of the agency process and legal consequences will flow from the actions taken.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN10]Judicial intervention into the agency process at the pre-enforcement stage denies the agency an opportunity correct its own mistakes and apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. Therefore, where the agency's own administrative processes show the potential to correct the agency action plaintiff

complains of, plaintiff's complaints are not amenable to judicial review.

Administrative Law > Agency Adjudication > Decisions > General Overview
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN11]A mere general attack on the authority of an agency to conduct an investigation does not obviate the Administrative Procedure Act's final agency decision requirement.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Separation of Powers > Constitutional Controls > General Overview
[HN12]A claim that an agency action is in plain contravention of a statutory mandate may present one of the extraordinary exceptions to the finality requirement. In order to properly invoke the court's jurisdiction under this exception, plaintiff must show that the agency is totally without jurisdiction to undertake the action and is acting in excess of its constitutional and statutory authority.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN13]In addition to demonstrating that they challenge a final agency action, plaintiffs must also show that they have no adequate remedy in a court. 5 U.S.C.S. § 704.

Administrative Law > Judicial Review > General Overview
[HN14]Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury necessitating review of Administrative Procedure Act claims.

Civil Procedure > Declaratory Judgment Actions > Federal Judgments > Appellate Review
[HN15]The Declaratory Judgment Act authorizes the federal courts to declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought. 28 U.S.C.S. § 2201(a).

Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion
[HN16]Relief under the Declaratory Judgment Act is discretionary even when an actual controversy exists in the constitutional sense because the court recognizes that the accelerated judicial intervention authorized by the act creates the risk of burdening courts and litigants with disputes that were otherwise destined to disappear by themselves.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN17]To determine whether a dispute is ripe for review the court considers the fitness of the matter for judicial decision and the hardship to the parties of withholding court consideration.

Administrative Law > Judicial Review > Reviewability > Ripeness
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN18]Courts determine whether a dispute is fit for judicial review by weighing whether (1) the disputed agency decision is "final"; and (2) whether the issue is purely legal or the underlying legal issues are facilitated if they are raised in the context of a specific attempt at enforcement.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect
Civil Procedure > Declaratory Judgment Actions > General Overview
Governments > Courts > Judicial Precedents
[HN19]Precedent establishing the conditions for final agency action under the Administrative Procedure Act are also binding under the Declaratory Judgment Act.

Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN20]Plaintiffs must show that their challenges to the Physicians At Teaching Hospitals audits concern issues that are more legal than factual in order to receive relief under the Declaratory Judgment Act.

Civil Procedure > Declaratory Judgment Actions > General Overview
[HN21]Suits based on potential future events are ill-suited for declaratory relief.

Civil Procedure > Declaratory Judgment Actions > General Overview
Healthcare Law > Business Administration & Organization > Judicial Review > General Overview
[HN22]The court recognizes that it may not decide a Declaratory Judgment Act claim which is based upon contingent future events that may not occur as anticipated, or indeed, may not occur at all.

Civil Procedure > Declaratory Judgment Actions > General Overview
[HN23]The last prong of the Declaratory Judgment Act ripeness analysis requires that the party requesting relief show that the denial of declaratory relief harms him more than it harms the challenged government agency.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN24]To prove hardship plaintiffs must show the complained of agency action caused them "direct and immediate" harm.

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JUDGES: ROBERT L. CARTER, U.S.D.J.

OPINION BY: ROBERT L. CARTER

OPINION

OPINION

ROBERT L. CARTER, District Judge

This action concerns a group of hospitals' request for declaratory and injunctive relief for their claims challenging the PATH [1] audits, a nationwide review of teaching hospitals' Medicare Part B reimbursement practices conducted by the Office of the Inspector General ("OIG"), and the Department of Health and Human Services ("HHS"). Plaintiffs are Greater New York Hospital Association ("GNYHA"), Mount Sinai School of Medicine, Beth Israel Medical Center, The Trustees of Columbia University on behalf of its Faculty of Medicine, Cornell University, and Memorial Sloan Kettering Cancer Center. Defendant is the United States of America, acting through OIG and HHS (collectively "defendants"). Presently before the court [*2] are defendants' motions to dismiss plaintiffs' Administrative Procedure Act ("APA") claims, pursuant to Rule 12(b)(1) and Rule 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Defendants also argue plaintiffs' Declaratory Judgment Act ("DJA") claims, 28 U.S.C. § 2201, should be dismissed because they are not ripe for review. Plaintiffs bring a cross-motion for summary judgment on their claims.

1 The PATH acronym stands for "Physicians At Teaching Hospitals."

II. FACTS

The Medicare Act, Title XVIII of the Social Security Act of 1935, creates a federally subsidized medical program that reimburses doctors for medical services provided to qualified elderly and disabled persons. Medicare Part A covers Medicare patients' inpatient care, *see* 42 U.S.C. §§ 1395c-1395i-2, and Medicare Part B covers Medicare patients' professional medical care, such as diagnostic and ambulatory services, *see* [*3] 42 U.S.C. § 1395j-1395w. Hospitals are bound by different reimbursement rules for the respective Medicare Parts; the dispute here concerns Part B's requirements, which authorize reimbursement for "attending physician services rendered to patients in a teaching setting." 20 C.F.R. § 405.521(a) (subsequently recodified as 42 C.F.R. § 405.521)).

HHS has delegated some administrative responsibility for the Medicare program to the United States Health Care Financing Administration ("HCFA"), *see* 42 U.S.C. §§ 1395(h) & (u), and HCFA in turn has contracted with private entities called "carriers" to conduct some Medicare Part B administrative duties, including: paying teaching hospitals for reimbursable services; performing reviews and audits; and educating teaching hospitals about reimbursable services under Medicare Part B. *See* 42 U.S.C. § 1395u(a)(1). HHS, HCFA, and the carriers have all issued statements about Medicare Part B reimbursement standards over the past thirty years.

In 1967, the Secretary of HHS promulgated a set of Medicare Part B reimbursement requirements which provided that an "attending physician['s]" [*4] services to a patient were reimbursable under Medicare Part B when "the attending 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(b) (1968) (subsequently recodified as 42 C.F.R. § 405.521). This regulation provided that "personal and identifiable direction" included "supervision in person by the attending physician" for services such as "major surgical procedures or other complex and dangerous procedures or situations." *Id*. The regulation also allowed an attending physician who involved interns and residents in a Medicare patient's treatment to be reimbursed for his fee as long as "his services to the patient [were] of the same character, in terms of the responsibilities to the patient that are assumed and fulfilled as the services to other paying patients." *Id*. These services included reviewing the patient's history and conducting a physical exam; personally examining the patient within a reasonable time after admission; confirming or revising the patient's diagnosis; determining the course of treatment to be followed; assuring that any supervision needed by the interns [*5] and residents was furnished; and making frequent reviews of the patient's progress. *Id*.

The 1967 regulations were supplemented by two Intermediary Letters ("I.L.'s"), issued to Medicare Part B carriers, clarifying which doctors' activities established an "attending physician" relationship with a covered patient. *See* I.L. 372 (1969); I.L. 70-2 (1970). I.L. 372 provided that "for a Teaching Physician to be eligible for Part B reimbursement . . . he must . . . render sufficient personal and identifiable medical services to the Medicare beneficiary to exercise full personal control over the management of the portion of the case for which a charge can be recognized" and "be present and ready to perform any service . . . when a major surgical procedure or complex or dangerous medical procedure is performed." *Id*. It further provided that the attending physician's care for the patient "must be demonstrated, in part, by notes and orders in the patient's records that are either written or countersigned by the supervising physician." *Id*. I.L. 70-2 indicated that attending doctors could in part demonstrate their responsibility for a patient's care by countersigning notes in the [*6] Medicare patient's record; it established that an attending physician's countersignature in the patient's record allowed one to presume that the patient had been examined by the attending doctor.

In 1980, Congress reissued the Medicare Part B reimbursement requirements for attending doctors, *see* 42 U.S.C. § 1395u(b)(7) (1980); the new requirements provided that a "physician [must render] sufficient personal and identifiable physicians' services to the patient to exercise full, personal control over the management of the portion for which payment is sought [and] the services [must be] of the same character as the services the physician furnishes to non-beneficiary patients."

In 1989, HCFA proposed additional revisions to the reimbursement regulations for "attending doctors" under Medicare Part B, acknowledging that the existing regulations were somewhat unclear and were being interpreted differently by different teaching hospitals. HCFA provided more detailed documentation standards for teaching hospital doctors seeking reimbursement under the "attending doctor" designation in an effort to "describe the methods that would be used to determine the [*7] customary charges" under Medicare Part B. 54 Fed. Reg. 5946 (Feb. 7, 1989). HCFA also recognized that the 1967 standards for identifying attending physicians, as described in regulation 405.520-21, were still in effect, and recognized I.L. 372 as setting forth the criteria for the "attending physician" relationship for the agency's new proposed rules. [2] (Pls.' Mem. at 13); 54 Fed. Reg. 5952 (Feb. 7, 1989).

> 2 Pls.' Mem. refers to Plaintiffs' Memorandum of Law in Opposition to the Government's Motion to Dismiss Plaintiff's Complaint and in Support of Plaintiffs' Cross Motion for Summary Judgment. Gov. Mem. refers to Government's Memorandum of Law in Further Support of Its Motion to Dismiss the Complaint and in Opposition to Plaintiffs' Motion for Summary Judgment.

In 1991, HCFA announced that it planned to finalize the rules it proposed in 1989. *See* 56 Fed. Reg. 25,793 & 25,799 (June 5, 1991). Additionally, HCFA recodified regulation 405.521, and announced that it was [*8] retaining the requirements and operating instructions for determining when a doctor who is supervising residents is considered a patient's "attending physician." *See* 56 Fed. Reg. at 25,799. HCFA referred persons seeking a detailed definition of "attending physician" for the purposes of Medicare Part B reimbursement to the original 1967 regulations and to I.L. 372, assuring doctors that the 1967 regulations were still in effect. *See* 56 Fed. Reg. 59,502 & 59,507 (Nov. 25, 1991).

On December 30, 1992, HCFA's Director of Payment Policy, Charles Booth, issued a memorandum to HCFA's regional offices ("Booth Memorandum") which provided that teaching doctors who sought reimbursement under Medicare Part B as "attending physicians" must be present on all occasions when physician services were delivered by their residents to a Medicare patient. On the same day, Thomas Ault, Deputy Director of HHS's Bureau of Policy Development, wrote a conflicting letter to a hospital explaining that "all payment for the physician's time spent in supervising residents in the care of a patient with whom an attending physician relationship is established is payable through fees [*9] . . . [under] Part B . . . ." Plaintiffs refer the court to documents showing that HCFA and HHS officials at various

points stated that the Booth Memorandum was not binding and the 1967 regulations for attending physicians were still in effect, and that even if the Booth Memorandum requirements were to become binding these requirements would not be enforced retroactively. (Pls.' Mem. at 26); (Obus Decl. Ex. E).

In 1995, HHS proposed new Medicare reimbursement rules. *See* 60 Fed. Reg. 38,400 (July 26, 1995) (describing proposed Medicare rules). After a period for comment on the proposed rules, on December 8, 1995, HHS promulgated the final and current version of the rules. *See* 42 C.F.R. § 415.172 et. seq. The new rules were not put into effect until July 1, 1996, in order to provide "adequate time to educate all affected parties." 60 Fed. Reg. 63,124 at 63,142-43 (Dec. 5, 1995).

Sometime after July 1995, when HHS entered a settlement with a teaching hospital for submitting fraudulent Medicare Part B claims, OIG announced that it would begin a nationwide audit of teaching hospitals collecting reimbursement under Medicare Part B to determine whether [*10] they were complying with I.L. 372, specifically, its provisions requiring an "attending physician" to be present during all billed patient procedures. (Pls.' Mem. at 16) (Obus Decl. Ex. A & B).

[HN1]OIG has the power, upon determining that a hospital has failed its PATH audit, to refer the hospital's case to the United States Attorney's Office for potential criminal or civil sanctions; if the United States Attorney's Office declines to accept the case for prosecution, the matter may be pursued by HHS for administrative recoupement proceedings. (Reeb Decl. PP 6-7). Plaintiffs submitted proof showing that many hospitals had not interpreted I.L. 372 as requiring the attending doctor's presence during every billed procedure, and therefore the PATH audits were likely to uncover many errors. (Obus Decl. Exh. B at 9).

After receiving complaints about the propriety of the PATH audits, the general counsel for HHS, Harriet Rabb, wrote a letter ("Rabb Letter") (Waltman Decl. Exh. B. App. A.) in which she recognized that the Medicare Part B reimbursement requirements were highly ambiguous during the period under review in the PATH audits and, therefore, the PATH audits should only continue at those [*11] hospitals where OIG had evidence that prior to December 30, 1992, (1) the local Medicare carrier for the hospital had provided the hospital with "written guidance stating that . . . reimbursement for teaching physician services would be limited to one of two situations: where the teaching physicians either personally furnished services to Medicare beneficiaries or were physically present when services were furnished by interns or residents" and the carrier's guidance (2) provided a "clear explanation of the rules regarding reimbursement for the services of teaching physicians." (Rabb Letter at 5). [3] PATH audits were terminated in several areas of the country where HHS and OIG determined that the local carrier had not informed hospitals that attending physicians were required to be present during the services rendered to Medicare patients in order to be reimbursed for their services. (Pls.' Mem. at 28-29).

> 3 Billing practices called "coding" are also being reviewed in the PATH audit. The PATH audit coding investigation examines physicians characterization of their evaluation and management services (E & M) to determine whether hospitals charged Medicare for a higher level of service than a doctor actually rendered to a Medicare patient. The facts supporting the parties' contentions about the fairness of the coding audits do not affect the legal analysis provided above, and therefore are not described in detail. Specifically, plaintiffs' contentions about the fairness of the PATH audit coding investigations raise the same issue as their claims about the "attending doctor" billing investigations: they are being charged with notice of changes in the Medicare reimbursement standards when no such notice was forthcoming from HHS, HCFA, or Medicare carriers. (Pls.' Mem. at 18-20).

[*12] OIG concluded that Empire Blue Cross, Blue Shield ("Empire"), the Medicare carrier for the hospitals in the greater New York area, had informed its hospitals of I.L. 372's requirement that "attending physicians" be present during patient services billed to Medicare Part B in a publication called "Fast Facts," (Pls.' Mem. at 30), and therefore these hospitals would be subject to PATH audits. *Id*. GYNHA appeared before OIG and HHS to persuade the agencies that the "Fast Facts" publication was not Empire's official Medicare information publication (Pls.' Mem. at 31-33); however, OIG and HHS refused to cancel the planned audits for hospitals in the greater New York area. OIG began investigating two of GNYHA's member hospitals, and the plaintiffs commenced suit to prevent the PATH audits from being conducted at any GYNHA member hospital. (Pls.' Mem. at 1).

At the time this action was submitted to the court, six PATH audits had been completed nationwide. (Reeb Decl. at P 6). In four cases, the PATH audits were resolved through settlement, and in two others no enforcement action was taken. (Reeb Decl. PP 6-8). Additionally, in 1998 the General Accounting Office (GAO) issued a report [*13] concluding the PATH audit standards on the "attending physician" requirement were reasonable. [4] (Gov. Mem. at 10).

4 The GAO report also indicated that the PATH audit standards used to review hospitals' coding of evaluation and management services were reasonable. (Gov. Mem. at 18).

II. ANALYSIS

The court begins with defendants' Rule 12(b)(1) motion to dismiss plaintiffs' APA claims on the ground that the court lacks subject matter jurisdiction to hear the claims, because failure to prove subject matter jurisdiction moots all other issues in an action. *See Dillard v. Runyon*, 928 F. Supp. 1316, 1322 (S.D.N.Y. 1996) (Mukasey, J.). Defendants bring a factual challenge to plaintiffs' subject matter jurisdiction, that is, they challenge whether sufficient facts exist for the court to determine that it has jurisdiction to hear the plaintiffs' claims. *See Guadagno v. Wallack Ader Levithan Assoc.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996) (Rakoff, J.) (distinguishing between facial [*14] and factual challenges under 12(b)(1)). [HN2]In reviewing a factual challenge to subject matter jurisdiction, the court may rely on the plaintiff's complaint, as well as look to extrinsic evidence, such as affidavits, to support its determinations. *Id*. However, "no presumption of truthfulness attaches to the complaint's jurisdictional allegations," and "the burden is on the plaintiff to satisfy the Court as fact-finder of the jurisdictional facts." *Id*.

II. APA Claims

With these standards in mind, the court reviews plaintiffs' APA claims. [5] [HN3]The APA "provides for judicial review of a final agency action for which there is no other adequate remedy in court." *See Franklin v. Massachusetts*, 505 U.S. 788, 796, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)(internal quotations omitted). "Two [HN4]conditions must be satisfied for an agency action to be final: First, the action must mark the consummation of the agency's decision-making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will follow." *Top Choice Distrib. v. United Postal Serv.*, 138 F.3d 463, 465 (2d. Cir. 1998). [*15]

5 Defendants' initial memorandum supporting their motion to dismiss characterized plaintiffs' claims as arising under both the APA and the DJA; they later characterized these claims as predominately arising under the DJA. (Gov. Mem. at 23 (describing earlier memorandum arguments). Plaintiffs' memorandum characterizes their claims as predominately DJA claims, but also raise APA issues. The court treats plaintiffs' claims as arising under both statutes.

1. Final Agency Decision

a. Announcement of Impending PATH Audits

Plaintiffs contend that the announcement that the PATH audits will occur is a final agency decision under the APA. (Pls.' Mem. at 60, 75). [HN5]An agency's announcement may be treated as a final agency decision when legal consequences, such as sanctions, flow from the announcement. *See Franklin*, 505 U.S. at 799. Also, when officials have no discretionary power to alter the announcement's directives and provisions for sanction, it may be considered a final decision. *Id* [*16] . Courts have further recognized that [HN6]when announced regulations "have the force of law before their sanctions are invoked," these regulations may be a final agency decision reviewable under the APA. *See Abbott Labs.*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681. Lastly, [HN7]when an agency refuses to change its policy despite administrative proceedings adjudicating the fact that its policies violate persons' rights, the court will treat its announced policy as a final agency decision. *See Jones v. Califano*, 576 F.2d 12, 18 (2d Cir. 1978).

Under these standards, the announced PATH audits do not constitute a final agency decision by OIG or HHS. The regulations do not establish the legal rights of parties, as the member hospitals still have the opportunity to challenge the PATH audits. *See Top Choice*, 138 F.3d at 465. Indeed, the audits do not definitively establish plaintiffs' liability or subject them to sanction, as HHS has the discretion to settle the audit claims for lesser amounts or dismiss the audit claims. (Reeb Decl. PP 6-8). Additionally, the agencies have not refused to change their position on the audits, as they have already agreed to circumscribe the group [*17] of hospitals subject to the PATH audit standards, based on whether the hospitals had adequate notice of the relevant Medicare reimbursement standards. (Reeb Decl. PP 6-8) & (Pls.' Mem. at 26-27). The court recognizes that the [HN8]PATH audit standards are not exactly "tentative or interlocutory" in nature; however, the evidence submitted also makes it clear that the agencies involved are not at the end of their decision-making processes about the audits. *Top Choice*, 138 F.3d at 465. Therefore the announced PATH audits cannot be treated as a final agency decision.

Plaintiffs argue that OIG's decision to conduct the PATH audits is final because it subjects them to the risk of "total destruction" based on their potential liability for False Claims Act ("FCA") claims. (Pls.' Mem. at 3). However, the Second Circuit recently rejected the claim that threat of liability is a sufficient basis for challenging

government action under the APA. In *Top Choice Distributors*, the court held that the post office's decision to file an administrative complaint against a company was not a "definitive agency decision," and would not become a final agency decision until after the time to [*18] appeal the ALJ's decision on the administrative claim had run, or the judicial officer in charge of the case resolved the appeal. *See* *Top Choice Distributors*, 138 F.3d at 467; *see also* *Federal Trade Commission v. Standard Oil*, 449 U.S. 232, 241, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980) (noting that an agency's complaint establishing that it had "reason to believe" a company was violating a statute was "not a definitive statement of position").

Here, plaintiffs have not even been charged in a complaint, but merely have been informed that they will be audited. Too much conjecture is required for the court to conclude that they will suffer injury from the audits: the court would have to assume OIG will determine the hospitals violated the PATH audit standards, and that they will refer these claims for FCA prosecutions or administrative recoupement proceedings.

Contrary to plaintiffs' assertion, the court's conclusion that the decision to conduct the PATH audits is not "final" under the APA does not insulate the PATH audit process from judicial review. (Pls.' Mem. at 61 & 63). Rather, the court simply defers this inquiry until a time when the "decisionmaking [*19] agency has arrived at a definite position on the issue that inflicts an actual concrete injury." *Top Choice Distributors*, 138 F.3d at 465. As defendants have not yet been found liable under the PATH Audits, the court cannot conduct the inquiry plaintiffs propose here.

b. Promulgation of PATH Audit Standards as a Final Agency Decision

Plaintiffs in their next two challenges allege that the PATH audit standards were improperly promulgated because they are being applied to a period prior to their promulgation, (Pls.' Mem. at 64, 73), and because these Medicare audit standards were actually promulgated by OIG and HCFA rather than HHS, as required by statute. (Pls.' Mem. at 51, 81). These claims are controlled by *Seafarers International Union of North America v. United States Coast Guard*, 736 F.2d 19, 22 (2d. Cir. 1984), a case in which the Second Circuit reviewed a group of plaintiffs' APA claim seeking to force the Coast Guard to "enforce applicable statutes and policies and to promulgate regulations in accordance with applicable statutes and federal policies" regulating the staffing of ships.

Under *Seafarers* [HN9]an agency's decisions about [*20] the promulgation and enforcement of its regulations are not "final" unless "the process of administrative decision-making has reached a stage where judicial review will not be disruptive of the agency process and . . . legal consequences will flow from the action[s] taken." *Seafarers*, 736 F.2d at 26. Courts recognize that "judicial [HN10]intervention into the agency process [at the pre-enforcement stage] denies the agency an opportunity correct its own mistakes and apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Standard Oil*, 449 U.S. at 241 (citations omitted). Therefore, where the agency's own administrative processes show the potential to correct the agency action plaintiff complains of, plaintiff's complaints are not amenable to judicial review. *See* *Seafarers*, 736 F.2d at 27-28.

Here it is clear that judicial review of the process for promulgating and enforcing the PATH standards would interfere with HHS's and the OIG's administrative procedures. The scope of the PATH initiative has changed as HHS [*21] officials have reviewed its progress, (Rabb Letter at 5)(establishing that hospital notice about Medicare standards must be established prior to the PATH audit inquiry and requiring dismissal of some PATH audits on this basis); and it continues to be reviewed. (see Gov. Mem. at 10)(discussing 1998 GAO report on the PATH audits). The jurisdictional facts plaintiffs have provided do not show that the PATH audit involves "definitive statutes, orders or regulations" or a "consistent pattern" of agency action eligible for pre-enforcement review. *Sinclair Oil Corp. v. C.R. Smith*, 293 F. Supp. 1111, 1112 (S.D.N.Y. 1968) (MacMahon, J.) (discussing review of definitive statutes); *National Wildlife Fed. v. Benn*, 491 F. Supp. 1234, 1241 (S.D.N.Y. 1980) (Tenney, J.) (discussing review of a pattern of agency action). There may well be further amendments to the PATH audits once plaintiffs avail themselves of their right to bring administrative challenges to the PATH audits; this has not occurred thus far because no plaintiff hospital has been found to have violated the PATH standards. (Pls.' Mem. at 1)(noting that only two hospitals have even been subject to PATH [*22] reviews). Therefore, the court will not review the PATH audit standards in order to give HHS and OIG an opportunity to correct the problems in the the PATH audit process, as these problems are fleshed out by administrative and settlement proceedings involving the audited hospitals. *See* *Seafarers*, 736 F.2d at 27-28.

c. The Inspector General's Participation in Audits as a Final Agency Decision

Plaintiffs' last claim attempts to circumvent the APA's finality requirement; they argue that they can challenge the PATH audits prior to their becoming a final agency decision because the audits are ultra vires acts of the OIG. [HN11]A mere general attack on the

authority of an agency to conduct an investigation does not obviate the APA's final agency decision requirement. *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994)(citations omitted). "A [HN12]claim, that an agency action is in plain contravention of a statutory mandate, however, may present one of the extraordinary exceptions to the finality requirement." *Veldhoen*, 35 F.3d at 225 (citing *Leedom v. Kyne*, 358 U.S. 184, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958)); [*23] *see also Sinclair Corp.*, 293 F. Supp. at 1114 (recognizing exception). In order to properly invoke the court's jurisdiction under this exception, plaintiff must show that the agency "is totally without jurisdiction" to undertake the action and is "acting in excess of [its] constitutional and statutory authority." *Sinclair Corp.*, 293 F. Supp. at 1114.

Plaintiffs have presented the court with statutory authority showing that the HHS has primary responsibility for Medicare program audits, *see* 42 U.S.C. §§ 1395u(a)(1)(A) and (C), and caselaw suggesting that OIG is limited to conducting spot checks for fraud perpetrated on administrative agencies, *see Burlington No. Railroad Co. v. Office of the Inspector General*, 983 F.2d 631, 638-41 (5th Cir. 1993) (holding that OIG does not have statutory authority to issue subpoenas for compliance with a nationwide audit); *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 328 (5th Cir. 1997) (explaining that OIG has subpoena power to conduct spot check audits). [6] Additionally, they point the court to documents showing that OIG and HHS have stated that [*24] the PATH audits are a nationwide investigatory initiative. (Pls.' Mem. at 16). However, there is also statutory authority suggesting that OIG may "provide policy direction for and . . . conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of the agency to which it is assigned. 5 U.S.C. App. 3 § 4(a)(1). This authority suggests that OIG's action "is not so at odds with the statute [creating its jurisdiction] as to present one of the extraordinary exceptions to the finality doctrine." *Veldhoen*, 35 F.3d at 225.

> 6 Neither *Burlington* nor *Winters Ranch* establishes that the OIG's decision to conduct an ultra vires audit is a decision reviewable as a final agency decision under the APA. *See Ass'n of Am. Med. Colleges v. United States*, 34 F. Supp. 2d 1187, 1191 (C.D. Cal. 1998)(discussing cases). Rather in both of these cases the courts' "jurisdiction was premised on the counterclaim filed by the Inspector General seeking enforcement of the subpoenas." *Id.*

[*25] Additionally, the court finds that the OIG's actions in conducting the PATH audits are distinguishable from the OIG's conduct in *Burlington*, the case plaintiffs' principally rely on to support their claim. Plaintiffs contend that OIG has characterized the PATH audits as a nationwide initiative, and this comment shows that the agency has exceeded its statutory authority to investigate specific kinds of fraud. (Pls.' Mem. at 28-29). However, despite this statement, the PATH audits have been conducted in a manner consonant with OIG's statutory authority. *Id.* (discussing OIG's decision to conduct the PATH audits only when hospitals had notice of relevant reimbursement standards); (Gov. Mem. at 10)(discussing GAO report reviewing how OIG and HHS should select hospitals for PATH audits). In *Burlington* the court determined that OIG only represented that it was investigating specific instances of railroad company fraud when the railroad companies threatened the agency with litigation based on the charge that OIG had exceeded the limits of its statutory authority to do limited fraud investigations. *See Burlington* 983 F.2d at 638. In this case, however, OIG and [*26] HHS have always conducted the PATH audits in a manner that shows they are trying to ferret out a specific set of fraudulent Medicare reimbursement practices. (Pls.' Mem. at 16)(characterizing the audit as an attempt to assess compliance with I.L. 372). Given these facts, it does not appear that the PATH audits involve one of the extraordinary circumstances of ultra vires agency action; rather, "this dispute is over the [OIG's] interpretation of its statute and its [PATH] regulations, an activity to which courts generally grant deference to agencies." *Veldhoen*, 35 F.3d at 226.

2. Alternative Legal Remedy

[HN13]In addition to demonstrating that they challenge a final agency action, plaintiffs must also show that they "have no adequate remedy in a court." 5 U.S.C. § 704. Courts that have previously addressed hospitals' PATH audit challenges have concluded that the hospitals have a number of adequate legal remedies available to them other than APA claims. *See Ass'n of Am. Med. Colleges*, 34 F. Supp. 2d at 1193; *Ohio Hospital Ass'n v. Shalala*, 978 F. Supp. 735, 742 & n.9 (N.D. Ohio 1997). These remedies can [*27] be accessed by "(1) refusing to settle to avoid [FCA] prosecution; (2) presenting their defenses to a False Claims lawsuit; and (3) winning that lawsuit based on lack of scienter . . . ; hospitals could either avoid recoupment or be in a position to obtain judicial review of a recoupment decision, and the policy underlying it." *Ohio Hospital Assoc.*, 978 F. Supp. at 741; *see also, Ass'n of Am. Medical Colleges*, 34 F. Supp. 2d at 1193 (discussing same). Furthermore, plaintiffs could refuse to comply with OIG subpoenas for their Medicare billing records, challenge OIG's use of its subpoena power in court, and in this way get judicial review of the PATH audits. *See, e.g., Winters Ranch*, 123 F.3d at 328 (describing plaintiffs' suit against OIG based on its

ultra vires exercise of its subpoena power); *Burlington*, 983 F.2d at 636-37 (same).

The court recognizes that plaintiffs may incur substantial costs defending against FCA claims; however, "mere [HN14]litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" necessitating review of their APA claims. *Standard Oil*, 449 U.S. at 243. [*28] For courts have recognized that "the expense and annoyance of litigation is part of the social burden of living under government;" they are not injuries requiring immediate court action. *Id*.

The analysis above demonstrates that plaintiffs have failed to demonstrate that they have been injured by a final agency action for which they have no adequate remedy in court; therefore the court declines to exercise subject matter jurisdiction over their APA claims.

III. Declaratory Judgment Act

Defendants argue that the court should decline to hear plaintiffs' claims under the DJA, 28 U.S.C. § 2201, because none of plaintiffs' challenges to the PATH audits are ripe for review. (Gov. Mem. at 3) (relying on [HN15] *Ass'n. of Am. Med. Colleges v. United States*, 34 F. Supp. 2d at 1194).

The Declaratory Judgment Act authorizes the federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought." 28 U.S.C. § 2201(a). [HN16]Relief under the act "is discretionary even when an actual controversy exists in the constitutional sense" because the court [*29] recognizes that the "accelerated judicial intervention" authorized by the act "creates the risk of burdening courts and litigants with disputes that were otherwise destined to disappear by themselves, a problem particularly acute when the burdened party is an agency of a coordinate branch of government charged by Congress with administering a statutory program." [HN17] *In re Combustion Equipment Ass'n. Inc. v. United States Environmental Protection Agency*, 838 F.2d 35, 37 (2d. Cir. 1988). To determine whether a dispute is ripe for review the court considers "the fitness of the matter for judicial decision and the hardship to the parties of withholding court consideration." *National Wildlife Fed.*, 491 F. Supp. at 1240 (citing *Abbott Labs.*, 387 U.S. at 149).

A. Fitness For Resolution

[HN18]Courts determine whether a dispute is fit for judicial review by weighing whether (1) the disputed agency decision is "final"; and (2) whether the issue is purely legal or the underlying legal issues would be facilitated if they were raised in the context of a specific attempt at enforcement. *See In re Combustion*, 838 F.2d at 37.

1. [*30] **Final Decision**

The first determination in the DJA analysis is whether the decisions raised in plaintiffs' challenges to the PATH audits concern final agency actions. [HN19]Precedent establishing the conditions for final agency action under the APA are also binding under the DJA. *See Abbott Labs.*, 387 U.S. at 149-50. Therefore, plaintiffs' failure to establish that the process for promulgating the PATH standards, the announcement of the PATH audits, and the OIG's exercise of authority to conduct the audits were final agency decisions also establishes that these claims are not "final" for the purposes of the DJA analysis.

2. More Legal than Factual

[HN20]Plaintiffs must also must show that their challenges to the PATH audits concern issues that are more legal than factual in order to receive relief under the DJA. [HN21]Suits based on potential future events are ill-suited for declaratory relief. *See In re Combustion*, 838 F.2d at 38-39. Plaintiffs' claims here about the harms the announced PATH audits will cause are based on a series of speculations: (1) that other GNYHA hospitals may be audited; (2) that these GNYHA hospitals will fail the PATH audits; (3) [*31] that the Secretary will initiate recoupment proceedings based on these PATH Audits; (4) that some of the audited hospitals will be referred to the U.S. Attorney's Office for FCA prosecutions; and (5) that the GNYHA hospitals may settle these claims rather that face liability from FCA claims.

Plaintiffs other claims: that the OIG exceeded its authority in conducting the audits, and that the audit standards were promulgated improperly, also require more extensive factual development. The court cannot determine whether OIG has acted improperly or used the PATH standards improperly without facts showing how the the OIG's implementation of the standards at the GNYHA hospitals inflicted injury. The fact record here is too underdeveloped for judicial review. [HN22]The court recognizes that it may not decide a DJA "claim which is based upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." *Thomas v. City of New York*, 143 F.3d 31, 33 (2d Cir. 1998).

B. Hardship to the Parties

[HN23]The last prong of the DJA ripeness analysis requires that the party requesting relief show that the denial of declaratory relief harms him more than it harms [*32] the challenged government agency. *See National Wildlife*, 491 F. Supp. at 1240. Plaintiffs contend that the

threat of FCA liability they face from the PATH audits is a hardship that makes their claims amenable to declaratory relief. *See* *Nutritional Alliance v. Shalala*, 144 F.3d 220, 226 (2d Cir. 1998). However, [HN24]to prove hardship plaintiffs must show the complained of agency action caused them "direct and immediate" harm. *Abbott Labs.*, 387 U.S. at 152. Plaintiffs have failed to show that they have already been injured by the PATH audits; they have not demonstrated that they have been forced to incur costs in order to comply with the audit standards or been required them to change their behavior with "serious penalties attached to non-compliance." *Id.* at 153; *cf.* *Nutritional Alliance*, 144 F.3d at 226 n.12 (requiring a showing of "significant present injuries produced by contemplation of a future event"). Rather, plaintiffs have complied with the physician presence requirement outlined by the PATH audit standards since the new Medicare Part B standards were articulated in 1995.

Plaintiffs contend that [*33] they have proven hardship by showing that their "primary conduct" -- their administration of hospitals relying on Medicare funding -- is affected by the PATH audits and the threat of FCA liability; this effect would support the appropriateness of adjudication now. (*see* Pls.' Mem. at 62-63); *cf.* *In re Combustion*, 838 F.2d at 39 (discussing threat to primary conduct as a basis for declaratory relief). However, the "possible harm from delaying litigation does not automatically render a dispute ripe[;]" indeed, this potential harm may be "outweighed by other factors," such as the hardship to the government. *Id.*

Here the hardship imposed on OIG and HHS by pre-enforcement review of the PATH audits is clear: it will prevent OIG from pursuing its statutory mandate to investigate fraud perpetrated on executive agencies, and prevent HHS from policing the spending of Medicare funds. *Id.* Furthermore, it would waste HHS and OIG resources as it would force the agencies to justify each PATH audit for each hospital before proceeding with their review. Indeed, the balance of equities suggests the government's hardship cancels out any benefit plaintiff might receive from [*34] pre-enforcement adjudication of the propriety of the PATH audits.

Based on these findings, the court dismisses plaintiffs' claims under the APA for lack of subject matter jurisdiction, and it dismisses their claims for declaratory relief as their claims are not ripe for review.

IT IS SO ORDERED.

Dated: New York, New York

November 9, 1999

ROBERT L. CARTER

U.S.D.J.

Subpoena Authority of Inspector Generals

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

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Univ. of Med. v. Corrigan, 2004 U.S. LEXIS 4612 (U.S., June 28, 2004)

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a medical and dental teaching hospital and related entities, sought review of an order of the United States District Court for the District of New Jersey, which held that it lacked subject matter jurisdiction to consider the hospital's challenge to a pending audit of its Medicare physician billing, and to administrative audits served upon it by appellee acting Inspector General, United States Department of Health and Human Services.

OVERVIEW: Under Medicare law, physicians other than residents who provided care to patients, were reimbursed under Part B based on the service performed. Pursuant to the rules as amended in 1992, such physicians had to provide personal and identifiable direction, but did not expressly state that a physician's presence was required at the hospital to obtain reimbursement. 42 C.F.R. § 404.521(b)(1) (1992). However, many Medicare insurance carriers had expressly stated that physical presence was required for teaching physicians to receive compensation under Medicare Part B. In that context, the Health and Human Services inspector general sought to audit the hospital's Medicare billings. The hospital refused to comply with the subpoenas, and the inspector general filed a motion to enforce the subpoenas. The district court found that the issuance of subpoenas and decision to initiate the audit was not a final action for purposes of judicial review, and that the inspector general had the authority to obtain the information it sought. The court of appeals affirmed. The initiation of the audit represented a definitive taking of a position only in the narrowest sense.

OUTCOME: The judgment of the district court was affirmed. Any challenges to the audit would properly be made when action was taken against the hospital and the employees.

CORE TERMS: audit, inspector general, path, carrier, subpoena, billing, teaching hospitals, investigate, resident, healthcare providers, inspector, initiate, finality, routine, intern, judicial review, enforcing, teaching, ad-

ministrative subpoenas, identifiable, patient, General Act, agency action, initiation, providers, ripe, physical presence, ripeness, entity, detect

LexisNexis(R) Headnotes

Public Health & Welfare Law > Social Security > Medicare > Coverage > Part B
Public Health & Welfare Law > Social Security > Medicare > Providers > Reimbursement > General Overview
Public Health & Welfare Law > Social Security > Medicare > Providers > Types > Physicians
[HN1]If a physician renders sufficient personal and identifiable physicians' services to a 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 as the services the physician furnishes to patients not entitled to benefits under this subchapter, the physician may bill for the services under Medicare Part B. 42 U.S.C.S. § 1395u(b)(7)(A)(i)(I).

Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN2]See 42 C.F.R. § 415.170.

Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN3]Offices of Inspector General are designed to be independent and objective units separate from their respective departments and agencies. 5 U.S.C.S. app. 3 § 2. They are directed to conduct and supervise audits and investigations relating to the programs and operations of their respective agencies. Their primary task is to prevent fraud and abuse within such programs and operations.

Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > General Overview
Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN4]The Office of Inspector General of Health and Human Services is an independent office with a primary function to investigate fraud and abuse within the Medicare program.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
[HN5]Under the Inspector General Act, each inspector general is authorized to require by subpoena the production of all documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, 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.S. app. § 6(a)(4).

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Civil Procedure > Pretrial Matters > Subpoenas
Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review
[HN6]Orders enforcing administrative subpoenas are subject to appellate review. Such orders are considered final for purposes of 28 U.S.C.S. § 1291 because there is no ongoing judicial proceeding that would be delayed by an appeal.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Civil Procedure > Pretrial Matters > Subpoenas
[HN7]An appellate court will affirm an order enforcing an agency's subpoena unless we conclude that the district court has abused its discretion.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges
[HN8]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.

Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN9]The power to effectively investigate Health and Human Services (HHS) and the participants in the Medicare program is fundamental to the HHS inspector general's mission.

Administrative Law > Agency Adjudication > Review of Initial Decisions
Administrative Law > Agency Investigations > Scope > Subpoenas
[HN10]In the ordinary course, judicial proceedings are appropriate only after the investigation has led to en-

forcement, 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN11]Judicial review of administrative subpoenas is strictly limited. The ultimate inquiry is whether the enforcement of the administrative subpoena would constitute an abuse of the court's process. 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN12] 5 U.S.C.S. app. 3 § 2 specifically authorizes inspectors general to conduct and supervise audits and investigations relating to Medicare programs and operations.

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN13]The Inspector General Act grants inspectors general a degree of discretion in determining when such audits and investigations are appropriate.

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN14]See 5 U.S.C.S. app. 3 § 6, 6(a)(2).

Administrative Law > Agency Adjudication > Review of Initial Decisions
[HN15] 5 U.S.C.S. app. 3 § 9 contains a restriction on the ability of the inspectors general to perform program operating responsibilities. The Inspector General Act (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 the Act. The Act specifically provides, however, that no such transfer shall include program operating responsibilities.

Public Health & Welfare Law > Social Security > Medicaid > Providers > Types > General Overview
Public Health & Welfare Law > Social Security > Medicare > Providers > Reimbursement > General Overview
[HN16]See 42 U.S.C.S. § 1395u(a).

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
Public Health & Welfare Law > Social Security > Medicare > General Overview
[HN17]The Department of Health and Human Services, through Medicare insurance carriers, is statutorily responsible for routine compliance audits, which are core program operating responsibilities, under 42 U.S.C.S. § 1395u(a).

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN18]Ripeness and finality are closely related. Finality is an element in the test for ripeness. A court's treatment of the finality issue involves an inquiry into the broader question of whether a given action is ripe for judicial review.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN19]Determining whether a dispute over agency action is ripe involves a two-part inquiry. A court must assess (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. The fitness question requires an assessment of whether the issues presented are purely legal, whether the agency action is final for purposes of the Administrative Procedures Act, and whether further factual development would 'significantly advance our ability to deal with the legal issues presented.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN20]An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action. 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.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN21]Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN22]There are 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.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN23]Although the burden of the filing of a complaint is substantial, it is different in kind and legal effect from the burdens attending what is considered to be a final action. The expense and annoyance of litigation is part of the social burden of living under government.

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

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

OPINION BY: 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. [1]

1 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 Ad-

ministration. 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. [2]

> 2 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 [HN1]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, [HN2]"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. [3] [HN3]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. [HN4]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.

> 3 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. [HN5]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), [HN6]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) (review-

ing order enforcing [*64] administrative subpoena); *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992) (reviewing quashal). [HN7]"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, [HN8]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). [HN9]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."). [HN10]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, [HN11]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, [HN12]the statute [**20] specifically authorizes inspectors general "to conduct and supervise audits and investigations relating to [these] programs and operations." *Id.* Furthermore, [HN13]the Act grants inspectors [*65] general a degree of discretion in determining when such audits and investigations are appropriate: [HN14]"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. [HN15]Section 9 of the Act contains a restriction on the ability of the inspectors general to perform program operating responsibilities. [4] [**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.

4 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, howev-

er, 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, [HN16]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, [HN17]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 United States Dep't 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 [5] 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.

5. 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.

[HN18]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*, 538 U.S. 803, 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.

[HN19]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, [6] 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.

> 6. 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.

[HN20]"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. [HN21]"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.

[HN22]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." [7] *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).

> 7. 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. [8]

> 8. 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, [HN23]"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 Ass'n 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).

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

249 F.3d 1077; 346 U.S. App. D.C. 83; 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.

CASE SUMMARY:

PROCEDURAL POSTURE: In its audits of programs of grantee legal services programs, appellee Inspector General of the Legal Services Corporation issued a subpoena to appellant legal services provider. When appellant failed to comply, appellee petitioned in the United States District Court for the District of Columbia for summary enforcement of the subpoena. The district court granted the petition, and appellant sought review.

OVERVIEW: The information sought by the subpoena included identification of appellant's clients. Appellant contended that the attorney-client privilege and appellant's attorneys' professional obligations prevented it from disclosing client names, associated with case numbers, as it would allow appellee to match names with types of cases. The court of appeals affirmed, finding it had jurisdiction under 28 U.S.C.S. § 1291 pertaining to final decisions, and rejecting appellant's claim of a blanket attorney-client privilege. Notwithstanding general restrictions on appellee's power, under 42 U.S.C.S. § 2996e(b)(3), protecting client identity, § 509(h) of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, § 509(h), 110 Stat. 1321, 1321-59, explicitly authorized compelling production of information, including client names. Under these circumstances, disclosure was consistent with appellant's ethical obligations. 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.

OUTCOME: The court affirmed the district court's order granting the petition for summary enforcement, and remanded for possible further proceedings. Appellee could not claim blanket attorney-client privilege. Compliance with subpoena would not be unduly burdensome.

CORE TERMS: subpoena, grantee, legal services, disclosure, retainer agreements, unduly, auditor, secret, attorney-client, burdensome, privileged, identifier, audit, subject matter, ethical obligations, particularized, injunction, appealable, authorizes, recipient, relevance, claim of privilege, per curiam, auditing, linkage, case number, General Act, Appropriations Act, MODEL RULE, applicable laws

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Contempt
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
Criminal Law & Procedure > Grand Juries > Investigative Authority > Subpoenas > Challenges > Appealability
[HN1]Grand jury and civil subpoenas are not injunctions appealable under 28 U.S.C.S. § 1292(a)(1). Review is instead procured by refusing to comply and litigating the subpoena's validity in the contempt proceeding that ensues. Upon noncompliance with an administrative subpoena, the issuing agency seeks enforcement in the district court. 5 U.S.C.S. app. 3, § 6(a)(4). The ensuing district court order, either granting or denying enforcement, is appealable under 28 U.S.C.S. § 1291 once final. In light of that there is even less reason to regard an administrative subpoena, either before or after enforcement, as an injunction.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN2]The considerations courts of appeal 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.

Evidence > Privileges > Attorney-Client Privilege > Exceptions
[HN3]Courts consistently hold that the general subject matters of clients' representations are not privileged under the attorney-client privilege. 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. That burden requires a showing that the privilege applies to each communication for which it is asserted.

Legal Ethics > Client Relations > Confidentiality of Information
Public Health & Welfare Law > Social Services > Legal Aid
[HN4]New York State and American Bar Association ethics rules protect both privileged information and unprivileged information deemed "secret." Model Rules of Professional Conduct Rule 1.6 cmt. 5 (1999); N.Y. Code of Professional 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. Model Rules of Professional Conduct Rule 1.6(a) (1999); N.Y. Code of Professional Responsibility DR 4-101(B)(1) (2000). Both rules exempt disclosures required by court order. Model Rules of Professional Conduct Rule 1.6 cmt. 20 (1999); N.Y. Code of Professional Responsibility DR 4-101(C)(2) (2000).

Public Health & Welfare Law > Social Services > Legal Aid
[HN5]The Legal Services Corporation Act of 1974 authorizes the Legal Services Corporation to supervise grantees' compliance with applicable laws. 42 U.S.C.S. § 2996e(b)(1)(A). In doing so, however, the Legal Services Corporation generally must respect the professional responsibilities incumbent on grantees' attorneys.

Public Health & Welfare Law > Social Services > Legal Aid
[HN6]See 42 U.S.C.S. § 2996e(b)(3).

Civil Procedure > Pretrial Matters > Subpoenas
Public Health & Welfare Law > Social Services > Legal Aid
[HN7]The Inspector General of the Legal Services Corporation, because he bears the burden of auditing and investigating grantees, is granted broad subpoena powers. 5 U.S.C.S. app. 3, §§ 4(a)(1), 6(a)(4). He also enjoys a limited exception to the restrictions of 42 U.S.C.S. § 2996e(b)(3).

Public Health & Welfare Law > Social Services > Legal Aid
[HN8]See Pub. L. No. 104-134, § 509(h), 110 Stat. 1321, 1321-59.

Civil Procedure > Pretrial Matters > Subpoenas
Public Health & Welfare Law > Social Services > Legal Aid
[HN9]The Office of the Inspector General is an arm of the Legal Services Corporation that insures the compliance of recipients and their employees with applicable law. 42 U.S.C.S. § 2996e(b)(1)(A); 5 U.S.C.S. app. 3, § 8G(b). Although the Office of the Inspector General was created after the Legal Services Corporation, § 2996e delineated ethical obligations binding on the entire corporation.

Public Health & Welfare Law > Social Services > Legal Aid

[HN10]Since the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, § 509(h), 110 Stat. 1321, 1321-59, explicitly exempts auditors of the Legal Services Corporation from 42 U.S.C.S. § 2996e(b)(3), which applies only to the Legal Services 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. Therefore, §§ 509(h) and 2996e(b)(3) are to be read to impose obligations on the Inspector General with regard to both privileged and secret materials.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Recordkeeping

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Public Health & Welfare Law > Social Services > Legal Aid

[HN11]The restrictions in 42 U.S.C.S. § 2996e(b)(3) notwithstanding, the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, § 509(h), 110 Stat. 1321, 1321-59, explicitly authorizes auditors of the Legal Services Corporation to compel production of time records, retainer agreements, and client names. The Legal Services 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).

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Public Health & Welfare Law > Social Services > Legal Aid

[HN12]The Legal Services 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). This is consistent with 42 U.S.C.S. § 2996e(b)(3)'s protection of client confidences and secrets and is therefore the general policy of the corporation. But § 509(h) of the Omnibus Appropriations Act of 1996, Pub. L. No. 104-134, § 509(h), 110 Stat. 1321, 1321-59, is an explicit exception to § 2996e(b)(3), so while the Legal Services Corporation's mandate for the contents of retainer agreements informs judicial analysis, its general regulation regarding protection of client identity cannot trump a more specific--and contrary--statutory provision.

Administrative Law > Agency Investigations > Scope > Subpoenas

Civil Procedure > Pretrial Matters > Subpoenas

[HN13]Federal courts enforce administrative subpoenas as long as they are reasonably relevant to the agency's purpose and not unduly burdensome.

Civil Procedure > Pretrial Matters > Subpoenas

[HN14]Frequently, concerns over burden in complying with subpoenas are related to relevance: in determining whether a burden is due, courts often examine its tailoring to the purpose for which the information is requested--that is, its relevance. Courts treat burden and relevance separately, because subpoenas might be relevant but still unduly burdensome.

Civil Procedure > Pretrial Matters > Subpoenas

[HN15]An administrative burden in complying with a subpoena would be undue if compliance threatened to unduly disrupt or seriously hinder normal operations.

Public Health & Welfare Law > Social Services > Legal Aid

[HN16]Courts defer to the determinations of relevance made by the Inspector General of the Legal Services Corporation unless they are obviously wrong.

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.

OPINION BY: 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." [1]

1 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. [2] Appellant renews its arguments here.

2 *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 [HN1]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.

[HN2]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). [3] 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.

> 3 *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. [HN3]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 [HN4]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). [4] [HN5]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:[HN6]

> 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). [HN7]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:

> [HN8]*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). [5]

> 4 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.
>
> 5 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. [HN9]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. [HN10]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. [HN11]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. [6]

> 6 [HN12]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. [HN13]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.

[HN14]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. [HN15]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 [HN16]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.

See General Authority of the Inspectors General, *infra,* for full text

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed from order of United States District Court for Eastern District of Texas enforcing administrative subpoena issued by plaintiff, U.S. Inspector General for Department of Interior, for documents concerning defendants' alleged underpayment of royalties to the government for production under federal oil and gas leases.

OVERVIEW: Plaintiff, the United States as represented by the Department of Interior Inspector General, issued administrative subpoenas to defendants for documents related to defendants' federal oil and gas leases as part of an investigation that defendants had misrepresented the value of their federal lease production. Defendants objected to the subpoenas' scope and threat to confidential and proprietary information. The district court ordered the subpoenas enforced subject to a protective order. Defendants contended the subpoenas were outside plaintiff's authority and were unduly burdensome. The court found statutory authority within the Inspector General Act of 1978, 5 U.S.C.S. app. 3, and the False Claims Act, 31 U.S.C.S. § 3730(b), for plaintiff to issue subpoenas. It also rejected defendants' claims that the subpoenas were overbroad and unduly burdensome because defendant offered no adequate explanation why the compliance cost and effort unduly disrupted or seriously hindered normal operations.

OUTCOME: Enforcement order affirmed; subpoenas were neither outside plaintiff's authority nor unduly burdensome; no abuse of discretion in district court's finding that protective order afforded defendants adequate protection especially in light of plaintiff's stipulation not to disclose protected competitive material.

CORE TERMS: subpoena, protective order, disclosure, inspector general, administrative subpoenas, confidentiality, lease, abuse of discretion, legislative history, post-argument, confidential, investigative, false claims, burdensome, royalties, unduly, notice, audits, investigate, Freedom of Information Act, federal funds, private party, statutory authority, establishment, cooperation, designated, recipient, notified, empower, oil

LexisNexis(R) Headnotes

Civil Procedure* > *Justiciability* > *Mootness* > *General Overview
[HN1]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.

LEXSEE

Caution
As of: Mar 18, 2011

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant inspector general appealed from a decision of the United States District Court for the Western District of Texas, which granted plaintiff's motion for summary judgment on defendant's application for enforcement of administrative subpoenas duces tecum issued to plaintiffs.

OVERVIEW: Defendant inspector general formulated a plan to investigate and audit the Consolidated Farm Service Agency's (CFSA) implementation of the payment limitation and eligibility requirements for participation in federal wool and mohair support programs. Defendant began investigating plaintiffs until they refused to comply and sued for a declaration that the subpoenas were not issued for a purpose with defendant's statutory authority. The court reversed and remanded the summary judgment for plaintiffs. Defendant issued the subpoenas for a purpose within defendant's statutory authority, which was to test the efficiency of the Consolidated Farm Service Agency's implementation of payment limitations in the wool and mohair price support programs. The Inspector General Act (Act), 5 U.S.C.S. app. 3 §§ 1-12, specifically authorized defendant to make such investigations as were, in the judgment of the defendant, necessary or desirable. The record did not support the district court's inferences that defendant's investigation usurped the CFSA's program operating responsibilities, was long-term, or was not being conducted for legitimate purposes under the Act.

OUTCOME: The court reversed and remanded the summary judgment for plaintiffs in plaintiffs' action for declaration that defendant inspector general's subpoenas were not issued for a purpose with defendant's statutory authority. The Inspector General Act authorized defendant to make any investigations necessary. Use of those investigations did not usurp the Consolidated Farm Service Agency's program operating responsibilities.

CORE TERMS: inspector, subpoena, audit, marketing, wool, mohair, producer's, summary judgment, railroad, statutory authority, price support programs, eligibility, support payments, General Act, end-of-year, conducting, farming operation, effectiveness, administrative subpoenas, investigatory, investigate, long-term, undisputed, partner, eligibility requirements, transferred, material fact, burdensome, authorizes, entity

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN1]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) the subpoena demand is reasonable and not unduly burdensome.

Governments > Agriculture & Food > Product Quality
Governments > Federal Government > Claims By & Against
[HN2]The Office of Inspector General of the United States Department of Agriculture was established by the Inspector General Act. Inspector General Act of 1978, 5 U.S.C.S. app. 3 §§ 1-12. Congress created the Office of Inspector General for the express purpose of combating fraud, waste, abuse, and mismanagement in the programs and operations of the federal government. 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
Governments > Agriculture & Food > Product Quality
[HN3]Each Inspector General, in carrying out the provisions of the Inspector General Act, 5 U.S.C.S. app. 3 §§ 1-12, 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 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 by the Act, 5 U.S.C.S. app. 3 § 6(a)(2), (4).

Governments > Agriculture & Food > Processing, Storage & Distribution
Governments > Agriculture & Food > Product Promotion
Governments > Agriculture & Food > Product Quality
[HN4]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 (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) (1996) (repealed 1996). Payments to any person were limited 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) (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).

Governments > Agriculture & Food > Product Quality
[HN5]United States Department of Agriculture (USDA) regulations charge the Consolidated Farm Service Agency (CFSA) with determining program eligibility, payment limitation compliance, and participants' general compliance with all program requirements. 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. The purpose of end-of-year reviews is to maintain the integrity of payment limitation and payment eligibility provisions and to ascertain that farming operations were carried out as represented when initial determinations were made.

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
[HN6]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. Under Fed.

R. Civ. P. 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).

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Agriculture & Food > Product Quality
[HN7]The Inspector General Act, 5 U.S.C.S. app. 3 §§ 1-12, clearly authorizes an Inspector General 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.

Administrative Law > Agency Investigations > General Overview
Governments > Agriculture & Food > Product Quality
[HN8]The purpose of the Inspector General Act (Act), 5 U.S.C.S. app. 3 §§ 1-12, in establishing an Inspector General (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.S. 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. 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. To fulfill these duties, the Act gives the IG additional powers.

Administrative Law > Agency Investigations > Scope > Subpoenas
Governments > Agriculture & Food > Product Quality
Governments > Local Governments > Administrative Boards
[HN9]The Inspector General (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. 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. 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. 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.

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Agriculture & Food > Product Quality
[HN10]Procedures other than subpoenas shall be used by the Inspector General (IG) to obtain documents and information from federal agencies. The IG is authorized to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the IG's functions.

Administrative Law > Agency Investigations > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Governments > Agriculture & Food > Product Quality
[HN11]The Inspector General Act, 5 U.S.C.S. app. 3 §§ 1-12, establishes and protects the Inspector General (IG) independent, objective 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. 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. 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.

Governments > Agriculture & Food > Product Quality
[HN12]See 5 U.S.C.S. app. 3 § 9.

Governments > Agriculture & Food > Product Quality
[HN13]5 U.S.C.S. app. 3 § 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 Inspector General (IG) and their transfer would further the purposes of the Inspector General Act, 5 U.S.C.S. app. 3 §§ 1-12. Correlatively, 5 U.S.C.S. app. 3 § 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.

Administrative Law > Agency Investigations > General Overview
Governments > Agriculture & Food > Product Quality
[HN14]5 U.S.C.S. app. 3 § 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 Inspector General's (IG) 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.

Governments > Agriculture & Food > Product Quality
[HN15]The Inspector General Act, 5 U.S.C.S. app. 3 §§ 1-12, authorizes and enables the Inspector General (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. 5 U.S.C.S. app. 3 § 6(a)(2).

JUDGES: Before GARWOOD, BARKSDALE and DENNIS, Circuit Judges.

OPINION BY: 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

[HN1]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. [1] The district court's [*330] ruling was restricted to the authority of the IG to issue the subpoenas.

1 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

[HN2]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. [HN3]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

[HN4]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).

[HN5]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

[HN6]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 proce-

dures 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. [HN7]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.

[HN8]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. [HN9]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). [HN10]"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. [HN11]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:

> [HN12]§ 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.

[HN13]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. [HN14]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, [HN15]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.

Analysis
As of: Mar 18, 2011

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant participants in a federal disaster program challenged an order of the United States District Court for the Middle District of Georgia, which enforced subpoenas issued to appellants by appellee Inspector General of the United States Department of Agriculture under § 6(a)(4) of the Inspector General Act of 1978, 5 U.S.C.S. app. §§ 1- 12.

OVERVIEW: As part of an audit of a federal disaster program under the Inspector General Act of 1978 (IGA), 5 U.S.C.S. app. §§ 1- 12, appellee Inspector General of the United States Department of Agriculture subpoenaed certain records from appellant federal disaster program participants to determine their compliance with regulatory payment limitations. Appellants refused to produce the records, and appellee sought summary enforcement. The district court entered an order enforcing the subpoenas. The court affirmed. The audit was not a regulatory compliance audit solely within the agency's authority to conduct under 5 U.S.C.S. § 9(a)(2), because appellee began its investigation in response to a specific allegation of fraud and abuse in the form of a hotline complaint. The subpoena power of 5 U.S.C.S. § 6(a)(4) was vital to appellee's function of investigating fraud and abuse in federal programs. Appellee therefore did not exceed his statutory authority. The subpoenas were not unduly burdensome, nor were they protected by an accountant-client privilege, since no such privilege existed under federal law and no state-created privilege had been recognized in federal cases.

OUTCOME: The court affirmed the district court's order enforcing subpoenas issued to appellant participants in a federal disaster program by appellee Inspector General of the United States Department of Agriculture. Appellee did not exceed his statutory authority and the subpoenas did not create an undue burden upon appellants.

CORE TERMS: subpoena, audit, subpoena powers, disaster, subpoenaed, reporting, railroad, detect, requested information, accountant-client, burdensome, subpoena issued, statutory authority, legislative history, appropriately, retention, exceeded, accuracy, unduly, combat, questionable, General Act, state law, federal programs, refused to produce, undue burden, establishment, investigating, state-created, conservation

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN1]The Inspector General Act of 1978, 5 U.S.C.S. app. §§ 1- 12, enables Inspectors General to combat fraud and abuse by allowing audits of Federal establishments, organizations, programs, activities, and functions, 5 U.S.C.S. § 4(b)(1)(A), and by authorizing broad subpoena powers, 5 U.S.C.S. § 6(a)(4).

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN2]The court 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.

Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN3]The Inspector General Act of 1978 (IGA), 5 U.S.C.S. app. §§ 1- 12, specifically directs the Inspector General to coordinate activities designed to prevent and detect fraud and abuse in departmental programs. 5 U.S.C.S. app § 2(2)(B). To enable the Inspector General to carry out this function, the IGA authorizes the Inspector General to conduct audits, 5 U.S.C.S. app. § 4(b)(1)(A), for the purpose of promoting efficiency and detecting fraud and abuse, 5 U.S.C.S. § 2(2)(A)(B).

Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN4]Audits under the Inspector General Act of 1978 (IGA), 5 U.S.C.S. app. §§ 1- 12, 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN5]To enable the Inspector General to conduct such audits in an effective manner, the Inspector General Act of 1978 (IGA), 5 U.S.C.S. app. §§ 1- 12, 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 to conduct a comprehensive audit, the Inspector General could have no serious impact on the way federal funds are expended.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN6]The subpoena power of 5 U.S.C.S. app. § 6(a)(4) is vital to the Inspector General's function under the Inspector General Act of 1978, 5 U.S.C.S. app. §§ 1- 12, of investigating fraud and abuse in federal programs.

Administrative Law > Agency Adjudication > Review of Initial Decisions
Civil Procedure > Pretrial Matters > Subpoenas
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN7]The general procedure for appealing Consolidated Farm Service Agency county and state committee decisions is set forth at 7 C.F.R. § 780.1-11. These provisions apply to decisions made under programs and by agencies, as set forth within the regulations. 7 C.F.R. § 780.2. The provisions do not apply to an independent review by the Inspector General.

Administrative Law > Governmental Information > Recordkeeping & Reporting
[HN8]Consolidated Farm Service Agency regulations require program participants to retain records for a period of two years following the close of the program year. 7 C.F.R. § 708.1 (1997).

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN9]While participants in Consolidated Farm Service Agency programs 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 under 5 U.S.C.S. app. § 6(a)(4).

Evidence > Privileges > Accountant-Client Privilege > General Overview
[HN10]No confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.

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.

OPINION BY: 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 [1] 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.

1 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") [2] 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.

2 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). [HN1]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). [HN2]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. [3]

> 3 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] [HN3]

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 [HN4]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. [HN5]To enable the In-

spector 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. [HN6]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. [4] In sum, we conclude that the subpoenas issued by the Inspector General did not exceed the statutory authority granted under the IGA.

4 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. [HN7]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. [HN8]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. [HN9]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"), [5] 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. [HN10]"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.

5 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.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant inspector general sought review of the decision from the United States District Court for the Northern District of Texas, which denied enforcement of its subpoena duces tecum.

OVERVIEW: Appellee railroad company filed an action seeking declaratory and injunctive relief against the enforcement of appellant inspector general's subpoena duces tecum. The district court denied summary enforcement of the subpoena. On appeal, the court affirmed the decision denying enforcement of the subpoena and held that inspector general was without statutory authority to conduct the proposed tax compliance audit of railroad company. The court held that inspector general lacked authority to conduct regulatory compliance investigations or audits, and therefore, lacked statutory authority to issue the subpoena duces tecum. The court concluded that inspector general exceeded its statutory oversight authority when it attempted to assume the regulatory compliance functions of the Railroad Retirement Board and the IRS.

OUTCOME: The court affirmed the decision denying enforcement of appellant inspector general's subpoena duces tecum. The court held that inspector general was without statutory authority to conduct a proposed tax compliance audit of appellee railroad company.

CORE TERMS: audit, railroad, subpoena, retirement, oversight, unemployment, statutory authority, administrative subpoena, General Act, Tax Act, discovery, summary judgment, investigative, detection, auditing, subpoena duces tecum, enforceability, reconciliation, investigatory, Railroad Retirement Acts, subpoena powers, reporting, accuracy, subpena, paying, detect, non-compliance, enforcement proceeding, investigate, enforceable

LexisNexis(R) Headnotes

Administrative Law > Separation of Powers > Executive Controls
Pensions & Benefits Law > Railroad Workers > General Overview
Torts > Transportation Torts > Rail Transportation > General Overview
[HN1]Under the existing administrative structure, the Inspector General, in attempting to perform his statutory oversight duties, could effectively assume the Railroad Retirement Board's tax enforcement duties.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Exempt Plans > General Overview
Pensions & Benefits Law > Railroad Workers > Railroad Retirement Act of 1974 > General Overview
Tax Law > Federal Income Tax Computation > Railroad Retirement Tax Act
[HN2]The Railroad Retirement Board (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.S. § 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.S. § 3201, et seq.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Claim Procedures
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Exempt Plans > General Overview
Tax Law > Federal Income Tax Computation > Railroad Retirement Tax Act
[HN3]The Railrod Retirement Board administers unemployment and sickness benefits to railroad workers under the Railroad Unemployment Insurance Act, 45 U.S.C.S. § 351, 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.

Labor & Employment Law > Disability & Unemployment Insurance > General Overview
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Exempt Plans > General Overview
Pensions & Benefits Law > Railroad Workers > Railroad Retirement Act of 1974 > Administrative Review
[HN4]The Railroad Retirement Board (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 the Act. 45 U.S.C.S. § 231f(b)(6).

Labor & Employment Law > Disability & Unemployment Insurance > General Overview
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Exempt Plans > General Overview
Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Interest (IRC secs. 6601-6631) > General Overview
[HN5]The Railroad Retirement Board (RRB) may require employers to file compensation reports under the Railroad Retirement Act. 45 U.S.C.S. § 231h. 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. 45 U.S.C.S. §§ 358-359.

Labor & Employment Law > Disability & Unemployment Insurance > General Overview
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Exempt Plans > General Overview
Transportation Law > Rail Transportation > Safety Appliance Act > Couplers
[HN6]Under the Railroad Unemployment Insurance Act, the Railroad Retirement Board has the power to investigate or audit railroad employers to determine if they are accurately reporting creditable compensation and properly paying taxes. 45 U.S.C.S. § 362.

Administrative Law > Separation of Powers > Executive Controls
[HN7]The Inspector General Act of 1978, 5 U.S.C.S. 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.

Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN8]Congress established fifteen independent and objective Offices of Inspector General: (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, 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.S. App. 3 § 2.

Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN9]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.S. App. 3, § 3(a). Each Inspector General shall report to and be under the general supervision of the head of the department or agency involved.

Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN10]The Inspector General Act of 1978 (Act) authorizes the head of the federal department or 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 the Act. 5 U.S.C.S. App. 3, § 9(a)(2). However, no program operating responsibilities of the department or agency shall be transferred to an Inspector General.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Separation of Powers > Executive Controls
Pensions & Benefits Law > Railroad Workers > Railroad Retirement Act of 1974 > General Overview
[HN11]The Inspector General for the Railroad Retirement Board (RRB) has all the investigatory and auditing powers originally provided for in the Inspector General Act of 1978 (Act). 5 U.S.C.S. 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 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 by Act. 5 U.S.C.S. App. 3, § 6(a)(2), 6(a)(4).

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN12]The requirements for judicial enforcement of an administrative subpoena are minimal. 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. 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN13]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. 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. As long as an administrative subpoena or summons is issued in good-faith pursuit of a congressionally authorized purpose, it is enforceable.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
Governments > Legislation > Overbreadth
[HN14]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.

Civil Procedure > Trials > Bench Trials
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN15]The appellate court reviews the district court's fact findings under the clearly erroneous standard of review. Under this standard, the appellate court will not set aside the district court's fact findings unless, based upon the entire record, the appellate court is left with the definite and firm conviction that a mistake has been committed. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court will not set it aside as clearly erroneous--even if convinced that, had the appellate court been sitting as trier of fact, the appellate court would have weighed the evidence differently.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Appeals > Standards of Review > De Novo Review
Tax Law > State & Local Taxes > Administration & Proceedings > Audits & Investigations
[HN16]The scope of an agency's subpoena power is question of law which is reviewed de novo.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN17]The Inspector General's investigatory and subpoena powers are not without limits. For example, an Inspector General's subpoena powers do not encompass the authority to compel the attendance of a witness. Nor do an Inspector General's investigatory powers generally extend to matters that do not concern fraud, inefficiency, or waste within a federal agency.

Administrative Law > Agency Investigations > General Overview
Administrative Law > Separation of Powers > Executive Controls
[HN18]An Inspector General lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance investigations or audits.

Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview
[HN19]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.

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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.

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OPINION BY: 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 au-

dits, 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, [HN1]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*

[HN2]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, [HN3]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.

[HN4]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, [HN5]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 [HN6]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, [HN7]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, [HN8]Congress established [**6] fifteen "independent and objective" [1] Offices of Inspector General:

1 To accomplish its purpose of making the OIG an independent and objective office, Congress provided that [HN9]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). [HN10]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, [HN11]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 peri-

odic 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, [2] it is settled that [HN12]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.

> 2 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, [HN13]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 [HN14]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.

[HN15]We review the district court's fact findings concerning the nature of the proposed audit under the clearly erroneous standard of review. [3] 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.

> 3 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 disputed 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 rationalization 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. [4]

> 4 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 non-compliance. 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) ([HN16]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).

[HN17]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 [HN18]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, [HN19]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.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, governor and taxpayers, challenged an order of the United States District Court for the Northern Mariana Islands, which enforced a subpoena mandating the release to appellee Inspector General of the United States Interior Department of tax records necessary to conduct an audit of the Commonwealth of the Northern Mariana Islands pursuant to the Insular Areas Act, *48 U.S.C.S. § 1681b*, and which denied taxpayers' motion to intervene.

OVERVIEW: When appellee Inspector General of the United States Interior Department attempted to conduct an audit of the Commonwealth of the Northern Mariana Islands (CNMI), appellant governor refused to grant appellee access to the necessary records, claiming that the audit violated the CNMI's right of self-government and the privacy rights of its taxpayers. Appellant refused to comply with a subpoena, so appellee petitioned for its enforcement. Appellant taxpayers sought to intervene. Affirming the district court's decision enforcing the subpoena and denying the motion to intervene, the court held that appellee had the authority to require by subpoena the information necessary to carry out his auditing duties under the Insular Areas Act (Act), *48 U.S.C.S. § 1681b*. The court found that the Act did not impermissibly intrude on the CNMI's right to self-governance. The court also held that *§ 1681b* implicitly amended the provisions of *26 U.S.C.S. § 6103* to authorize disclosure of confidential tax information to appellee. The court found that the privacy interests asserted by appellant taxpayers were adequately represented by appellant governor and were insufficient to warrant intervention.

OUTCOME: The court affirmed the decision of the district court enforcing a subpoena issued by appellee Inspector General of the United States Interior Depart-

ment requiring appellant governor to provide access to the records needed to perform an audit of the Commonwealth of the Northern Mariana Islands. The court found that appellant taxpayers were not entitled to intervene because their privacy interests were being adequately represented.

CORE TERMS: island, audit, self-government, subpoena, Insular Areas Act, internal affairs, tax returns, confidentiality, intervene, federal laws, subpoena powers, administrative subpoena, legislative powers, legislative authority, confidential, negotiations, sovereignty, disclosure, finances, enforcement proceedings, trust territory, privacy interests, statutory authority, intrude, federal interest, sentence, tax information, tax records, privacy rights, amicus curiae

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN1] The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute.

Administrative Law > Separation of Powers > Jurisdiction
[HN2] The Insular Areas Act, *48 U.S.C.S. § 1681b*, provides the authority for the Inspector General of the United States Interior Department to conduct an audit of the Commonwealth of the Northern Mariana Islands.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN3] The Inspector General Act of 1978 specifies that the Inspector General of the United States Interior Department has the authority to require by subpoena all the information necessary to carry out his duties. *5 U.S.C.S. 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, *48 U.S.C.S. § 1681b*.

Constitutional Law > Relations Among Governments > New States & Federal Territory
Contracts Law > Types of Contracts > Covenants
Estate, Gift & Trust Law > Trusts > Trustees > General Overview
[HN4] The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, *48 U.S.C.S. § 1681* note, states that the Northern Mariana Islands are a self-governing commonwealth known as the "Commonwealth of the Northern Mariana Islands," (CNMI) in political union with the United States. The relations between the CNMI and the United States are governed by the covenant which, together with those laws of the United States applicable to the CNMI, are the supreme law of the CNMI. The people of the CNMI have the right of local self-government and govern themselves with respect to internal affairs in accordance with a constitution of their own adoption. The United States may enact legislation which will be applicable to the CNMI. The United States agrees to limit the exercise of that authority so that the fundamental provisions of this covenant, namely arts. I, II, and III, and §§ 501 and 805, may be modified only with the consent of the United States and the CNMI.

Constitutional Law > Relations Among Governments > New States & Federal Territory
Contracts Law > Types of Contracts > Covenants
[HN5] The authority of the United States towards the Commonwealth of the Northern Mariana Islands arises solely under the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 90 Stat. 263, reprinted in *48 U.S.C.S. § 1681* note.

Constitutional Law > Relations Among Governments > New States & Federal Territory
[HN6] The United States must have an identifiable federal interest that will be served by legislation affecting the Commonwealth of the Northern Mariana Islands.

Civil Procedure > Pretrial Matters > Subpoenas
Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Confidentiality of Returns & Return Information
[HN7] *26 U.S.C.S. § 6103* generally prohibits state officials from disclosing confidential tax return information except to those specifically authorized. This provision has been made applicable to the Commonwealth of the Northern Mariana Islands. *26 U.S.C.S. § 6103(b)(5)(A)*.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information

(IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > General Overview
[HN8] The Insular Areas Act, *48 U.S.C.S. § 1681b*, by authorizing an audit of the Commonwealth of the Northern Mariana Islands, implicitly amended the confidentiality provisions of *26 U.S.C.S. § 6103* to authorize disclosure of confidential tax information to the Inspector General of the United States Interior Department.

Constitutional Law > Relations Among Governments > New States & Federal Territory
[HN9] Under the Insular Areas Act, *48 U.S.C.S. § 1681b*, the Inspector General is required to report to the Secretary of the Interior all failures to collect amounts due the Commonwealth of the Northern Mariana Islands government.

Civil Procedure > Parties > Intervention > Motions to Intervene
Civil Procedure > Parties > Intervention > Right to Intervene
Constitutional Law > Relations Among Governments > New States & Federal Territory
[HN10] Section 502 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, *48 U.S.C.S. § 1681* note, governs the application to the Commonwealth of the Northern Mariana Islands of federal laws existing prior to January 9, 1978, and § 105 governs the application of federal laws enacted after that date.

Civil Procedure > Parties > Intervention > Motions to Intervene
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN11] A district court's decision to deny a motion for intervention may be reversed only if there has been an abuse of discretion.

Civil Procedure > Parties > Intervention > Permissive Interventions
Civil Procedure > Parties > Intervention > Right to Intervene
[HN12] There is no intervention as a matter of right for taxpayers in subpoena enforcement proceedings against a third party. Thus, intervention is permissive only. To succeed on their motion, intervenors must demonstrate that they have a significantly protectable interest in the tax records.

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.

OPINION BY: 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. [1]

1 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*

[HN1] "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*.

[HN2] The Insular Areas Act unambiguously provides the authority for the Inspector General to conduct an audit of the CNMI. [2] 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.

> 2 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). [HN3] 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:

[HN4] *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 [HN5] "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 [HN6] 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 consent 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*. [HN7] *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 [HN8] 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. [HN9] 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 [HN10] 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. [HN11] 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 [HN12] 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.*

UNITED STATES OF AMERICA, Appellee v. EDUCATIONAL DEVELOPMENT NETWORK CORPORATION, Appellant at No. 89-1239; UNITED STATES OF AMERICA, Appellee v. GERALD KRESS, Appellant at No. 89-1240

Nos. 89-1239, 89-1240

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

884 F.2d 737; 1989 U.S. App. LEXIS 13343

July 25, 1989, Argued
September 7, 1989, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Pennsylvania, D.C. Criminal Action Nos. 88-00271-01, 88-00271-02.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants sought review of an order from the United States District Court for the Eastern District of Pennsylvania, which convicted after a plea of guilty. Defendants maintained that the United States Attorney's Office acted in bad faith and in violation of Fed R. Crim. P. 6(e), when it used Inspector General subpoenas to gather evidence during a joint grand jury, criminal, civil, administrative, and military investigation.

OVERVIEW: Defendants were indicted on charges that defendants inflated estimates to the government on a contract with the United States Department of Defense. Defendants were subject to investigation by various agencies for both civil and criminal violations. Defendants sought to compel discovery and suppress information gathered by a subpoena from the Inspector General and used by the United States Attorney's Office (USAO) before the grand jury. Defendants pled guilty and sought review after they were sentenced. On appeal, the court affirmed because Fed. R. Crim. P. 6(e)(2), did not bar the USAO from participating in other agencies investigations before the USAO actually began presentation of evidence to the grand jury.

OUTCOME: The court affirmed defendants' convictions on the ground that the United States Attorney's Office was permitted to present to the grand jury information uncovered with a subpoena by other agencies and the Inspector General.

CORE TERMS: grand jury, subpoena, criminal division, disclosure, indictment, bad faith, criminal investigation, grand jury, search warrant, secrecy, discovery, notice, cooperation, summons, investigating, criminal cases, good faith, legislative history, investigative, investigator, suppression, issuance, referral, dicta, case law, criminal discovery, information obtained, civil liability, special agent, fraud case

LexisNexis(R) Headnotes

Criminal Law & Procedure > Grand Juries > Indictments > Right to Indictment by Grand Jury
Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
Evidence > Privileges > Self-Incrimination Privilege
[HN1]See U.S. Const. amend. V.

Criminal Law & Procedure > Grand Juries > Investigative Authority > General Overview
Criminal Law & Procedure > Grand Juries > Secrecy > Disclosure > Government Attorneys
Criminal Law & Procedure > Grand Juries > Secrecy > Rule of Secrecy

[HN2]The court does not believe that Fed. R. Crim. P. 6(e) bars the United States Attorney's Office criminal division from participating in other agencies' investigations before it actually begins presentation of evidence to the grand jury, and appellants refer us to no statutory or case law to the contrary. Rule 6(e)(2) provides in general that matters occurring before the grand jury may not be disclosed. Disclosure of such matters may only be made under the narrow exceptions listed in rule 6(e)(3). The grand jury material may not be used for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. Fed. R. Crim. P. 6(e)(3)(B). Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal. Fed. R. Crim. P. 6(e)(6). United States Attorneys do not have the power to subpoena evidence. They must ask the grand jury to do that. However, grand jury subpoenas often are issued as a matter of course.

Criminal Law & Procedure > Grand Juries > Secrecy > General Overview

[HN3]Once evidence is presented to the grand jury, the secrecy requirements of Fed. R. Crim. P. 6(e) attach and prevent the government from sharing that information with persons other than those listed on the notice of disclosure.

Criminal Law & Procedure > Grand Juries > Secrecy > General Overview

[HN4]The Justice Department is free to guide or influence the Inspector General and his subpoenas, so long as the Inspector General's subpoenas seek information relevant to the discharge of his duties. Congress intends that the courts accept the Inspector General's determination of what information is necessary to carry out the functions assigned to him so long as the information is relevant to an Inspector General function.

Criminal Law & Procedure > Grand Juries > Secrecy > General Overview

[HN5]Congress expects cooperation between the Inspector General and the Department of Justice in investigating and prosecuting fraud cases.

Administrative Law > Agency Investigations > General Overview
Criminal Law & Procedure > Grand Juries > Secrecy > General Overview

[HN6]Although the United States Attorney's Office criminal division is traditionally restricted to conducting investigations before a grand jury, the court sees no law or principle that would prevent it from presenting to the grand jury facts properly uncovered in the course of lawful investigations by another agency.

Administrative Law > Agency Investigations > Scope > Subpoenas
Criminal Law & Procedure > Discovery & Inspection > Subpoenas > General Overview

[HN7]A party seeking enforcement of a subpoena must show that (1) the agency has the power to request the evidence, (2) that each requested item is relevant to the investigation, and (3) that the evidence is sought in good faith.

COUNSEL: Gregory T. Magarity, Esquire (Argued) Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pennsylvania, Attorney, for Appellants.

Lee J. Dobkin, Esquire (Argued), Assistant United States Attorney, Philadelphia, Pennsylvania, Attorney, for Appellee.

JUDGES: Gibbons, Chief Judge, Hutchinson, Circuit Judge, and Wolin, District Judge. *

* Hon. Alfred M. Wolin, District Judge of the United States District Court for the District of New Jersey, sitting by designation.

OPINION BY: HUTCHINSON

OPINION

[*738] OPINION [**2] OF THE COURT

HUTCHINSON, Circuit Judge

I.

The issue in this case is whether the criminal division of the United States Attorney's Office's (USAO's) use of subpoenas that the Department of Defense Inspector General issued after the USAO's criminal division filed a Federal Rule of Criminal Procedure 6(e) Notice of Disclosure violated the appellants' Fifth Amendment rights to due process and indictment only by action of a grand jury. We conclude that it did not and will affirm the district court's orders of judgment and conviction.

II.

Educational Development Network Corporation (EDN) and its owner, Gerald Kress (Kress), entered into a non-competitive contract with the United States De-

partment of Defense (DOD) to provide an educational and employment training program to the Army National Guard Bureau (Guard). Lieutenant Colonel Robert Allen Baxter (Baxter), [1] chief of the Guard's Recruitment and Retention Center, was the Contract Officer Representative for the EDN contract. Baxter had significant contact with EDN and Kress and oversaw and approved the work called for by EDN's contract. In the summer of 1986, a former EDN employee and several government officials contacted the [**3] USAO about possible wrongdoing in connection with the cost and pricing information EDN was providing to the DOD. [2] The meetings that followed were attended by representatives from the civil and criminal divisions of the USAO and William Weinstein (Weinstein), a special agent of the DOD Inspector General, Defense Criminal Investigative Service. EDN was informed of an impending investigation by Assistant United States Attorney Lee J. Dobkin (Dobkin) of the USAO criminal division around September 22, 1986.

1 A jury found Baxter guilty of receiving an illegal gratuity. He has separately appealed his conviction, at No. 89-1214. We affirm his conviction in a published opinion issued today.

2 The indictment alleged that EDN and Kress became 50% owners in Baxter's family race car operation, Performance Formula, Inc., and supplied approximately $61,400 in funding to it.

On October 2, 1986, the USAO's criminal division opened a grand jury file on EDN, Kress and Baxter and filed an *ex parte* Rule 6(e) Notice [**4] of Disclosure with the United States District Court for the Eastern [*739] District of Pennsylvania. [3] It listed Dobkin as the Assistant United States Attorney in charge of the file. The grand jury docket sheet shows no further activity until January 13, 1988.

3 As we wrote in *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962): "The proceedings before a grand jury are protected against disclosure by the common law policy of secrecy. This policy is continued in Rule 6(e). . . ." By filing a Notice of Disclosure with the court, the USAO informed the court that it intended to disclose grand jury materials to the government personnel set forth in the notice, so that they could assist in the prosecution.

On October 3, 1986, Weinstein served an Inspector General (IG) subpoena on EDN. On October 30, 1986, before the documents were due, a federal magistrate issued a search warrant to the DOD covering many of the same documents. [4] The DOD took possession of documents during the [**5] search and later when EDN turned over the remaining subpoenaed documents. The documents were made available to the civil and criminal divisions of the USAO, the DOD and the Army Criminal Investigation Division (Army), which was investigating Baxter. The government candidly admits on appeal that the USAO and DOD agreed to conduct a joint investigation and to use DOD IG subpoenas so that the agencies could share the evidence obtained. [5]

4 Weinstein stated by affidavit that the search warrant was issued "due to alleged misconduct in EDN's production in response to the I.G. subpoenas." Appendix (App.) at 55a.

5 The record contains a Chronological Activity Summary of agent Klug (Klug), who was in charge of the Army investigation. App. at 120a-225a. Some of Klug's entries indicate that Dobkin agreed to help the Army get subpoenas for Baxter's tax returns. *Id.* at 148a, 156a. The IRS was also interested in the Army's procurement of an *ex parte* order gaining access to EDN's and Baxter's IRS records. *Id.* at 196a. There is also other evidence that the investigators clearly sought to avoid using the grand jury because that information would have to be kept secret. An investigator wrote:

> November 24, 1987:
>
> I am not opposed to combining our invest[igation] with that of [DOD], but if we do not do that we must go for the corporate check register with DOD IG subpoenas . . . *not* Grand Jury Subpoenas. Don't lose sight of Rule 6(e) requirements/problems.

Id. at 206a. Nevertheless, Dobkin later decided to use grand jury subpoenas to gather this information. *Id.* at 209a.

In his affidavit Weinstein indicated that he was the person deciding whether to issue IG subpoenas. *Id.* at 54a-55a. However, at oral argument the USAO stated that the issuance of IG subpoenas was controlled by both the USAO and the DOD and that they agreed to use them in lieu of a grand jury investigation so that the USAO and the DOD could avoid the Rule 6(e) secrecy requirements and share the documents.

[**6] On January 6, 1988, the DOD was told to complete all communications with the civil division of the USAO by January 13, 1988, when a "new phase" of the criminal investigation was to begin. Appendix (App.) at 56a. The information collected during the joint inves-

tigation was then presented to the grand jury. It returned an indictment on July 13, 1988. The indictment alleged that EDN and Kress submitted inflated estimates of EDN's costs on its contract to the DOD and that Baxter received illegal gratuities in return for approving them.

On October 14, 1988, the defendants filed a motion to compel discovery in aid of a suppression motion, alleging that the USAO acted in "bad faith" when it used IG subpoenas and a search warrant to gather evidence during a joint grand jury/criminal/civil/administrative/military investigation. The motion sought an order compelling additional discovery and requested a hearing to determine whether the USAO had in bad faith violated defendants' rights under the Fifth Amendment to due process and indictment only by action of a grand jury. [6] Defendants based their requests on *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978), [**7] which held *inter alia* that the Internal Revenue Service (IRS) must use its summons authority in good faith when pursuing a civil/criminal investigation. After a hearing, the district court denied the motion, holding that *LaSalle* applied only to [*740] IRS investigations and not to the IG subpoenas.

> 6 [HN1]The Fifth Amendment states, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. V.

On November 28, 1988, EDN, Kress and Baxter filed a motion to suppress and dismiss the indictment, based on the same argument. On November 29, 1988, after another hearing, the district court denied the motion. The court found:

> The defendants have failed to make out a prima facie showing of grand jury abuse. It is well-settled in this Circuit that grand jury proceedings are generally accorded a presumption [**8] of regularity and that a request for inspection of grand jury materials must be bottomed on more than an allegation that improper conduct has occurred and that discovery will verify this belief. Furthermore, although the defendants presented no evidence of improper disclosure of matters occurring before the grand jury, Special Agent Weinstein's affidavit demonstrates that no evidence was presented to the grand jury until January 1988, a date subsequent to the period during which defendants suggest that grand jury material may have been disclosed to the Department of Defense. Since the grand jury had not heard any evidence, there was nothing to disclose prior to January 1988 that would violate Rule 6(e).

App. at 279a.

On November 29, 1988, the date trial was to start, EDN and Kress pleaded guilty. In the plea agreement the defendants reserved the right to raise these issues on appeal from their convictions. They were sentenced on March 14, 1989 and filed this appeal on March 22, 1989.

III.

We have appellate jurisdiction over the district court's orders of judgment and conviction pursuant to 28 U.S.C.A. § 1291 (West Supp. 1989). Since resolution [**9] of the issues EDN and Kress raise concerning the district court's orders involves questions of law, we exercise plenary review.

IV.

EDN and Kress contend that the district court erred in denying their motion for suppression of all documents obtained by either the IG subpoena or the search warrant. [7] They base their contention on the argument that once the USAO's criminal division impaneled the grand jury and filed a notice of disclosure under Rule 6(e), the agency was not free to ignore the grand jury subpoena process and its secrecy requirements in favor of the IG subpoena process. Appellants say this raises serious issues about the constitutional role of the grand jury in restricting the government's inquisitory power over persons suspected of crime.

> 7 In their reply brief appellants concede that there is no longer any need for discovery and a *Genser II/Serubo* hearing to determine whether the government acted in bad faith, given the USAO's acknowledgement of its role in the investigation and its control over issuance of the IG subpoenas. *See United States v. Genser*, 595 F.2d 146, 152 (3d Cir.) *(Genser II)*, *cert. denied*, 444 U.S. 928, 62 L. Ed. 2d 185, 100 S. Ct. 269 (1979); *United States v. Serubo*, 604 F.2d 807, 812 (3d Cir. 1979).

[**10] In presenting their argument appellants place great reliance on Federal Rule of Criminal Procedure 6(e)(2). However, [HN2]we do not believe Rule 6(e) bars the USAO's criminal division from participat-

ing in other agencies' investigations before it actually begins presentation of evidence to the grand jury, and appellants refer us to no statutory or case law to the contrary. Rule 6(e)(2) provides in general that matters occurring before the grand jury may not be disclosed. Disclosure of such matters may only be made under the narrow exceptions listed in Rule 6(e)(3). The grand jury material may not be used "for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e)(3)(B). "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal. . . ." Rule 6(e)(6). United States Attorneys do not have the power to subpoena evidence. They must ask the grand jury to do that. However, grand jury subpoenas often are issued as a matter of course. *See In re Grand Jury Proceedings*, 486 F.2d 85, 90 [*741] (3d Cir. 1973) *(Schofield I)* (grand jury subpoenas [**11] are "instrumentalities of the United States Attorney's office").

The rationales for grand jury secrecy are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); *see Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n. 10, 60 L. Ed. 2d 156, 99 S. Ct. 1667 (1979); *SEC v. Dresser Indus.*, Inc., 202 U.S. App. D.C. 345, 628 F.2d 1368, 1382 n. 36 (D.C.Cir.) (en banc), *cert.* [**12] *denied*, 449 U.S. 993, 101 S. Ct. 529, 66 L. Ed. 2d 289 (1980).

[HN3]Once evidence is presented to the grand jury, the secrecy requirements of Rule 6(e) attach and prevent the government from sharing that information with persons other than those listed on the Notice of Disclosure. In this case the USAO did not present any evidence to the grand jury until January 13, 1988. Therefore, the secrecy requirements of Rule 6(e) did not attach until that time, and the USAO was free to share information uncovered in the joint investigation with the DOD and the Army. What occurred here is the USAO's disclosure of information obtained by the DOD to the grand jury, not the USAO's disclosure of information obtained by the grand jury to the DOD. Therefore Rule 6(e), requiring grand jury secrecy, would seem to have no application. In any event, we fail to find any Rule 6(e) violation, since it is clear that after January 13, 1988 the USAO's criminal division ceased communicating with the DOD and the Army about the investigation.

Appellants also argue that the evidence must be suppressed because the USAO's criminal division obtained it pursuant to subpoenas and a search warrant it had [**13] caused to be issued in a bad faith attempt to do an end run around the constitutional requirement that indictments be secured only through a grand jury. EDN and Kress base this argument on the fact that the USAO was involved in the investigation and controlled, at least partially, the issuance of the IG subpoenas. We do not minimize the concerns appellants express about the USAO's criminal division's conceded express avoidance of the grand jury by choosing instead to use the Inspector General's civil investigative powers in the investigation of crime, but they fail to direct us to any statutory, regulatory, or case law that prevents the USAO from doing so.

Appellants rely on dicta in *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978), in support of their position that the use of civil investigative powers is improper when there is an ongoing criminal investigation. *LaSalle* involved an IRS agent who was using summonses to obtain evidence for a criminal investigation. The Supreme Court held that although an IRS agent has no statutory power to conduct a criminal investigation, it was almost impossible to conduct an IRS investigation [**14] without both civil and criminal implications. The Court concluded, based on its prior decision in *Donaldson v. United States*, 400 U.S. 517, 536, 27 L. Ed. 2d 580, 91 S. Ct. 534 (1971), that so long as the summonses were issued in good faith before the agent referred the case to the Justice Department for prosecution, they were enforceable. To establish bad faith, the complainant had to show that the IRS issued the summons for a purpose other than those authorized by Congress in 26 U.S.C.A. § 7602 (West 1989).

Appellants rely on the following language from *LaSalle*:

> [*742] A referral to the Justice Department permits criminal litigation to proceed. The IRS cannot try its own prosecutions. Such authority is reserved to the Department of Justice and, more particularly, to the United States neys. 28 U.S.C. § 547(1). *Nothing in § 7602 [of the Internal Revenue Code] or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation.* [**15] *The likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted.* For example, the IRS, upon referral, loses its ability to compromise both the criminal and the civil aspects of a fraud case. 26 U.S.C. § 7122(a). After the referral, the authority to settle rests with the Department of Justice. Interagency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute. But such cooperation, when combined with the inherently intertwined nature of the criminal and civil elements of the case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive. Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interests while encouraging maximum interagency cooperation.

LaSalle, 437 U.S. at 312-13 (citations omitted) (emphasis added).

Appellants' reliance on [**16] *LaSalle* is misplaced. *LaSalle* was decided under § 7602 of the Internal Revenue Code and is relevant only in criminal cases involving the IRS. In *Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985), the appellant asked us to "recognize a general, albeit nonconstitutional, rule that administrative subpoenas issued to develop criminal cases are unenforceable." We noted that the cases relied on by appellant, *LaSalle, Donaldson* and *United States v. Powell*, 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964), "do not establish any such general rule." *Donovan*, 757 F.2d at 77. We recognized that *LaSalle, Donaldson* and *Powell* "do no more than establish standards for determining when an administrative agency that has only civil enforcement powers is engaged in an investigation aimed at developing a criminal case, and is hence acting beyond its statutory authority." *Id.* [8] Therefore, although dicta in *LaSalle* appear to support appellants' position, we do not believe they apply to this case because neither the DOD nor the Army was acting beyond its statutory requirements in conducting its investigation.

8 The Third Circuit cases relied on by appellants are also IRS cases. *See United States v. Genser*, 595 F.2d 146 (3d Cir.) *(Genser II), cert. denied*, 444 U.S. 928, 62 L. Ed. 2d 185, 100 S. Ct. 269 (1979); *United States v. Genser*, 602 F.2d 69 (3d Cir.) (per curiam) *(Genser III), cert. denied*, 444 U.S. 928, 62 L. Ed. 2d 185, 100 S. Ct. 269 (1979); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979).

[**17] In denying appellants' request for a hearing and suppression of the evidence, the district court relied on *United States v. Aero Mayflower Transit Co.*, 265 U.S. App. D.C. 383, 831 F.2d 1142 (D.C.Cir. 1987). In that case, the Antitrust Division of the Justice Department was investigating the moving and storage industry. In September 1985, the Department of Defense Inspector General began his own investigation of DOD contractors. The Antitrust Division and the FBI contacted the Inspector General and suggested a "cooperative investigation." *Id.* at 1144. The Inspector General then issued subpoenas to the appellants, who refused to comply. They argued that the Inspector General had "rubber stamped" the subpoenas and that the real investigator was the Justice Department, which should have gotten its subpoenas from a grand jury. The Inspector General's subpoenas, they argued, were therefore issued for an improper purpose. The district court declined to pass on the scope of the Inspector General's independence and ordered compliance. On appeal, [*743] the United States Court of Appeals for the District of Columbia Circuit made clear that [HN4]the Justice Department [**18] was free to guide or influence the Inspector General and his subpoenas, "so long as the Inspector General's subpoenas seek information relevant to the discharge of his duties." *Id.* at 1146. *See also United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 171 (3d Cir. 1986) ("We believe Congress intended that the courts accept the Inspector General's determination of what information is 'necessary to carry out the functions assigned [to him]' so long as the information is relevant to an Inspector General function."). The court in *Aero Mayflower* found nothing wrong with the Justice De-

partment's use of IG subpoenas rather than grand jury subpoenas, since grand jury matters could not be shared with the DOD. It said that "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." *Aero Mayflower*, 831 F.2d at 1146. [9] Likewise, there are no such restrictions in this case.

Appellants argue that

> the question in *Aero Mayflower* should not have been did the interpretation of the [**19] Statute restrict the Justice Department's power to use the grand jury to obtain the same documents. It should have been, as in *LaSalle*, was there any Congressional intent to justify an interpretation or application which would expand the [Justice Department's] criminal discovery rights or infringe (even potentially by allowing [the Justice Department] to have an alternative [to]) the role of the grand jury.

9 The court found *LaSalle* "totally inapposite." *Aero Mayflower*, 831 F.2d at 1146.

Brief for Appellants at 27. Whatever our reservations regarding the USAO's use of IG subpoenas and its degree of involvement in the DOD and Army investigation, appellants' arguments are more properly addressed to the Congress than to a court. [10]

10 A review of the relevant legislative history indicates that [HN5]Congress expected cooperation between the IG and the Department of Justice in investigating and prosecuting fraud cases. *See* S.Rep. No. 1071, 95th Cong., 2d Sess. 6-7, *reprinted in* 1978 U.S.Code Cong. & Admin.News 2676, 2681-82.

While the DOD did not receive its own IG until 1983, *see* Department of Defense Authorization Act, 1983, Pub.L. No. 97-252, § 1117(a)(1), 96 Stat. 718, 750 (1982), nothing in the legislative history pertaining to the establishment of the post of DOD IG prohibits his cooperation with the Department of Justice.

[**20] [HN6]

Although the USAO's criminal division is traditionally restricted to conducting investigations before a grand jury, on this record we see no law or principle that would prevent it from presenting to the grand jury facts properly uncovered in the course of lawful investigations by another agency. [11]

11 There is nothing in this record to show that the agency investigation itself was improper or used as a subterfuge by the USAO once it was unable to obtain the subpoenas from a grand jury.

Appellants also rely on dicta in *Dresser Industries* and *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 905 (Temp.Emer.Ct.App. 1984), in support of their argument that a party's rights could be compromised if he is confronted with simultaneous civil and criminal investigations. These cases do not apply. Both state that the party under investigation must show either that his rights will be prejudiced or that the investigating agency is acting in bad faith or using malicious tactics. Appellants [**21] fail to show how the criminal division's use of the IG subpoenas and search warrant prejudiced them. They also fail to show that the DOD or Army acted in bad faith or otherwise improperly in carrying out its investigations.

Finally, appellants allege that the USAO's criminal division "side-stepped" the procedural safeguards this Court established in *Schofield I*, 486 F.2d at 93, and in *In re Grand Jury Proceedings*, 507 F.2d 963, 964-65 (3d Cir.) *(Schofield II), cert. denied*, 421 U.S. 1015, 95 S. Ct. 2424, 44 L. Ed. 2d 685 (1975). Those cases require that [HN7]a party seeking enforcement of a subpoena [*744] must show that (1) the agency has the power to request the evidence, (2) that each requested item is relevant to the investigation, and (3) that the evidence is sought in good faith. Here, the IG subpoenas were properly issued in the course of a DOD investigation. There is no allegation that the evidence was not relevant, that the DOD had no power to issue the subpoenas, or, as noted, of bad faith on the part of the DOD. Appellants' argument that the USAO's participation affected any one of the three prongs of the *Schofield* [**22] test is therefore without merit.

V.

We conclude that the district court did not commit error when it denied appellants' motion to suppress evidence obtained by the use of IG subpoenas and a search warrant. We will therefore affirm the judgment and conviction orders of the district court.

UNITED STATES OF AMERICA, Appellee v. WESTINGHOUSE ELECTRIC CORPORATION, Appellant

No. 85-3456

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

788 F.2d 164; 1986 U.S. App. LEXIS 24005; 33 Cont. Cas. Fed. (CCH) P74,342

March 4, 1986, Argued
April 14, 1986, Decided

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh) Misc. No. 11710.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of an order of the United States District Court for the Western District of Pennsylvania (at Pittsburgh), which held that appellee Inspector General of the Department of Defense's subpoena for the internal audit reports of appellant company was enforceable.

OVERVIEW: Appellee, the Inspector General of the Department of Defense, at the request of a separate auditing agency within the Department of Defense, initiated an enforcement proceeding and issued a subpoena for the internal audit reports of appellant. Appellant contended that appellee impermissibly used his subpoena power on behalf of another agency and that the subpoena was unreasonably broad. On appeal, the court affirmed the trial court's holding that the subpoena was enforceable. The appellee had the statutory authority to issue a subpoena at the request of the Defense Contract Audit Agency, as long as he did so in furtherance of a purpose within his statutory authority and exercised some independent judgment in deciding to issue the subpoena. The trial court did not clearly err in crediting appellee's stated purposes and those purposes were within his statutory authority. The subpoena was not unreasonably broad.

OUTCOME: Affirmed the trial court's holding that appellee's subpoena for the internal audit reports of appellant was enforceable, since appellee had the statutory authority to issue the subpoena and the subpoena was not unreasonably broad.

CORE TERMS: inspector general, subpoena, audit, audit reports, investigative, subpoena power, statutory authority, auditing, assigned, government contracts, segment, auditor, issuing, contractor, conferees, legislative history, unreasonably, inspectors, allocated, investigate, General Act, subpoena issued, independent judgment, transferred, carrying, capability, accounting, combating, pooled, statutory mandate

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN1]The general standards that determine the enforceability of an administrative subpoena are well established. Courts will enforce a 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. In addition, if a subpoena is issued for an improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas

[HN2]Under the statute, the Inspector General of the Department of Defense may require by subpoena all information necessary in the performance of the functions assigned by the defense Authorization Act of 1982. 5 U.S.C.S. app. § 6(a) (1982).

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Separation of Powers > Jurisdiction
[HN3]The statute stipulates that the Inspector General of the Department of Defense may investigate fraud, waste and abuse uncovered as a result of other audits, 5 U.S.C.S. § 8(c)(2) (1982), and that he may request assistance from other audit, inspection and investigative units of the department, 5 U.S.C.S. § 8(c)(8) (1982). On its face, then, the statute would appear to authorize the Inspector General both to follow leads from other units of the Department of Defense, and to employ other Defense auditors in carrying out an investigation.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN4]The legislative history of the 1982 Defense Authorization Act, 5 U.S.C.S. app. § 8 et seq. (1982), does not demonstrate an intent by Congress to prohibit the Inspector General of the Department of Defense (Inspector General) from using his subpoena power through other investigative agencies within the Department of Defense, so long as the subpoena is otherwise within the Inspector General's power. Rather, the history reflects the clear intent, consonant with the powers expressly conferred on the agency by the statute, that the Inspector General both supervise and work with existing audit agencies, including the Defense Contract Audit Agency.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Judicial Review > Standards of Review > General Overview
[HN5]The district court's determination on the issue of whether the Inspector General of the Department of Defense had an independent purpose in issuing a subpoena is a finding of fact, based on its distinctive ability to appraise the evidence, which may not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a).

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN6]A subpoena may be enforced where it recites the agency's statutory duties, and the statutes themselves alert the parties to the purposes of the investigation.

Administrative Law > Agency Investigations > Scope > Subpoenas
Administrative Law > Separation of Powers > Jurisdiction
Civil Procedure > Pretrial Matters > Subpoenas
[HN7]A constricted interpretation would be at odds with the broad powers conferred on the Inspector General of the Department of Defense by the statute. 5 U.S.C.S. app. 6(c)(4) (1982).

Administrative Law > Judicial Review > Standards of Review > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Public Contracts Law > Costs & Prices > General Overview
[HN8]In view of the well-established principle of deference to agency discretion in issuing subpoenas and in the absence of contrary legislative history, the court believes Congress intended that the courts accept the Inspector General of the Department of Defense's (Inspector General) determination of what information is necessary to carry out the functions assigned by the Defense Authorization Act, 5 U.S.C.S. app. § 8 et seq. (1982), so long as the information is relevant to an Inspector General function.

COUNSEL: Herbert L. Fenster (Argued) Thomas C. Papson McKenna, Connor & Cuneo, Washington, District of Columbia, Attorneys for Appellant.

Richard K. Willard, Assistant Attorney General, J. Alan Johnson, United States Attorney, John Cordes, Robert L. Ashbaugh (Argued) U.S. Department of Justice, Washington, District of Columbia, Attorneys for Appellee.

JUDGES: Aldisert, Chief Judge, Seitz and Adams, Circuit Judges.

OPINION BY: ADAMS

OPINION

[*165] **OPINION OF THE COURT**

ADAMS, Circuit Judge

Under a 1982 statute, the Inspector General of the Department of Defense (Inspector General) is charged with combating fraud, waste, and abuse. To discharge that duty, Congress gave the Inspector General broad subpoena power. This appeal, presenting an issue of first

impression in the appellate courts, requires us to consider the contours of that power.

At the request of a separate auditing agency within the Department of Defense, the Inspector General issued a subpoena for internal audit reports of Westinghouse Electric Corporation (Westinghouse). Westinghouse [**2] contends that the Inspector General impermissibly used his subpoena power on behalf of another agency, and that the subpoena was unreasonably broad. The district court 615 F. Supp. 1163, held the subpoena enforceable. Because we agree that the subpoena was authorized by the statute creating the Inspector General's office and not unduly broad, we affirm.

I.

The Inspector General Act of 1978 established an office of inspector general in 15 federal departments and agencies. 5 U.S.C. App. § 1 *et seq.* (1982). The enactment reflected congressional concern that fraud, waste and abuse in United States agencies and federally funded programs were "reaching epidemic proportions." S. Rep. No. 1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2676, 2679. To attack the problem, audit and investigative functions within each of the departments were centralized under one high-level official, an Inspector General, who was given broad powers to seek out fraud and waste in agency operations and programs. 5 U.S.C. App. §§ 2, 4. In agencies with existing auditing or investigative units, the functions of these units [**3] were transferred to an Inspector General, 5 U.S.C. App. §§ 2, 4. To carry out the statutory mandate, each Inspector General was entrusted with the power to subpoena all information "necessary in the performance of the functions assigned by this Act." 5 U.S.C. app. § 6(a)(4).

One department excluded from the reach of the 1978 Act was the Department of Defense, which, unlike some of the other federal agencies, had long maintained a large audit and investigative staff assigned to various units within the Department. By 1982, however, Congress had come to believe that centralization of audit and investigative efforts within Defense was also necessary. As a result, the Defense Authorization Act of 1982 contained a provision amending the Inspector General Act of 1978 to create an Inspector General within the Department of Defense.

The provisions of the 1982 Act, however, varied somewhat from the 1978 model. Under the 1982 Act, Congress did not consolidate all existing audit and investigative units under an Inspector General. 5 U.S.C. app. §§ 8(c), 9(c). It did, though, make clear that the Inspector General was to play the [**4] central role. Thus, it stipulated that he would be the principal adviser to the Secretary of Defense for "matters relating [*166] to the prevention and detection of fraud, waste and abuse" in the department, 5 U.S.C. app. § 8(c)(1), would "provide policy direction for audits and investigations," *id.* at § 8(c) (3), and would "monitor and evaluate the adherence of Department auditors" to audit policies, *id.* at § 8(c)(6). More specifically, the 1982 Act authorized the Inspector General to "investigate fraud, waste and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate," *id.* at § 8(c)(4), and to "request assistance as needed from other audit, inspection, and investigative units of the Department of Defense," *id.* at § 8(c)(8).

One of the major existing audit agencies not transferred to the Inspector General's direct control was the Defense Contract Audit Agency (DCAA), which is charged both with auditing and assisting in the negotiation of defense contracts. In June and July, 1983, the Inspector General undertook a review of the DCAA that focused on the adequacy of the DCAA's audits [**5] of private defense contractors. Among other areas, the Inspector General inquired into whether DCAA had access to contractors' internal audit reports. Through this inquiry it was learned that internal audit reports were not made available at six of the twenty-three contractor locations where the DCAA maintained offices. Later, four contractors agreed to permit some access, leaving only Westinghouse and one other company refusing to provide the reports to DCAA.

Apparently prompted by the Inspector General's probing, the DCAA in February, 1984 for the first time asked Westinghouse for permission to inspect its internal audit records. Westinghouse refused, contending that the agency's requests were not authorized by the access provisions of the department's contract with the company. After an exchange of letters, the DCAA in August, 1984 requested the Inspector General to issue a subpoena for the disputed documents. On September 28, 1984, the Inspector General issued a subpoena for all Westinghouse internal audits where the auditing costs were allocated to Department of Defense contracts or subcontracts.

In issuing the subpoena, the Inspector General designated the investigation as [**6] an investigation by his office, pursuant to a policy memorandum he had distributed the previous year. The Inspector General assigned an aide to follow the subpoena and to receive reports on information produced by it. But he requested that DCAA auditors carry out the investigation.

Westinghouse refused to comply with the subpoena, and the Inspector General initiated an enforcement proceeding in the district court. Essentially, the company maintained that the Inspector General lacked statutory

authority to issue the subpoena on behalf of the DCAA and that the subpoena was overly broad. After limited discovery and oral argument, the district court on August 4, 1985, ruled that the Inspector General acted within his statutory mandate in issuing the subpoena, that it was not overly broad, and ordered that it be enforced. The district court stayed its enforcement order to allow this appeal to be heard.

II.

At the crux of the dispute is the extent of the subpoena power of the Inspector General. The DCAA's right of access to the internal audit reports is not at issue here. That issue is being litigated separately in administrative proceedings before the Armed Services Board of Contract [**7] Appeals, and it has no bearing on this case.

[HN1]The general standards that determine the enforceability of an administrative subpoena are well established. Courts will enforce a 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, e.g.*, *United States v. Powell*, 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950). In addition, if a subpoena is issued for an [*167] improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process. *See Pickel v. United States*, 746 F.2d 176, 185 (3d Cir. 1984). *SEC v. Wheeling Pittsburgh Steel Corp.*, 648 F.2d 118, 125 (3d Cir. 1981) (in banc).

Westinghouse's principal argument focuses on the Inspector General's statutory authority, which, it maintains, does not permit issuance of a subpoena to obtain documents [**8] for the DCAA. We conclude, however, that the subpoena was within the Inspector General's authority.

[HN2]Under the statute, the Inspector General may require by subpoena all information "necessary in the performance of the functions assigned by this Act. . . ." 5 U.S.C. app. § 6(a). Thus, we must determine whether the subpoena for the internal audit documents falls within the statutory functions assigned to the Inspector General.

[HN3]The statute stipulates that the Inspector General may investigate fraud, waste and abuse uncovered as a result of other audits, *id.* at § 8(c)(2), and that he may request assistance from other audit, inspection and investigative units of the department, *id.* at § 8(c)(8). On its face, then, the statute would appear to authorize the Inspector General both to follow leads from other units of the Department of Defense, and to employ other Defense auditors in carrying out an investigation, as the Inspector General has done here.

Westinghouse, however, [**9] relies on legislative history in urging a contrary interpretation. The linchpin of its argument is found in the history of the 1978 Act, the legislation that created various inspectors general but not the Inspector General for the Department of Defense. The Committee report for the 1978 Act stated:

> The committee intends, of course, that the Inspector and auditor general will use this subpoena power in the performance of his statutory functions. The use of subpoena power to obtain information for another agency component which does not have such power would clearly be improper.

S. Rep. No. 1071, 95th Cong., 2d Sess. 34 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2676, 2709.

This language, Westinghouse insists, shows that Congress intended that the Act "would not operate to alter existing access to records rights of other components of the affected agencies." In effect, the company appears to argue that any Inspector General subpoena which results in another Defense component gaining access to information it would not otherwise be able to obtain violates congressional intent.

We decline to accept Westinghouse's interpretation, however. First, it overlooks [**10] a critical difference between the 1978 and 1982 Acts. In the departments and agencies covered by the 1978 Act, the inspectors general were given all audit and investigative responsibilities. Thus, where the 1978 report referred to "other agency components," by definition it was referring to components not involved in auditing or investigating. Under the 1978 Act, within the affected departments only the inspectors general were to perform auditing and investigative functions. The 1982 Act created a different model: a department with an Inspector General, where several other units, or "components," within the department continued to perform auditing and investigative work. Because this configuration did not present itself in 1978, the reference in the Committee's report to other components would appear inapplicable to the Department of Defense.

Moreover, Westinghouse's reading of the legislation is inconsistent with the express language of the 1982 Act, which authorizes the Inspector General to utilize the personnel of other Defense audit and investigative agencies in carrying out its investigations. If Congress intended to allow investigators for other Defense units to

assist the [**11] Inspector General, it must have realized that the other units would gain access to documents within the Inspector General's subpoena power. The excerpt from the 1978 legislative history relied upon by Westinghouse, then, does not support its argument that the subpoena issued here [*168] was beyond the authority of the Inspector General.

Westinghouse also relies heavily on the decision by Congress in 1982 to exclude the DCAA from the Inspector General's direct control. Originally, the House bill would have transferred DCAA inspectors to the Inspector General's office. This provision was deleted on the House floor, however, by an amendment proposed by Congressman Stratton. 128 Cong. Rec. H4774-75 (daily ed. July 28, 1982). Stratton stated that "it is clear that the functions of the Inspector General were not intended to, and should not, include the type of audits performed by the DCAA -- contract cost audits for the purpose of assisting in the negotiations, administration, and settlement of government contracts." *Id.*

It was this view, Westinghouse contends, that was enacted into law. However, in so arguing it ignores the House-Senate Conference report on the final version [**12] of the bill that was eventually enacted as the 1982 Act. H.R. Rep. No. 749, 97th Cong., 2d Sess. 176-77 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1569, 1581-83 (Conference report on the 1983 Defense Authorization Act). The conferees, the report shows, agreed with Congressman Stratton that the Inspector General should not be involved in *negotiating* contracts, but they disagreed with him on the question of *auditing* contracts, and specifically contemplated that the Inspector General develop a contract audit capability. The report makes this distinction quite clearly:

> The conferees agree not to transfer any functions from the Defense Contract Audit Agency, however. Instead, the conferees agreed to direct the Secretary of Defense to transfer not less than 100 additional positions to the Office of Inspector General to be filled by the Inspector General with persons trained to perform contract audits. The conferees believe that it is essential that the new Inspector General develop a significant capability in the highly technical area of contract audit. The conferees do not intend that these auditors advise Department of Defense contracting officers in the [**13] process of *negotiating* contracts, a function that the Defense Contract Audit Agency auditors perform. The conferees envision the contract audit capability in the Office of Inspector General to be used (1) to provide the manpower and technical expertise to oversee effectively and review the work of the Defense Contract Audit Agency, and (2) to provide the Inspector General flexibility and resources in situations where he deems it necessary or appropriate to *look at entire procurements* -- the performance of defense contractors as well as the performance of defense personnel.

H.R. Rep. No. 749, 97th Cong., 2d Sess. 176-177 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1569, 1581-83. (emphasis added).

Before the Senate voted on the final bill, Senator Roth explained the "compromise Inspector General Amendment" that the conference committee had adopted. While noting that the committee had abandoned the plan to transfer the DCAA, he stated: "It is important to reiterate, however, that the DCAA will be required to comply with audit policies established by the Inspector General and that the agency is required under the compromise to work cooperatively with the [**14] Inspector General in efforts to fulfill responsibilities assigned to him." 128 Cong. Rec. S10654 (daily ed. Aug. 17, 1982).

In sum, [HN4]the legislative history of the 1982 Act does not demonstrate an intent by Congress to prohibit the Inspector General from using his subpoena power through other investigative agencies within the Department of Defense, so long as the subpoena is otherwise within the Inspector General's power. Rather, the history reflects the clear intent, consonant with the powers expressly conferred on the agency by the statute, that the Inspector General both supervise and work with existing audit agencies, including DCAA.

Faced with this history and the statutory language, Westinghouse at oral argument took a somewhat different tack. While [*169] conceding that the Inspector General had the statutory authority to "look at" Westinghouse, the argument ran, he was not doing that here. Rather, the Inspector General "was just issuing a subpoena." To evaluate this argument, we must consider whether, even assuming the Inspector General could properly subpoena Westinghouse's [**15] internal audit reports at the instance of the DCAA, and assuming he could assign the conduct of the investigation back to DCAA, the Inspector General's subpoena here was invalid because he did not exercise independent judgment in deciding to issue it, but rather merely rubber-stamped the DCAA's request that the subpoena issue.

Under the policy memorandum, the Inspector General will issue a subpoena only at the request of another Defense audit and investigative unit "if the Inspector General determines the audit or investigation to be in furtherance of an Inspector General function. . . ." App. at . In an affidavit and deposition before the district court, the Inspector General declared that he was motivated to seek access to Westinghouse's records by the company's adamant refusal to disclose the reports. "It was just a cold, stonewall, no, you can't have it. That made me very, very suspicious." App. at 321. Specifically, he stated, he wanted to determine whether Westinghouse's accounting records, which establish the basis for costs in contracts negotiated by the government, were subject to internal manipulation; whether Westinghouse was effective in policing itself against [**16] fraud, waste and mismanagement; and whether Westinghouse was as vigilant in combating waste at federal contract segments, where the government bears much of the added costs, as it is at fully commercial segments, where the company must absorb extra costs. App. at 12. Also, because the cost of the audits is allocated to government contracts, the Inspector General explained, "I want to see what the government is getting for its money." App. at 13.

These statements were the subject of express findings by the district court, which found "no evidence of any improper, even fragmentary, collusion" between the Inspector General and the DCAA, and characterized his "unimpeached and uncontradicted testimony" as "totally credible." It thus concluded that the Inspector General did independently decide that he wanted to subpoena Westinghouse's internal audit reports, for reasons of his own distinct from DCAA's. Beyond suggesting that the Inspector General's adoption of the DCAA inquiry and reassignment of that investigation to DCAA auditors amounts to a "sham," Westinghouse has offered no evidence to rebut this conclusion.

The question whether the Inspector General had an independent purpose [**17] in issuing the subpoena, as he testified, would appear to turn on an evaluation of the Inspector General's motive or intent. [HN5]The district court's determination on this issue is a finding of fact, based on its distinctive ability to appraise the evidence, which may not be set aside unless "clearly erroneous." Fed. R. Civ. P. 52(a). *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982); *Baker Industries, Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 209-10 (3d Cir. 1985); *United States v. Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 306 (3d Cir. 1981). In view of the unrebutted testimony, we cannot say that the district court clearly erred in finding that Inspector General did exercise independent judgment in issuing the subpoena.

III.

Even assuming that the Inspector General possesses the statutory authority to subpoena Westinghouse's internal audit reports, the company maintains that the subpoena here is deficient because it fails to state an investigative purpose against which its relevance may [**18] be measured, and that it is unreasonably broad. We are not persuaded by these arguments, either.

The subpoena issued to Westinghouse includes a preprinted portion which states that the documents are needed by [*170] the Inspector General in carrying out his statutory responsibility to investigate fraud. Westinghouse argues that this is inadequate, citing a line of cases holding unenforceable a subpoena that contains *no* indication of its purpose. *See, e.g.*, *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 195 U.S. App. D.C. 201, 602 F.2d 379, 398 (D.C.Cir. 1979). But [HN6]a subpoena may be enforced where it recites the agency's statutory duties, and "the statutes themselves alert the parties to the purposes of the investigation. . . ." *FTC v. Carter*, 205 U.S. App. D.C. 73, 636 F.2d 781, 787 (D.C. Cir. 1980).

Here it is clear from the subpoena itself that it is issued to conduct audits and investigations relating to economy and the detection of fraud in defense programs. In addition, Westinghouse had an opportunity to challenge the subpoena [**19] at a hearing before the district court, *see* *United States v. Powell, supra*, 379 U.S. at 58, *United States v. McCarthy*, 514 F.2d 368, 372 (3d Cir. 1975), where the court developed an expanded record exploring the agency's purpose. This record demonstrates that Westinghouse received sufficient notice of the Inspector General's purpose in issuing the subpoena.

Westinghouse also contends that the subpoena is so broad that it exceeds the boundaries of the subpoena authority established in the Inspector General Act. It is clear that, given the measure of relevance applied in subpoena enforcement proceedings, the subpoena here would pass muster under the usual standard. *See* *United States v. Arthur Young & Co.*, 465 U.S. 805, 814, 79 L. Ed. 2d 826, 104 S. Ct. 1495 (1984). *FTC v. Texaco, Inc.*, 180 U.S. App. D.C. 390, 555 F.2d 862, 872 (D.C. Cir.) (in banc), *cert. denied*, 431 U.S. 974, 97 S. Ct. 2939, 53 L. Ed. 2d 1072 (1977). Accordingly, Westinghouse maintains that the Inspector General's subpoena authority is more restricted than that of other administrative agencies, and that his subpoena power should [**20] be construed more narrowly.

This proposition is based on the language of the Inspector General statute, which confers power to require by subpoena the production of all information "necessary

in the performance of the functions assigned by this Act, . . ." 5 U.S.C. App. § 6(c)(4). The word "necessary," the company argues, signals Congress's intention to restrict narrowly the Inspector General's subpoena power.

There is, however, no legislative history that suggests Congress intended by the use of this word to limit the scope of the Inspector General's subpoena power. [HN7]A constricted interpretation would be at odds with the broad powers conferred on the Inspector General by the statute. Nor is the long line of decisions granting agencies wide latitude in their use of subpoenas grounded on the precise statutory language setting out their subpoena power. The "relevancy" standard derives from *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 87 L. Ed. 424, 63 S. Ct. 339 (1943). There the Secretary of Labor issued a subpoena in administrative proceedings against [**21] a corporation under the Walsh-Healy Public Contracts Act. The district court held that the corporation's activities were not covered by the statute. The Supreme Court, however, held that the district court lacked authority to make that determination. The court was obliged to enforce the subpoena because it was not "plainly incompetent or irrelevant to any lawful purpose" of the Secretary under the Act. *Id.* at 509. This standard has since been applied to numerous agencies. *See, e.g., United States v. Powell*, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1969) (Internal Revenue Service); *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 94 L. Ed. 401, 70 S. Ct. 357 (1950) (Federal Trade Commission); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946) (Administrator of Fair Labor Standards Act). [1]

1 The basis for application of this standard was not the particular language bestowing subpoena power on the agency, but rather an analogy between the administrative inquiry and the grand jury, "which 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. at 57, (quoting *United States v. Morton Salt Co.*, 338 U.S. at 642-43). That analogy applies with equal force here.

[**22] [*171] [HN8]In view of the well-established principle of deference to agency discretion in issuing subpoenas and in the absence of contrary legislative history, we believe Congress intended that the courts accept the Inspector General's determination of what information is "necessary to carry out the functions assigned by this Act" so long as the information is relevant to an Inspector General function.

The subpoena issued here required the production of records of internal audits that the government paid for through costs allocated to Department of Defense contracts or subcontracts. Westinghouse protests that the subpoena will require production of close to 80% of its internal audit reports. Because of the way in which the company's general and administrative costs are pooled and allocated, the only audit reports not covered by the subpoena are audits of business segments of the company which perform no government contracts *and* whose costs are pooled separately from audit business groups who audit segments with government contracts. Swept within the subpoena, as a result, are internal [**23] audit reports of business segments which perform *no* government work, but whose costs are pooled together with audit groups who audit segments with government contracts. Such audit reports cannot possibly be necessary or relevant to the Inspector General's duties. Westinghouse urges, since they are not related to Department of Defense programs.

This contention, however, is not well-supported. First, all of the audit reports sought are related to Department of Defense programs, in the sense that the Department pays some amount of money for them through the portion of general and administrative costs allocated to every government contract. More important, internal audits, even of business segments that do not themselves perform government contracts, may indicate how vigilant Westinghouse is in combating fraud, waste, and abuse and how it responds when irregularities are revealed. Such information is crucial to evaluating Westinghouse's fitness as a defense contractor.

Finally, Westinghouse's audit reports bear on the accuracy of its internal accounting systems. The Department of Defense, in turn, relies on those systems to determine costs which are properly charged to the government. [**24] A deficiency disclosed by an audit report of a solely commercial segment of the company, for instance, may well be reflected in government contracts as well, since the same accounting systems are frequently used throughout the company. Thus, as James Curry, the Assistant Inspector General for Audit Policy and Oversight, testified in the district court, where a deficiency in internal controls is found in a division of the company, "we would like to know about that because then the same deficiency surely would also exist at the division that has business with the government." App. at 259.

Accordingly, we conclude that the subpoena is not unreasonably broad.

IV.

To summarize, we hold that the Inspector General had the statutory authority to issue a subpoena at the request of the DCAA, so long as he did so in furtherance of a purpose within his statutory authority and exercised some independent judgment in deciding to issue the

subpoena. We also conclude that the district court did not clearly err in crediting the Inspector General's stated purposes, and that those purposes came within his statutory authority. Finally, the subpoena was not unreasonably broad. Accordingly, the judgment [**25] of the district court will be affirmed.

LEXSEE

Thomas Lytle, Plaintiff, v. Inspector General of the Department of Defense, et al., Defendants

No. 87 C 2983

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1988 U.S. Dist. LEXIS 618

January 25, 1988, Decided; January 27, 1988, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant Inspector General of Department of Defense filed a motion to dismiss an action brought against him by plaintiff subject of a subpoena duces tecum issued by the inspector.

OVERVIEW: The subject brought an action against the inspector and contended that the Inspector had improperly used his authority to obtain a subpoena duces tecum at the behest of a subagency. The Inspector filed a motion to dismiss the subject's action. The court found that no documents were actually produced pursuant to the subpoena and that they were obtained in another fashion. The court determined that the Inspector withdrew the subpoena. The court determined that provided the Inspector used his independent judgment in issuance of the subpoena he had the authority to do so at the behest of a subagency. The court found that the subject had failed to make a case and dismissed the action.

OUTCOME: The court granted the Inspector's motion for dismissal.

CORE TERMS: subpoena, statutory authority, authorizes, subagency, audit, subpoena power, independent judgment, fails to state, fraudulent, initiate, military, issuing, martial

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Matters > Subpoenas
Military & Veterans Law > Defense Powers > U.S. Department of Defense

[HN1]Under the Inspector General Act of 1978, 5 U.S.C.S. app. 3 (Supp. 1987), the Inspector General of the Department of Defense may require by subpoena all information necessary in the performance of the function assigned by the Act, § 6(a). The statute permits the Inspector to initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate, § 4(c)(2). The statute also authorizes the Inspector to request assistance as needed from other audit, inspection, and investigative units of the Department of the Defense (including military departments), § 4(c)(8)(Supp. 1987). On its face the statute authorizes the Inspector to work jointly with other branches of the Department of Defense to detect and prevent fraud, abuse, and waste within the Department.

OPINION BY: [*1] HOLDERMAN

OPINION

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

On March 27, 1987 plaintiff Thomas A. Lytle filed this lawsuit challenging a subpoena duces tecum issued by the Inspector General of the Department of Defense (the "Inspector"). The subpoena sought plaintiff's Bank Americard VISA records in connection with an investigation into whether plaintiff submitted false and fraudulent airline ticket vouchers which he claimed as expenses. No documents were ever produced as a result of this subpoena. The documents were obtained via a trial subpoena in connection with plaintiff's court martial proceeding. Plaintiff's court martial has already taken place. On July 9, 1987 the Inspector withdrew the subpoena at issue in this case.

The Inspector has moved to dismiss the complaint on three grounds: (1) failure to effect proper service of process under Fed. R. Civ. P. 4(j); (2) mootness; and (3) failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

DISCUSSION

At the crux of this dispute is the extent of the Inspector's subpoena power. Plaintiff asserts that the Inspector exceeded his statutory authority under the Inspector General [*2] Act of 1978, 5 U.S.C., App. 3 (Supp. 1987), by issuing the subpoena. According to plaintiff, the Act does not permit the Inspector to issue a subpoena to obtain documents on behalf of the U.S. Army Criminal Investigation Command ("CID"). This court concludes, however, that the subpoena was within the Inspector's authority.

[HN1]Under the Act, the Inspector may require by subpoena all information "necessary in the performance of the function assigned by this Act . . . ." 5 U.S.C., App. 3, § 6(a)(Supp. 1987). The statute permits the Inspector to "initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate." 5 U.S.C., App. 3, § 4(c)(2)(Supp. 1987). The statute also authorizes the Inspector to "request assistance as needed from other audit, inspection, and investigative units of the Department of the Defense (including military departments)." 5 U.S.C., App. 3, § 4(c)(8)(Supp. 1987). On its face the statute authorizes the Inspector to work jointly with other branches of the Department of Defense to detect and prevent fraud, abuse, and waste within the Department. [1]

1 Other sections of the Act also illustrate the degree of interplay between the Inspector and subagencies of the Department of Defense. For example, the Act requires the Inspector to serve as advisor to the Secretary for all matters relating to the detection and prevention of fraud and abuse in the Department's programs. 5 U.S.C., App. 3, § 4(c)(1)(Supp. 1987). The Act also authorizes the Inspector to develop policy, monitor the internal audit investigations and evaluate program performance of the Department's ties. 5 U.S.C., App. 3, § 4(c)(1), (3), (5)-(7)(Supp. 1987).

[*3] Plaintiff argues that the Inspector's subpoena power is limited to those investigations which it initiates. Plaintiff contends that a subagency such as the CID cannot use the Inspector to "further its own ends." (Complaint, para. 9.) Plaintiff, however, cites nothing in the Act or the legislative history to support such a limitation of the Inspector's authority.

Moreover, at least one circuit has held that the Inspector in fact does have statutory authority to issue a subpoena at the request of a subagency so long as he furthers a purpose within his statutory authority and exercises independent judgment in doing so. *United States v. Westinghouse Electric Corp.*, 788 F.2d 164, 167 (3rd Cir. 1986). *See also United States v. Art Metal-U.S.A., Inc.*, 484 F.Supp. 884, 887 (D.N.J. 1980).

In this case, the Inspector issued the subpoena in order to assist the CID's investigation into allegedly fraudulent expense reports. The subpoena surely was within the Inspector's statutory authority under the Act. Plaintiff has not suggested that the Inspector failed to exercise his independent judgment in issuing the subpoena. Consequently, plaintiff's complaint fails to state a claim upon [*4] which relief can be granted under Fed. R. Civ. P. 12(b)(6). [2]

2 Because the plaintiff's complaint fails to state a claim, the court need not address the defendant's two other grounds for dismissal.

CONCLUSION

For the reasons stated in this memorandum opinion and order, the defendant's motion to dismiss is GRANTED.

LEXSEE

Analysis
As of: Mar 18, 2011

UNITED STATES OF AMERICA v. PHILIP J. MONTEFIORE, ET AL.

CRIMINAL ACTION NOS. 97-105-02, 97-105-03

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1998 U.S. Dist. LEXIS 5492

April 20, 1998, Decided
April 22, 1998, Filed, Entered

DISPOSITION: [*1] Joint Motion by Defendant Alphonzo Gallo and Defendant Richard Gallo to Suppress Evidence (Docket No. 27) GRANTED in part and DENIED in part. Defendants' Motion DENIED as it relates to evidence seized from the interior and the roofs of the rental properties and GRANTED as it relates to evidence seized from the basements of the defendants' housing units, in which the defendants had exclusive control.

CASE SUMMARY:

PROCEDURAL POSTURE: In the government's prosecution against defendants for making false statements in violation of 18 U.S.C.S. § 1001, for mail fraud, under 18 U.S.C.S. § 1341, and for obstruction of justice, under 18 U.S.C.S. § 1503, defendants filed a joint motion to suppress evidence seized pursuant to the government's warrantless searches.

OVERVIEW: Defendants participated in a federally subsidized housing program. Pursuant to the program, they received more than $ 500,000 of federal funds to rehabilitate housing units for occupation by low to moderate income individuals. In order for the program to forgive the debt, defendants were required to fulfill the program's conditions. In connection with a Housing and Urban Development (HUD) audit, HUD inspectors and government agents examined the properties. During warrantless inspections of the homes owned by defendants, the government representatives searched the interiors of the dwelling units, the basements of the dwelling units, and the roofs of the dwelling units. The inspectors discovered that defendants: 1) failed to comply with the requisite renovation requirements; 2) falsely certified that the renovations had been properly completed; and 3) received subsidies in connection with the renovations. The court denied defendants' motion as it related to evidence seized from the interior and the roofs of the rental properties and granted the motion as it related to evidence seized from the basements of the defendants' housing units, in which the defendants had exclusive control.

OUTCOME: The court granted defendants' motion in part, and denied it in part. Defendants showed a legitimate expectation of privacy in the basements, which were not part of the rental agreements, but did not with respect to the interior and the roofs of the housing units. Finally, the alleged cooperative efforts between the HUD Inspector General, the HUD investigators, the United State Attorney's Office and the FBI were permissible.

CORE TERMS: inspectors, grand jury, expectation of privacy, indictment, inspections, superseding, basements, tenant's, evidence seized, housing units, dwelling, subpoenas, rental, rental properties, false statements, ownership, housing, renovation, repair, warrantless searches, exclusive control, criminal investigation, criminal division, warrantless, cooperative, searched, interior, landlord, privacy, seized

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > General Overview
[HN1]The Fourth Amendment of the United States Constitution guarantees that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation. U.S. Const. amend. IV.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN2]One's Fourth Amendment rights are personal, and defendants may claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. However, as the moving party, a defendant has the burden of establishing that he has a legitimate expectation of privacy in the item seized or the place searched.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN3]Proof of a legitimate expectation of privacy requires more than proof of ownership of the property seized. While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of a court's inquiry. Instead, to prove standing a defendant must demonstrate that he had a legitimate expectation of privacy in the place searched by showing an actual, subjective expectation of privacy which society is prepared to recognize. Thus, a defendant must show that he had both a subjective and an objectively reasonable expectation of privacy.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN4]Although defendants may own houses, they abandon any expectation of privacy therein by renting the dwellings to the tenants.

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview
[HN5]When the government conducts a warrantless search, it bears the burden of demonstrating that some exception to the warrant requirement is present.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN6]So long as summonses are issued in good faith before the IRS agent refers the case to the Justice Department for prosecution, they are enforceable. To establish bad faith, the complainant has to show that the IRS issued the summons for a purpose other than those authorized by Congress.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches
[HN7]Courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the regulatory scheme.

COUNSEL: For ALFONZO GALLO, DEFENDANT: J. SHANE CREAMER, ESQ., DILWORTH, PAXSON, KALISH & KAUFFMAN, PHILADELPHIA, PA USA. For RICHARD GALLO, DEFENDANT: THOMAS COLAS CARROLL, PHILA, PA USA.

U. S. Attorneys: LINDA DALE HOFFA, MAUREEN BARDEN, U.S. ATTORNEY'S OFFICE, PHILA, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINION BY: HERBERT J. HUTTON

OPINION

MEMORANDUM AND ORDER

HUTTON, J.

Presently before this Court is the Joint Motion by Defendant Alphonzo Gallo and Defendant Richard Gallo to Suppress Evidence (Docket No. 27) and the Government's response thereto. For the reasons listed below, the defendants' motion is **GRANTED in part and DENIED in part.**

I. *BACKGROUND*

From 1989 through 1995, defendants Alphonzo Gallo and Richard Gallo (the "Gallos") participated in a federally [*2] subsidized housing program (the "pro-

gram"). Second Superseding Indictment P 5. The United States Department of Housing and Urban Development ("HUD") funded the program, and the Montgomery County Housing and Community Development Program ("MCHCDP") administered the funds. *Id.* PP 1, 2.

The program's goal was to promote the rehabilitation of rental housing units in Montgomery County. *Id.* P 3. The program provided that renovations could be subsidized with interest-free loans, with all debts to be forgiven in ten years, if certain conditions were met. *Id.* To qualify for the subsidies, a borrower was required to: 1) "rent the property to low to moderate income residents for ten years;" 2)"finance the balance of the rehabilitation project with private funds;" and 3) "rehabilitate the dwelling in conformance with all applicable building codes, HUD requirements and written specifications." *Id.*

The Gallos own several housing units in Norristown, Pennsylvania. Jt. Decl. of Defs.' P 1. Pursuant to the program, the Gallos received "more than $ 500,000 of federal funds . . . to rehabilitate [these] housing units for occupation by low to moderate income individuals." Second Superseding [*3] Indictment P 5. In order for the program to forgive the debt, the Gallos were required to fulfill the program's conditions.

In connection with a HUD audit, HUD inspectors and government agents examined the MCHCDP properties, including those owned by the Gallos. Govt.'s Resp. at 1. During warrantless inspections of the Gallo-owned homes, the government representatives searched the interiors of the dwelling units, the basements of the dwelling units, and the roofs of the dwelling units. Defs.' Supp. Mem. at 2. The inspectors discovered that the Gallos: 1) failed to comply with the requisite renovation requirements; 2) falsely certified that the renovations had been properly completed; and 3) received subsidies in connection with the renovations. Defs.' Jt. Mot. at 2.

On March 4, 1997, a grand jury indicted and charged defendant Philip J. Montefiore ("Montefiore"), a MCHCDP employee responsible for inspecting the Gallos' properties, with multiple counts of making false statements in violation of 18 U.S.C. § 1001. On May 27, 1997, a grand jury returned a superseding indictment, charging Montefiore with eleven counts of making false statements in violation of 18 U.S.C. § 1001. On June [*4] 3, 1997, a grand jury returned a second superseding indictment, charging Montefiore with seventeen counts of making false statements in violation of 18 U.S.C. § 1001. In that indictment, the grand jury also charged the Gallos with numerous counts of mail fraud and making false statements, under 18 U.S.C. § 1341 and 18 U.S.C. § 1001, respectively. Further, the grand jury charged Alphonzo Gallo with one count of obstruction of justice, under 18 U.S.C. § 1503. On April 13, 1998, this Court dismissed the charges against Montefiore, after finding that Montefiore was not physically able to stand trial.

Following the second superseding indictment, the defendants filed the instant motion to suppress the evidence seized pursuant to the government's warrantless searches. On April 13, 1998, this Court held a suppression hearing.

II. DISCUSSION

A. *Standing*

The defendants seek to exclude evidence obtained by the government during warrantless searches of the Gallos' rental properties. [HN1]The Fourth Amendment of the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches [*5] and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. Const. amend. IV. In *United States v. Salvucci*, 448 U.S. 83, 85, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980), the United States Supreme Court held that [HN2]one's "Fourth Amendment rights are personal, and that defendants 'may claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.'" *United States v. Mastrangelo*, 941 F. Supp. 1428, 1438 (E.D. Pa. 1996). However, "as the moving party, the defendant has the burden of establishing that he had a legitimate expectation of privacy in the item seized or the place searched." *Id.* (citations omitted).

[HN3]"Proof of a 'legitimate expectation of privacy' requires more than proof of ownership of the property seized. *Rawlings[v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980)] (ownership of drugs concealed in a third party's purse, insufficient evidence of a privacy interest in the purse); *Salvucci*, 448 U.S. at 91-93 (ownership of stolen checks seized in apartment of defendant's mother, insufficient evidence of a privacy interest in the apartment)." *United States v. Martinez*, 625 F. Supp. 384, [*6] 388 (D. Del. 1985). "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . ., property rights are neither the beginning nor the end of this Court's quiry." *Salvucci*, 448 U.S. 83 at 91, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (citations omitted). Instead, "to prove standing a defendant must demonstrate that he had a legitimate expectation of privacy in the place searched . . . by showing an actual, subjective expectation of privacy which society is prepared to recognize." *United States v. Chun Yen Chiu*, 857 F. Supp. 353, 358 (D.N.J. 1993) (citing *Minnesota v. Olson*, 495 U.S. 91, 95, 109 L. Ed.

2d 85, 110 S. Ct. 1684 (1990); *Salvucci*, 448 U.S. at 93; *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979); *United States v. Dickens*, 695 F.2d 765, 777-78 (3d Cir. 1982), *cert denied.*, 460 U.S. 1092, 76 L. Ed. 2d 359, 103 S. Ct. 1792 (1983)). Thus, a defendant must show that he had both a subjective and an objectively reasonable expectation of privacy. *See United States v. Varlack Ventures, Inc.*, 1997 U.S. Dist. LEXIS 12731, 37 V.I. 266, No.Crim.A.96-229, 1997 WL 530272, at *5-6 (D.V.I. Aug. 20, 1997) (applying Fourth Amendment standing test).

In an attempt to meet their burden, the defendants submitted a Joint Declaration. [*7] Taking all of the allegations within the Joint Declaration as true, the Gallos: 1) rent, maintain, inspect, and repair the properties at issue; 2) retain keys to the properties after rental; 3) are on a first name basis with all of the tenants; 4) have an "oral understanding[]" with their tenants, whereby the Gallos "may use [their] keys to enter the properties for maintenance and repairs, normally after advising tenants of an intent to so enter but at any time if there is an emergency;" 5) "inspect the exterior of the properties on a daily basis, six days a week;" 6) "are on call 24 hours per day, seven days a week, to effect repairs at the request of tenants and emergency repairs are done immediately by defendants;" 7) "personally supervise snow removal, grass cutting and landscaping on all rental properties;" 8) and "store materials and supplies belonging to defendants in several of the properties," especially in the basements of unrented properties. Jt. Decl. of Defs.' PP 2-9. [1]

1. The government does not dispute these facts. *See* Tr. of 4/13/98 at 14- 15.

[*8] With respect to the interior and the roofs of the housing units, the defendants have failed to meet their burden. While the defendants have proven that they are devoted landlords, they have failed to show that they had a reasonable expectation of privacy that was violated by the government's inspections. Although the Gallos owned, maintained, and repaired the properties at issue, their connection with the properties was limited to their duties as landlords. The Gallos did not live in the rental units at issue, *see Chun Yen Chiu*, 857 F. Supp. at 358 (finding defendants had standing to challenge search of warehouse where they slept, ate, and spent most of their time within confines of warehouse); further, they lacked control over the persons entering the properties, *see Varlack Ventures, Inc.*, 1997 WL 530272, at *5 ("Exclusive control and privacy generally go hand-in-hand."). Thus, [HN4]"although the [defendants] owned the houses in question, they abandoned any expectation of privacy therein by renting the dwellings to" the tenants. *Miller v. Kunze*, 865 F.2d 259, No. CIV.A.86-1776, 1988 WL 138916, at *4 (6th Cir. Dec. 28, 1988) (unpublished opinion) (finding landlord lacked standing to [*9] challenge search of tenant's house). Therefore, the defendants' motion is denied with respect to the evidence seized during inspections of the rental properties.

The Gallos have met their burden with respect to the basements of the housing units which "were not part of the rental agreements." Defs.' Supp. Mot. at 2. The defendants had exclusive control of these premises. *Id.* Further, the defendants stored materials and supplies in these locations. Jt. Decl. of Defs.' P 9. Accordingly, the defendants have shown a legitimate expectation of privacy in the basements which were not part of the rental agreements.

[HN5]When the government conducts a warrantless search, it bears the burden of demonstrating that some exception to the warrant requirement is present. *Illinois v. Rodriguez*, 497 U.S. 177, 183-84, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990). In the instant matter, the government has failed to offer any arguments justifying the warrantless inspections of the non-rented basements. Accordingly, the defendants' motion is granted with respect to the evidence seized as a result of these searches. The defendants, however, retain the burden of proving which specific premises were within their exclusive control and used [*10] for storage purposes.

B. *Improper Administrative Inspection*

The defendants contend that the inspections at issue, conducted by HUD, were performed pursuant to a request by the United States Attorney's Office ("USAO"). The defendants allege that the USAO made these requests both before and after the grand jury returned the second superseding indictment. Moreover, the defendants assert that the Federal Bureau of Investigation and the HUD Inspector General conducted joint investigative interviews during this time frame. Thus, the defendants argue that the inspections were improper, under *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978). [2]

2 In the instant action, the alleged cooperative efforts between HUD investigators and the USAO or the FBI are not relevant to the defendants' motion, to the extent the defendants lack standing. *See United States v. Shaefer, Michael and Clairton Slag, Inc.*, 637 F.2d 200, 203 (3d Cir. 1980) (performing standing analysis prior to reaching the improper regulatory conduct).

[*11] In *United States v. Educational Dev. Network Corp.*, 884 F.2d 737, 741-43(3d Cir. 1989), *cert. denied*, 494 U.S. 1078, 108 L. Ed. 2d 937, 110 S. Ct. 1806 (1990), the Third Circuit Court of Appeals discussed the USAO's use of subpoenas that the Department

of Defense Inspector General issued after the USAO's criminal division began criminal proceedings against the appellants. The Third Circuit discussed the Supreme Court's holding in *LaSalle*, as it applied to the USAO's actions:

> Appellants also argue that the evidence must be suppressed because the USAO's criminal division obtained it pursuant to subpoenas and a search warrant it had caused to be issued in a bad faith attempt to do an end run around the constitutional requirement that indictments be secured only through a grand jury.
>
> . . . .
>
> Appellants rely on dicta in [*LaSalle*], in support of their position that the use of civil investigative powers is improper when there is an ongoing criminal investigation. *LaSalle* involved an IRS agent who was using summonses to obtain evidence for a criminal investigation. The Supreme Court held that although an IRS agent has no statutory power to conduct a criminal investigation, it was almost impossible [*12] to conduct an IRS investigation without both civil and criminal implications. The Court concluded, based on its prior decision in *Donaldson v. United States*, 400 U.S. 517, 536, 27 L. Ed. 2d 580, 91 S. Ct. 534 . . . (1971), that [HN6]so long as the summonses were issued in good faith before the agent referred the case to the Justice Department for prosecution, they were enforceable. To establish bad faith, the complainant had to show that the IRS issued the summons for a purpose other than those authorized by Congress . . . .

Educational Dev. Network Corp., 884 F.2d at 741. The Third Circuit found that "Appellants' reliance on *LaSalle* [was] misplaced," because LaSalle "is relevant only in criminal cases involving the IRS." *Id.* at 742. Moreover, the Court explained that, "in *Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985), the appellant asked us to 'recognize a general, albeit nonconstitutional, rule that administrative subpoenas issued to develop criminal cases are unenforceable.' We noted that these cases relied on by appellant . . . 'do not establish any such general rule.' *Donovan*, 757 F.2d at 77." *Id.*

Instead, the Third Circuit embraced a case from the United States Court of [*13] Appeals for the District of Columbia. In United States v. Aero Mayflower Transit Co., Inc., 265 U.S. App. D.C. 383, 831 F.2d 1142, 1144 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia faced a situation where the Antitrust Division of the Justice Department and the Department of Defense Inspector General performed a cooperative investigation. The District of Columbia Circuit Court found that "the Justice Department was free to guide or influence the Inspector General and his subpoenas, 'so long as the Inspector General's subpoenas seek information relevant to his discharge of his ties.'" *Educational Dev. Network Corp.*, 884 F.2d at 743 (quoting *Aero Mayflower Transit Corp.*, 831 F.2d 1142 at 1146).

The Third Circuit agreed with the District of Columbia Circuit's finding that "'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.'" *Educational Dev. Network Corp.*, 884 F.2d at 743 (quoting *Aero Mayflower Transit Corp.*, 831 F.2d at 1146). Thus, "although the USAO's criminal division is traditionally restricted [*14] to conducting investigations before a grand jury, on this record [the Third Circuit saw] no law or principle to prevent it from presenting to the grand jury facts properly uncovered in the course of lawful investigations by another agency." *Educational Dev. Network Corp.*, 884 F.2d at 743.

The Third Circuit faced a similar situation in *United States v. Shaefer, Michael and Clairton Slag, Inc.*, 637 F.2d 200 (3d Cir. 1980). In *Shaefer*, the Pennsylvania State Police conducted a warrantless search and seizure of the defendants' truck, pursuant to an ongoing investigation. *Id.* at 202. In an attempt to justify the search, the government argued that such a search was permissible under a regulatory scheme designed to weigh vehicles in order to assure that their size and weight conformed to the state's limitations. *Id.* at 204. However, the government "conceded that the purpose of the stop was unrelated to enforcement of the overweight law, and was for an investigatory rather than regulatory purpose." *Id.* Under this scenario, the Third Circuit held that [HN7]"courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the [*15] regulatory scheme." *Id.* (citing *LaSalle*, *Donaldson*, and *Reisman v. Caplin*, 375 U.S. 440, 11 L. Ed. 2d 459, 84 S. Ct. 508 (1964)).

In the instant action, the alleged cooperative efforts between HUD Inspector General, the HUD investigators, the USAO and the FBI were clearly permissible. As the Third Circuit stated, the USAO and the FBI were "free to guide" the HUD Inspector General and inspectors, so

long as the inspections were "'relevant to [the] discharge of [HUD's] duties.'" *Educational Dev. Network Corp.*, 884 F.2d at 743 (quoting *Aero Mayflower Transit Corp.*, 831 F.2d 1142 at 1146). The defendants have not argued that the HUD Inspector General and inspectors were acting unlawfully, or beyond their regulatory powers. Moreover, the defendants have not asserted that the Inspector General or the inspectors were not acting for regulatory purposes. Thus, the defendants' arguments must fail.

An appropriate Order follows.

ORDER

AND NOW, this 21st day of April, 1998, upon consideration of the Joint Motion by Defendant Alphonzo Gallo and Defendant Richard Gallo to Suppress Evidence (Docket No. 27), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED in part and DENIED in part** [*16] .

IT IS FURTHER ORDERED that:

1) the defendants' Motion is **DENIED** as it relates to evidence seized from the interior and the roofs of the rental properties; and

2) the defendants' Motion is **GRANTED** as it relates to evidence seized from the basements of the defendants' housing units, in which the defendants had exclusive control.

BY THE COURT:

HERBERT J. HUTTON, J.

**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

831 F.2d 1142; 265 U.S. App. D.C. 383; 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).

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant corporation challenged the decision of the United States District Court for the District of Columbia, which declined to permit discovery and granted the government's motion for summary enforcement of administrative subpoenas 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 moving and storage contracts.

OVERVIEW: Corporation contended that the district court applied an incorrect legal standard in 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. The court affirmed and agreed with the district court that corporation was not entitled to discovery. Corporation had argued that the Inspector General was acting in bad faith or for an improper purpose because the information was actually sought for the Justice Department's Antitrust Division. The court determined that the use of Inspector General subpoenas, instead of grand jury subpoenas, did, however, further an important Defense Department interest because information obtained through a grand jury would not have been readily available in pursuing civil remedies against those who may have defrauded the department. The court found no reason for discovery because even if corporation's allegations were taken as true, the subpoenas were properly enforced.

OUTCOME: Summary enforcement of the administrative subpoenas was affirmed.

CORE TERMS: subpoena, military, discovery, civilian, van, enforcement proceeding, investigative, storage, law enforcement, improper purpose, criminal investigations, summons, audit, personnel, grand jury, issuance, subpena, desk, requested documents, en banc, bad faith, authorization, proscription, coordination, cooperation, instituted, contractor, harassment, carrying, tracing

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Federal Government > Employees & Officials

[HN1]In addition to the authority otherwise provided by the Inspector General Act (Act), 5 U.S.C.S. app. §§ 1-12, each Inspector General, in carrying out the provisions of the Act, is authorized to require by subpoena 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 the Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforcea-

ble by order of any appropriate United States district court, provided that procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from federal agencies. 5 U.S.C.S. app. § 6(a)(4).

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN2]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. 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.

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).

OPINION BY: 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. [1] 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 [2] and criminal [3] investigative authority and subpoena powers coextensive with that authority. [4]

1 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).

2 *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]

3 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.

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

> [HN1]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] [HN2]

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. [5] 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).

5 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 "determine[] 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. [6] 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").

> 6 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. [7] 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.

> 7 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.

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

610 F.2d 943; 198 U.S. App. D.C. 1; 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).

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, Inspector General of the Department of Energy, appealed an order of the United States District Court for the District of Columbia denying enforcement of a subpoena ad testificandum issued by plaintiff in the course of an investigation of alleged unauthorized disclosure of information by Department of Energy officials.

OVERVIEW: Plaintiff, Inspector General of the Department of Energy, in the course of an investigation of alleged unauthorized disclosure of information by Department of Energy officials, issued a subpoena ad testificandum to defendant, an employee of the American Petroleum Institute. When defendant failed to comply with the subpoena, plaintiff filed a petition for enforcement in the district court, which declined to enforce the subpoena. The court of appeals affirmed the judgment since the district court rightly concluded that plaintiff's special subpoena powers did not encompass the authority to compel the attendance of witnesses.

OUTCOME: The court of appeals affirmed the judgment since the district court rightly concluded that plaintiff's special subpoena powers did not encompass the authority to compel the attendance of witnesses.

CORE TERMS: inspector general, subpoena, subpoena power, delegated, appearance, delegation, general supervision, oral testimony, inspector, authorize, delegate, removal, agency heads, Department of Energy Organization Act, documentary evidence, unauthorized, appointment, attendance, carrying, General Act, disclosure of information, congressional intent, testimony of witnesses, legislative history, attendance of witnesses, documentary, appointed, reinforces, rightly, advice

LexisNexis(R) Headnotes

Energy & Utilities Law > Administrative Proceedings > U.S. Federal Energy Regulatory Commission > General Overview

[HN1]The 1977 Department of Energy Organization 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.S. § 7138(a)(1) (Supp. I 1977).

Energy & Utilities Law > Administrative Proceedings > U.S. Federal Energy Regulatory Commission > General Overview
Energy & Utilities Law > Conservation > General Overview
[HN2]The Inspector General's function, in part, is to investigate activities relating to the promotion of economy and efficiency in the administration of, or the prevention or detection of fraud or abuse in, programs and operations of the department. 42 U.S.C.S. § 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.S. § 7138(a)-(g). The legislative history of the Act reflects the theme that the Inspector General, although subject to general supervision by the Secretary, is intended to act independently in fulfilling his duties.

Civil Procedure > Pretrial Matters > Subpoenas
Energy & Utilities Law > Administrative Proceedings > U.S. Federal Energy Regulatory Commission > General Overview
[HN3]Section 208(g)(2) of the Department of Energy Organization Act, 42 U.S.C.S. § 7138(g)(2), authorizes the Inspector General 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 by this section. The Secretary's subpoena power is granted by § 645 of the Department of Energy Organization Act , 42 U.S.C. § 7255. It provides that for the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under § 49 of title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter.

Energy & Utilities Law > Administrative Proceedings > U.S. Federal Energy Regulatory Commission > General Overview
[HN4]Section 642 of the Department of Energy Organization Act, 42 U.S.C.S. § 7252, states that 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.

Governments > Legislation > Interpretation
[HN5]A word is known by the company it keeps.

Energy & Utilities Law > Administrative Proceedings > U.S. Federal Energy Regulatory Commission > General Overview
Governments > Federal Government > Employees & Officials
[HN6]The Secretary of the Department of Energy cannot by delegation expand the limited powers expressly granted to the Inspector General by Congress.

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.

OPINION BY: 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.

[HN1]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). [HN2]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.

[HN3]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.

[HN4]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 "[HN5]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 [HN6]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. [1] 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 [2] is an "unusual step" included to insure the independence of the Inspectors General.

1. 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]

2. 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. [3] 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.

3. 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

Analysis
As of: Mar 18, 2011

UNITED STATES OF AMERICA, Petitioner, Appellee, v. STEPHEN B. COMLEY, Respondent, Appellant.

No. 92-1208

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

1992 U.S. App. LEXIS 31586

August 31, 1992, Decided

NOTICE: [*1] RULES OF THE FIRST CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported as Table Case at 974 F.2d 1329, 1992 U.S. App. LEXIS 32148.

PRIOR HISTORY: APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Robert E. Keeton, U.S. District Judge

DISPOSITION: The district court's order enforcing the subpoena is Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of the order of the United States District Court for the District of Massachusetts, which enforced an administrative subpoena issued by the Office of the Inspector General of the Nuclear Regulatory Agency.

OVERVIEW: The Office of the Inspector General of the Nuclear Regulatory Agency issued a subpoena to appellant for tape-recorded conversations between appellant and a senior Nuclear Regulatory Agency official. Investigators from the Nuclear Regulatory Agency concluded that the official may have disclosed confidential information to appellant and failed to pass on appellant's relevant safety information. Appellant refused to comply with the administrative subpoena. The district court enforced the administrative subpoena. Appellant sought review of the order. The court affirmed the order because the Inspector General possessed the statutory authority to conduct the investigation and issue the subpoena under 5 U.S.C.S. app. § 4(a)(3), (a)(5).

OUTCOME: The court affirmed the order enforcing the administrative subpoena issued by the Office of the Inspector General of the Nuclear Regulatory Agency.

CORE TERMS: subpoena, federal funds, enforcing, subpoena power, tape, subpoena issued, recorded conversations, conversations, expenditure, misconduct

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation
[HN1]The task of interpreting a provision begins with the statutory language, which the court accords its ordinary meaning.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
[HN2]Congress authorizes Inspectors General to issue subpoenas when necessary in the performance of the functions assigned by this Act. 5 U.S.C.S. app. § 6(a)(4)

Administrative Law > Separation of Powers > Jurisdiction
Energy & Utilities Law > Nuclear Power Industry > U.S. Nuclear Regulatory Commission
[HN3]5 U.S.C.S. app. § 4 imposes upon each Inspector General the responsibility (1) to review agency activities for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, the same, and (2) to keep the Nuclear Regulatory Agency and Congress fully and currently informed concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations. 5 U.S.C.S. app. § 4(a)(3), (a)(5).

COUNSEL: Ernest C. Hadley for appellant.

Leslie A. Brueckner, Patti A. Goldman, Alan B. Morrison and Public Citizen Litigation Group on brief for Public Citizen Litigation Group, Government Accountability Project, Maine Nuclear Referendum Committee, Nuclear Information and Resource Service, Clamshell Alliance, Citizens Within the Ten Mile Radius, Don't Waste U.S., Rowe Monday Night Meeting Group, New England Green Alliance, Citizen Alert, Don't Waste N.Y., Seacoast Anti-Pollution League, North East Coalition on Nuclear Pollution, Citizen's Awareness Network, National Whistleblower Center, Citizens At Risk, Task Force Coventry, Harvey Wasserman, Don't Waste CT, Georgians Against Nuclear Energy, People's Action for Clean Energy, Our Town Our Planet, Radioactive Waste Campaign, Trap Rock, Nuclear Energy Information Service, Citizen [*2] Environmental Coalition, Citizens Against Radioactive Dumping, and Connecticut Opposed to Waste, amici curiae.

Paul G. Levenson, Assistant United States Attorney, with whom A. John Pappalardo, United States Attorney, Roberta T. Brown, Assistant United States Attorney, John Cordes, Solicitor, United States Nuclear Regulatory Commission, and Carole F. Kagan, Attorney, United States Nuclear Regulatory Commission, were on brief for appellee.

JUDGES: Before Torruella and Selya, Circuit Judges, and Zobel, * District Judge.

* Of the District of Massachusetts, sitting by designation.

OPINION BY: PER CURIAM

OPINION

Per Curiam. Stephen B. Comley appeals from an order of the district court enforcing an administrative subpoena issued by the Office of the Inspector General ("OIG") of the Nuclear Regulatory Agency ("NRC"). The subpoena at issue in this appeal seeks the same tape recorded conversations and arises out of the same investigation as an earlier subpoena issued by the NRC's Office of Inspector and Auditor ("OIA") and enforced by this Court in *United States* v. *Comley*, 890 F.2d 539 (1st Cir. 1989). Appellant contends that the OIG lacks statutory authority to issue the subpoena [*3] and also claims, as he did with respect to the earlier subpoena, that it violates his first amendment right to freedom of association. For the reasons discussed below, we affirm the district court's order enforcing the subpoena.

Based on a review of two tape recorded conversations between appellant and a senior NRC employee, the NRC investigators concluded that the employee may have disclosed confidential information to appellant and that the employee may have failed to pass on to other officials relevant safety information received from the appellant. *Comley*, 890 F.2d at 541. In an effort to investigate further, OIA issued a subpoena seeking the tapes for an additional fifty conversations recorded by appellant. *Id.* Although this Court affirmed a district court order enforcing that subpoena, appellant never complied with the subpoena and was ultimately fined $ 135,000. In December 1989, the OIG assumed responsibility for the investigation. It issued a second subpoena, the one at issue in the instant appeal, after the district court determined that the earlier subpoena had expired.

We need not again review the role of a court in a subpoena enforcement [*4] proceeding, but proceed directly to appellant's first argument. *See id.* (discussing standards governing enforcement of subpoenas). He asserts that the OIG's subpoena authority, 5 U.S.C. app. § 6(a)(4) (1988), encompasses only investigations concerning the expenditure of federal funds. [HN1]The task of interpreting this provision begins with the statutory language which we accord its ordinary meaning. *Securities Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989) (citing *United States* v. *James*, 478 U.S. 597, 604 (1986); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)). [HN2]Congress authorized Inspectors General to issue subpoenas when "necessary in the performance of the functions assigned by this Act." 5 U.S.C. app. § 6(a)(4) (1988). From that subsection appellant's construction derives no support.

Turning to the substantive provisions referenced in section 6, they also provide no assistance to appellant. [1] The relevant functions are defined in [HN3]section 4 which imposes upon each Inspector General the responsibility, *inter alia*, (1) to review agency activities [*5] for the "purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in," the same, and (2) "to keep . . . [the NRC]

and Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations." 5 U.S.C. app. § 4(a)(3), (a)(5) (1988). Nothing therein even suggests a requirement that investigations specifically relate to the expenditure of federal funds. Indeed, the language expresses Congress's intent that Inspectors General shall work to identify, correct and prevent problems in agency operations. That is precisely the object of appellee's investigation into the conversations between appellant and the NRC employee. Furthermore, resort to the legislative history confirms the legitimacy of an Inspector General examining specific instances of employee misconduct unrelated to federal funds. S. Rep. No. 1071, 95th Cong., 2d Sess. 28, *reprinted in* 1978 U.s. Code Cong. & Admin. News 2676, 2703 (stating by way of example that an OIG may involve itself in employee misconduct not concerning the disbursement of federal funds). Therefore, [*6] the Inspector General possesses statutory authority to conduct this investigation and issue a subpoena in furtherance thereof.

1 To the extent appellant claims OIG's subpoena power is narrower than its oversight responsibilities, he is plainly wrong. Neither the language of section 6(a)(4) nor the case law supports that proposition. *United States* v. *Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (describing Inspector General's subpoena power as "coextensive" with its investigative authority); *United States* v. *Westinghouse Elec. Corp.*, 788 F.2d 164, 170 (3d Cir. 1986) (rejecting "constricted interpretation" of subpoena power).

Appellant's first amendment claim raises no new issues or arguments. Accordingly, we reject it for the reasons expressed in our decision regarding the first subpoena. *Comley*, 890 F.2d at 543-45. [2]

2 We decline to consider the additional arguments raised by amici. *United Parcel Serv.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *McCoy* v. *Massachusetts Inst. of Technology*, 950 F.2d 13, 23 n.9 (1991). *cert. denied*, U.S. , 112 S. Ct. 1939 (1922).

[*7] The district court's order enforcing the subpoena is *Affirmed.* The mandate shall issue forthwith.

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.

CASE SUMMARY:

PROCEDURAL POSTURE: The government filed a petition for summary enforcement of an inspector general subpoena to compel defendant bank to produce bank records pertaining to the accounts of two corporate customers. The subpoena was issued pursuant to an official investigation conducted by the Office of the Inspector General for the Agency for International Development (OIG-AID) pursuant to the Inspector General Act (IG Act), 5 U.S.C.S. § 6(a)(4).

OVERVIEW: The OIG-AID issued a subpoena to the bank to produce certain records of two of its customers in connection with an investigation it was conducting under the IG Act. The bank opposed the subpoena on the ground that it did not comply with Maryland's financial privacy statute. The court held that under the Supremacy Clause, the Maryland statute did not apply to subpoenas issued pursuant to the authority of the IG Act. The court noted that the congressional intent behind the act was to provide the OIG with broad investigatory and subpoena powers to facilitate the detection of waste, fraud, and abuse in federally funded programs. The court concluded that the notice provisions of the Maryland statute served as an obstacle to the accomplishment of the congressional objective. The court reasoned that if the OIG-AID were forced to comply with the statute, it would also have to comply with may other state statutes relating to bank records, resulting in substantial frustration to the enforcement of the IG Act.

OUTCOME: The court granted the government's petition for the summary enforcement of the inspector general subpoena against the bank.

CORE TERMS: subpoena, IG Act, customer, notification, bank records, privacy, notice, subpoena powers, purpose behind, federal funds, financial records, financial institutions, administrative subpoena, accomplishment, certification, burdensome, obstacle, entities

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN1]A subpoena is within the statutory authority of the Inspector General Act, 5 U.S.C.S. § 6(a)(4), where 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.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act

[HN2]The Inspector General Act of 1978 (IG Act), 5 U.S.C.S. § 6(a)(4)(a), enables the Office of the Inspector General to issue 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.S. App. 3 § 6(a)(4). An Inspector General subpoena is subject to the Right to Financial Privacy Act (RFPA), 12 U.S.C.S. §§ 3401-3433. The RFPA requires federal agencies "to follow the procedures established by this title when they seek an individual's records. Notice to customers is a prerequisite to enforcement of an administrative subpoena. 12 U.S.C.S. § 3405. Under RFPA, however, notification is only required to individuals and partnership entities of less than five individuals. 12 U.S.C.S. § 3401(4).

Banking Law > Federal Acts > Gramm-Leach-Bliley Act
Civil Procedure > Pretrial Matters > Subpoenas
[HN3]Under Maryland's Confidential Financial Record Act ("CFRA"), Md. Fin. Inst. Code Ann. § 1-304 (1992), 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, Md. Fin. Inst. Code Ann. § 1-304(b)(1), or (2) the notification requirement had been waived by the court for good cause, Md. Fin. Inst. Code Ann. § 1-304(b)(1).

Constitutional Law > Supremacy Clause > Supreme Law of the Land
Governments > Federal Government > U.S. Congress
Governments > State & Territorial Governments > Relations With Governments
[HN4]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, if enacted pursuant to congress' lawful authority, can nullify conflicting state or local actions. 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.

COUNSEL: For Petitioner: Kathleen McDermott, Asst. U.S. Attorney, Baltimore, Maryland.

For Respondent: Kenneth F. Krach, Baltimore, Maryland.

JUDGES: Hargrove

OPINION BY: 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). [1]

1 [HN1]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.

[HN2]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. [HN3]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. [HN4]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

UNITED STATES OF AMERICA, for OFFICE OF INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT v. PHILADELPHIA HOUSING AUTHORITY

MISC. NO. 10-0205

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2011 U.S. Dist. LEXIS 12053

February 4, 2011, Decided

CORE TERMS: subpoena, audit, General Act, disclosure, partial, housing, license, security numbers, burdensome, Privacy Act, Right-to-Know Law, state laws, public policy, unreasonably, subpoena power, administrative subpoena, certification, digits, federal law, state government, conflicts of interest, identification, establishment, municipality, transparency, coordinate, scattered, detecting, exemptions, assigned

COUNSEL: [*1] For UNITED STATES OF AMERICA, for Office of Inspector General United States Department of Housing and Urban Development, Petitioner: MARGARET L. HUTCHINSON, U.S. ATTORNEY'S OFFICE, PHILADELPHIA, PA; MICHAEL S. BLUME, UNITED STATES ATTY'S OFFICE, PHILADELPHIA, PA.

For PHILADELPHIA HOUSING AUTHORITY, Respondent: RAYMOND A. QUAGLIA, LEAD ATTORNEY, BALLARD SPAHR ANDREWS & INGERSOLL, LLP, PHILADELPHIA, PA.

JUDGES: R. BARCLAY SURRICK, J.

OPINION BY: R. BARCLAY SURRICK

OPINION

MEMORANDUM

Presently before the Court is the United States' Petition for Summary Enforcement of Inspector General Subpoena (ECF No. 1) filed by the United States Attorney on behalf of the Office of the Inspector General ("OIG") of the United States Department of Housing and Urban Development ("HUD"). For the following reasons, the Petition will be granted.

I. BACKGROUND

On November 9, 2010, the United States Attorney, on behalf of the Office of Inspector General ("OIG") of the United States Department of Housing and Urban Development ("HUD"), petitioned for summary enforcement of an Inspector General's subpoena. (Pet. Ex. A, ECF No. 1.) The administrative subpoena *duces tecum* was issued pursuant to § 6(a)(4) of the Inspector General Act of 1978 ("Inspector [*2] General Act"), 5 U.S.C. app. 3. The subpoena was issued on July 14, 2010, and was served on the Philadelphia Housing Authority ("PHA") the same day. (Pet. Ex. A.) The subpoena requires the PHA to provide the first five digits of the Social Security numbers of 28 PHA employees in connection with HUD-OIG's audit survey of the PHA. [1] (*Id.*) The PHA has failed to produce any records in response to the subpoena. (Pet'r's Mem. Ex. A ¶ 20, ECF No. 1.)

1 These 28 employees were identified by HUD-OIG, "based on their job titles and descriptions, as those most likely to have been involved in the award and/or administration of contracts relevant to the audit survey." (Pet'r's Mem. Ex. A ¶ 15, ECF. No. 1) The first five digits of the Social Security numbers were requested as a means of differentiating the individuals who work for PHA from other individuals with the same names. (*Id.* ¶11.)

The HUD-OIG is conducting an audit survey of the PHA to determine "whether, with respect to the program under audit, any real or apparent conflicts of interest exist due to employee affiliations with contractors or subcontractors of the PHA and/or due to the PHA's purchasing goods or services from its employees." [*3]

(Pet. ¶ 8.) The program under audit is the PHA's scattered site housing projects. (Pet'r's Mem. Ex. A.) The subpoena at issue directed the PHA to turn over the requested partial Social Security numbers to James Carrington of the HUD-OIG before July 28, 2010. (Pet. Ex. A.) The PHA responded by informing the HUD-OIG that "consistent with past practice, PHA was not prepared to provide employee [Social Security number] information but would work cooperatively with OIG's auditors to the extent that OIG required additional information about particular employees." (Resp't's Mem. 5, ECF No. 3.) PHA's counsel, James Eisenhower, exchanged a number of emails with John P. Buck, OIG's Regional Inspector General for Audit, regarding the disclosure of the requested Social Security numbers. (Resp't's Mem. Ex. B, C, D.) The parties were ultimately unable to reach an agreement. The HUD-OIG was unwilling to accept anything less than the 28 partial Social Security numbers demanded by the subpoena. The PHA refused to provide them. Accordingly, HUD-OIG filed the instant Petition for summary enforcement of the subpoena. (Pet. Ex. A.)

IL DISCUSSION

A. The Role of the Court

When determining the enforceability [*4] of an administrative subpoena, courts play a "strictly limited role." *See* *Sandsend Fin. Consultants v. Fed. Home Loan Bank Bd., Ltd.*, 878 F.2d 875, 879 (5th Cir. 1989); *see also* *Univ. of Med. and Dentistry of NJ. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003); *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72, 180 U.S. App. D.C. 390 (D.C. Cir. 1997). 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. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986); *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436 (1950).

B. The Authority of the Inspector General

The Inspector General Act of 1978 provides:

> It is 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 such establishment; ... (3) to recommend policies for, and to conduct, supervise, [*5] 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.

5 U.S.C. app. 3 § 4(a). Thus, the HUD-OIG is authorized by statute to conduct audits and investigations of HUD programs or operations. The PHA's scattered site housing projects is one such operation, since it involves the expenditure of federal funds provided by HUD. The purpose of HUD-OIG's audit survey of this program is "to determine whether the Authority administered its scattered site housing and related funding in accordance with applicable HUD requirements." (Pet'r's Mem. Ex. ¶7.)

Under § 6 (a) of the Inspector General Act, "[e]ach Inspector General is authorized ... (4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information, as well as any tangible thing) and any documentary evidence *necessary in the performance of the functions assigned by this Act* ...." 5 U.S.C. app. 3 § 6(a) (emphasis added). The PHA contends that [*6] the information sought by the subpoena is unnecessary, and that the Government has failed to show the required need for the partial Social Security numbers. (Resp't's Mem. 1.) The Government maintains that the Social Security numbers are necessary to the performance of the HUD-OIG's assigned functions under the Inspector General Act. (Pet'r's Mem. 6.)

In *Westinghouse*, the Third Circuit determined that Congress did not intend to limit the scope of the Inspector General's subpoena power with the use of the word "necessary." 788 F.2d at 170 ("A constricted interpretation would be at odds with the broad powers conferred on the Inspector General by the statute. Nor is the long line of decisions granting agencies wide latitude in their use of subpoenas grounded on the precise statutory language setting out their subpoena power.") Quoting from the Supreme Court's decision in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. Ed. 424 (1943), the Third Circuit observed that a district court is obliged to enforce a subpoena that is not "plainly incompetent or irrelevant to any lawful purpose." 317 U.S. at 509. In affirming the district court's enforcement of the Inspector General's subpoena, the *Westinghouse* [*7] court stated that "Congress intended that the courts accept the Inspector General's determination of what information is 'necessary to carry out the functions assigned by this Act' so long as the information is *relevant*

to an Inspector General function." 788 F.2d at 171 (emphasis added).

C. "Reasonably Relevant" Information

It is a function of the Inspector General to coordinate audits of the activities of the PHA "for purposes of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations." 5 U.S.C. app. 3 §§ 4(a)(1), (3). Therefore, to the extent that the requested partial Social Security numbers are relevant to one of these functions, the subpoena should be enforced.

The term "relevant" has been broadly defined. In *United States v. Oncology Services Corp.*, the Third Circuit stated that "[r]easonably relevant means merely that the information must be relevant to some (any) inquiry that the [agency] is authorized to undertake." 60 F.3d 1015, 1020 (3d Cir. 1995) (internal citations and emphasis omitted). "The court must defer to the agency's appraisal of relevancy so long as it is not 'obviously wrong.'" *United States v. Hunton & Williams*, 952 F.Supp. 843, 854 (D.D.C. 1997) [*8] (citations omitted). As long as the material sought "touches on a matter under investigation," it is enough to be deemed "relevant" and the subpoena must be enforced. *Sandsend*, 878 F.2d at 882.

The partial Social Security numbers requested here are clearly relevant. The HUD-OIG is seeking these numbers in order to more efficiently cross-reference employees of the PHA as part of its determination of whether a problematic conflict of interest exists due to employee affiliations with contractors or subcontractors of the PHA. (Pet. ¶8.) Obviously, such conflicts of interest can result in fraud and abuse. Preventing or detecting fraud and abuse within programs receiving federal funding is one of the primary purposes of the OIG. *See* 5 U.S.C. app. 3 §§ 4(a)(1), (3). Accordingly, we are compelled to conclude that the partial Social Security numbers at issue here are properly subject to subpoena by HUD-OIG.

D. "Unreasonably Broad or Burdensome"

The Government claims that the subpoena is narrowly targeted to allow HUD-OIG to complete its audit survey because "it seeks focused information directly relevant to this legitimate inquiry - namely the partial Social Security numbers of select employees [*9] likely to have the authority to award contracts. . . ." (Pet'r's Mem. 9.) The PHA claims that the information sought by the subpoena is unreasonably broad or burdensome because it seeks unnecessary information "in contravention [of] Pennsylvania law and public policy." (Resp't's Mem. 10.)

The burden of demonstrating that a demand is unreasonable falls upon the subpoenaed party. *Powell*, 397 U.S. at 58. This burden is not easily met when the agency inquiry "is authorized by law and the materials sought are relevant to the inquiry." *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973); *Texaco, Inc.*, 555 F.2d at 882. Agencies are accorded "extreme breadth" in conducting their investigation. *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517, 303 U.S. App. D.C. 316 (D.C. Cir. 1993). Moreover, a demand that is "unreasonably broad or burdensome" has been defined as a demand with which "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (citations omitted).

The subpoena in the instant case merely requires the PHA to produce the first five digits [*10] of the Social Security numbers of 28 employees. This is not burdensome in terms of time, labor or finances and does not threaten to disrupt or seriously hinder PHA's business operations.

E. Pennsylvania Laws and Public Policy

The PHA argues that the HUD-OIG's subpoena is unreasonably broad and burdensome because it seeks unnecessary information in violation of Pennsylvania law and in contravention of the public policy of Pennsylvania. (Resp't's Mem. 10.) Specifically, the PHA points to Pennsylvania's Social Security Number Privacy Act, 71 P.S. § 2601, and Pennsylvania's Right-to-Know Law, 65 P.S. § 67.708(b)(6)(i)(A). [2] (Resp't's Mem. 10-11.)

> 2 The PHA also cites the case of *Stewart v. Moll*, 717 F. Supp. 2d 454 (E.D. Pa. 2010), in support of its position. Stewart is a § 1983 case in which defense counsel objected to questions posed during the deposition of a police officer about his Social Security number and contact information. The court recognized that Social Security numbers are "sensitive information," and that Plaintiff must establish a "particularized need for the information as well as safeguard its dissemination." *Id.* *Stewart* is inapposite. It involved the [*11] disclosure of the Social Security number of a police officer in a § 1983 excessive force case during a deposition. It did not involve administrative subpoenas or the government's authority to subpoena such sensitive information under the Inspector General Act.

The Social Security Number Privacy Act limits the collection of Social Security numbers on state and local

forms and prohibits health insurers from using Social Security numbers. 71 P.S. § 2601. It provides that "individuals applying for or renewing a professional license or certification, occupational license or certification or recreational license required by a Commonwealth agency or municipality shall be permitted to provide an alternative to disclosing their SSNs if the SSNs are collected by the agency or municipality solely for the purpose of complying with 23 Pa. C.S. § 4304.1(a)(2) (relating to cooperation of government and nongovernment agencies)." 71 P.S. § 2603. The 28 partial social security numbers in the instant case are not requested in order to apply for or renew "a professional license or certification, occupational license or certification or recreational license. . . ." *Id*. They are also [*12] not being requested or collected by a Commonwealth agency or municipality. The HUD-OIG, a federal government office, is requesting the partial Social Security numbers in order to efficiently conduct an audit of the PHA. Based upon the specific language of Pennsylvania's Social Security Number Privacy Act, it has no application here.

The Right-to-Know Law gives transparency to the inner workings of state government and requires the disclosure of public records. Lindsay M. Shoeneberger, *Striking a Balance Between Public Interest of Transparency of Government and the Privacy of Personal Identification and Security Information: An Examination of* Tribune-Review Publishing Co. v. Bodack, 19 Widener L.J. 577, 577-78 (2010). The statute identifies certain exemptions to the general requirement of disclosure. 65 P.S. § 67.708(b)(6)(i)(A)-(C). Specifically, subsection (A) exempts "[a] record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number." 65 P.S. § 67.708 (b)(6)(i)(A). [*13] The exemptions in the Right-to-Know Law illustrate Pennsylvania's public policy in favor of protecting personal security information such as Social Security numbers. However, the purpose of the statute is to provide state government transparency without causing "inadvertent disclosures of important personal identification and security information." Shoeneberger, *supra* at 1. An OIG subpoena does not lead to an "inadvertent disclosure." The exemptions in the Right-to-Know law were not intended to protect personal security information against a subpoena issued pursuant to the Inspector General Act.

In any event, even though the Social Security Number Privacy Act and the Right-to-Know Law may reflect the public policy of Pennsylvania regarding the disclosure of sensitive personal information, such statutes that restrict the disclosure of such information are preempted by the Inspector General Act under the Supremacy Clause of the Constitution. Under the Supremacy Clause, state laws that "interfere with, or are contrary to the laws of [C]ongress" are invalid. U.S. Const. art. VI, cl. 2. Unless Congress directs otherwise, the Supremacy Clause preempts state laws which are in conflict with [*14] federal law. Such conflicts exist 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*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). "If the purpose of the [federal] act ... must be frustrated and its provisions be refused their natural effect," then a conflict exists. *Savage v. Jones*, 225 U.S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182 (1912); *see Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233 (3d Cir. 2009); *United States v. First Nat'l Bank of Maryland*, 866 F. Supp. 884, 886 (D. Md. 1994) (finding a conflict between state and federal law when the requirements of the Maryland Confidential Financial Record Act "hinder the enforcement" of the Inspector General Act, and noting that such interference is expressly prohibited by the Supremacy Clause); *United States v. New York Dep't of Taxation and Fin.*, 807 F. Supp. 237, 240-41 (N.D.N.Y. 1992) (finding that a New York tax statute conflicts with the Inspector General Act where the state law "obstructs fulfillment of [the OIG's] goals" by preventing the OIG from receiving tax and wage records).

Congress's purpose in promulgating the Inspector General [*15] Act and giving the OIG broad investigatory and subpoena powers was to facilitate the detection of waste, fraud, and abuse in federal programs. *See* Inspector General Act of 1978, No. 95-452, § 2, 92 Stat. 1101. "The enactment reflected congressional concern that fraud, waste, and abuse in United States agencies and federally funded programs 'were reaching epidemic proportions.'" *Westinghouse*, 788 F.2d at 165 (quoting S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2679). Congress specifically stated that, "[s]ubpoena power is absolutely essential to the discharge of the Inspector General and Auditor General's functions.... 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* U.S.C.C.A.N. 2676, 2679.

In the instant case the HUD-OIG seeks to use its subpoena power to audit potential waste, fraud and abuse within the PHA. If we were to interpret both the Social Security Number Privacy Act and the Right-to-Know Law as preventing the disclosure of the information sought by [*16] the HUD-OIG, these Pennsylvania statutes then "stand as an obstacle" to the OIG's functions

as Congress intended them under the Inspector General Act. The state laws are therefore "in conflict with federal law" and preempted under the Supremacy Clause of the Constitution.

IV. CONCLUSION

For the foregoing reasons, the Government's Petition for Summary Enforcement of Inspector General Subpoena will be granted.

An appropriate Order follows.

BY THE COURT:

/s/ R. Barclay Surrick

R. BARCLAY SURRICK, J.

ORDER

AND NOW, this 4th day of February, 2011, upon consideration of The United States Government's Petition for judicial enforcement of an administrative subpoena issued by the Inspector General of the United States Department of Housing and Urban Development to the Philadelphia Housing Authority ("Respondent"), and all documents filed in support and opposition thereof, it is **ORDERED** as follows:

1. The Petition for Summary Enforcement of Inspector General Subpoena (ECF No. 1) is **GRANTED**; and

2. Respondent shall, within ten (10) calendar days of the date of this Order, produce documents sufficient to identify the first five digits of the Social Security numbers of the employees enumerated in the subpoena; [*17] and

3. Respondent shall confirm in writing that the responsive documents have been produced.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. BARCLAY SURRICK, J.

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

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, the Office of Inspector General (OIG) for the United States Department of Labor, initiated a proceeding against respondent, the New York State Department of Taxation and Finance, pursuant to 5 U.S.C.S. app. 3, § 6(a)(4) to compel respondent to produce certain wage records.

OVERVIEW: The OIG conducted an audit to determine whether various participants in the Department of Labor's Job Training Partnership Act (JTPA) had satisfied the JTPA's training and assistance requirements. In connection therewith, the OIG subpoenaed from the State of New York the wage records of certain JTPA participants. The State refused to produce the documents, claiming that they were privileged under N.Y. Tax L. § 697(e)(1) and Fed. R. Evid. 501. The OIG commenced a proceeding under 5 U.S.C. app. 3 § 6(a)(4) to compel production of the documents. The court concluded that even if the State was correct in its assertion that the documents were privileged under N.Y. Tax L. § 697(e)(1), it could not rely on § 697(e)(1) as a basis for refusing to comply with the subpoena because the provision was in irreconcilable conflict with the OIG's Congressionally-mandated duties and was thus preempted by the JTPA. The court noted that Congress conferred upon the OIG the authority to conduct audits of JTPA participants and that the ability to subpoena the records necessary to conduct such audits was essential to the discharge of the OIG's functions.

OUTCOME: The court granted the OIG's petition.

CORE TERMS: subpoena, state law, federal law, audit, Tax Law, subpoena power, judicial order, grand jury's, confidentiality, subpoenaed, preempt, preempted, disclosure, balancing, state's interest, federal programs, evidentiary privileges, impossibility, promulgating, preemption, obstruct, notably, invoke, Act Pub, rule of decision, common law, state statute, administrative subpoena, federal agencies, tax records

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Discovery > Motions to Compel
[HN1]5 U.S.C.S. app. 3, § 6(a)(4).

Constitutional Law > Supremacy Clause > Federal Preemption
[HN2]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. Under this standard, determination of whether a state law conflicts with a federal law turns upon the purposes and objectives of Congress. If, after examining Congress' 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.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Evidence > Privileges > General Overview
[HN3]Application of Fed. R. Evid. 501 is limited 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. In other words, a party may invoke state-based privileges under Rule 501 only when state law will supply the rule of the decision.

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JUDGES: McCurn

OPINION BY: 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. [1]

1 The relevant portion of 5 U.S.C. app. 3 § 6(a)(4) states that [HN1]"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. [2] 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.

2 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.). [3] 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.

3 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. [4] 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.

> 4 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.

[HN2]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). [5] 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.

> 5 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 [HN3]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

Cited
As of: Mar 18, 2011

Roy E. Doyle, Plaintiff, v. U.S. Postal Service, Defendant

File No. 91CV00276

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

771 F. Supp. 138; 1991 U.S. Dist. LEXIS 12407

September 5, 1991, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Pursuant to § 1110 of the Right to Financial Privacy Act of 1978, 12 U.S.C.S. § 3401 et seq., plaintiff postal employee sought to quash an administrative subpoena issued by defendant, the United States Postal Service, in conjunction with its inquiry into the employee's alleged false claim for workers' compensation benefits.

OVERVIEW: The postal service sought bank records of the employee and of a retail store that he was alleged to have operated while on disability leave from his employment. The employee claimed that the subpoena was not authorized by statute, was overly broad, and sought irrelevant material. The subpoena was issued by the U.S. Postal Inspection Service and signed by an assistant regional chief postal inspector. Denying the motion to quash, the court held that: (1) the subpoena was authorized by statute because the Inspector General Act allowed an inspector general to delegate his subpoena power to subordinates and such delegation had, in fact, occurred; (2) the statutory notice requirement was satisfied because the employee had received actual notice of the agency's motivation for seeking the records; (3) the subpoena was not overly broad as it was within the expansive authority granted by the Inspector General Act to seek such records; and (4) the records sought were relevant because they might well have contained highly probative evidence concerning whether the employee's workers' compensation claim was fraudulent.

OUTCOME: The court denied the postal employee's motion to quash the subpoena issued by the postal service in conjunction with its investigation into the employee's allegedly fraudulent workers' compensation claim.

CORE TERMS: subpoena, Postal, notice, postal service, athletic, disability, subpoena power, subpoena issued, delegated, regional, delegate, business activities, fraudulent, overbroad, Privacy Act, subpoena duces tecum, records relating, statutory authority, notice requirement, subordinates, investigate, subpoenaed, motivation, custodian, authorizes, assigned, customer, dating, lastly, detect

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN1]Courts will enforce an agency-issued 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.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas

[HN2]Section 6(a)(1), (4) of the Inspector General Act authorizes the Inspector General to require by subpoena the production of all documents necessary in the perfor-

mance of the functions assigned by the act. 5 U.S.C.S. app. § 6(a)(1), (4).

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Federal Government > Employees & Officials
[HN3]The Inspector General Act gives each inspector general broad duties and responsibilities. Each inspector general is mandated to conduct audits and investigations relating to the programs and operations of his agency, 5 U.S.C.S. app. § 4(a)(1), and to work with other agencies and local government units to prevent and detect instances of fraud and abuse, 5 U.S.C.S. app. § 4(a)(4). In order to properly perform these investigatory and auditing functions, inspectors general are given subpoena authority to compel the necessary documentary evidence. 5 U.S.C.S. app. § 8E(g)(2) states: An 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 of Inspector General.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
Governments > Federal Government > Employees & Officials
[HN4] 5 U.S.C.S. app. § 8E(g)(2) allows an inspector general to delegate his statutory responsibilities, including his subpoena power, to subordinates.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act
[HN5]Although the Inspector General Act does not require that notice of a subpoena served upon a records custodian be provided to the individuals whose records are sought, the provisions of the Right to Financial Privacy Act does add a notice requirement when customer records are sought from a financial institution. 12 U.S.C.S. § 3405.

Criminal Law & Procedure > Grand Juries > Investigative Authority > General Overview
Governments > Federal Government > Employees & Officials
[HN6]The authority of an inspector general to investigate is essentially the same as the grand jury's and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation. The agency can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Administrative Law > Agency Investigations > Scope > Subpoenas
[HN7]An inspector general's subpoena authority is expansive; the Inspector General Act authorizes an inspector general to subpoena such materials as he deems necessary to carry out his duties and responsibilities. Accordingly, any intimation that the phrasing in 5 U.S.C.S. app. § 6(a)(4) that an inspector general is authorized to subpoena records necessary in the performance of the functions assigned by the act is intended as a limitation upon an inspector general's subpoena power must be rejected. Thus, any subpoena issued for the purpose of promoting economy and efficiency or to prevent, detect, or prosecute fraud or abuse is enforceable. Consequently, a reviewing court must order production of materials sought by an inspector general unless his subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties.

COUNSEL: [**1] ATTORNEY FOR PLAINTIFF: David Kohlman Spiro, Esq., Rilee, Cantor & Edmonds, Richmond, Virginia.

ATTORNEY FOR DEFENDANT: Robert William Jaspen, Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Richmond, Virginia.

JUDGES: Richard L. Williams, United States District Judge.

OPINION BY: WILLIAMS

OPINION

[*139] *MEMORANDUM OPINION*

RICHARD L. WILLIAMS, UNITED STATES DISTRICT JUDGE

This is matter is before the Court on the plaintiff's motion to quash an administrative subpoena issued by the United States Postal Service, pursuant to Section 1110 of the Right to Financial Privacy Act of 1978, 12 U.S.C. Section 3401 *et seq.* This case presents an issue of first impression: whether the Chief Postal Inspector can designate his subpoena power under the Inspector General Act.

Factual Background

On or about February 4, 1991, the U.S. Postal Inspection Service issued a subpoena *duces tecum* to Wayne Banks, President/Custodian of Records of the First National Bank of Emporia, Virginia, pursuant to 5 U.S.C. Appx. § 6(a)(1) and (a)(4). The subpoena commanded the production of bank records relating to the plaintiff and/or the Emporia Athletic and Active Wear Outlet dating from December 9, 1989 to the present.

The bank records are sought in conjunction with an inquiry [**2] concerning whether Mr. Doyle was engaged in gainful employment as the proprietor of a small business while on sick leave status from the Postal Service recovering from neck surgery. The plaintiff was apparently removed from his job as a postal service employee at some point between February and April of 1991, based at least in part on a Postal Inspection Report. He has filed a grievance over his removal, which is presently being handled by the U.S. Postal Workers Union's regional office in Maryland. The plaintiff claims that the subpoena is not authorized by statute, is overly broad, and seeks irrelevant material.

For the reasons stated below, Mr. Doyle's motion to quash the administrative subpoena is DENIED.

Argument

[HN1]Courts will enforce a 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. *United States v. Powell*, 379 U.S. 48, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964). Mr. Doyle claims that the administrative subpoena issued in his case should not be enforced because it fails on all three counts.

A. *Not Authorized by Statute*

[HN2]Section 6(a)(1) [**3] and (4) of the Inspector General Act authorizes the Inspector General to require by subpoena "the production of all . . . documents . . . necessary in the performance of the functions assigned by [the] Act". 5 U.S.C. Appx. § 6(a)(1) and (4). In this case, the subpoena was issued by the U.S. Postal Inspection Service and signed by an Assistant Regional Chief Postal Inspector, D.A. Planey. The plaintiff maintains that Congress did not intend to grant such intrusive power to a "designee." In other words, Mr. Doyle states that the subpoena is invalid because it was not issued in the name of the Chief Postal Inspector, who holds the position of Inspector General of the U.S. Postal Service under the act. *See* 5 U.S.C. Appx. § 8E(f)(1). The plaintiff also asserts that even if the subpoena power could be delegated, there has been no showing to date that the subpoena has in fact been delegated and, lastly, that proper notice was not given to Mr. [*140] Doyle as to the reason why the records were subpoenaed.

[HN3]The Inspector General Act gives each Inspector General broad duties and responsibilities. Each Inspector General is mandated to conduct audits and investigations relating to the programs and [**4] operations of his agency, 5 U.S.C. Appx. § 4(a)(1), and to work with other agencies and local government units to prevent and detect instances of fraud and abuse, 5 U.S.C. Appx. § 4(a)(4). In order to properly perform these investigatory and auditing functions, Inspectors General are given subpoena authority to compel the necessary documentary evidence.

Given these broad responsibilities, it is not surprising that Congress recognized that Inspectors General could not effectively perform their duties without assistance. Accordingly, 5 U.S.C. Appx. § 8E(g)(2) states:

> An 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 of Inspector General . . . .

Although neither the Government nor Mr. Doyle cites a case interpreting this subsection, the most reasonable construction would seem to be one that [HN4]allows an Inspector General to delegate his statutory responsibilities, including his subpoena power, to subordinates. A contrary reading would inhibit an I.G.'s capability to properly discharge his statutory duties. Therefore, the power of the Chief Postal Inspector [**5] to delegate his subpoena authority to subordinates is supported by both the plain language and underlying purposes of the Act.

Contrary to Mr. Doyle's claims, the Chief Postal Inspector has in fact delegated his duty to issue the subpoena. Inspector Planey, who signed the subpoena in this case, declares that Chief Postal Inspector Clauson issued Letter 89-3 which adopts the same policies and procedures for issuance of I.G. subpoenas as previously promulgated in Letter ARL 88-03 concerning the Program Fraud Civil Remedies Act. Government Exhibit 1, Planey Declaration, at Exhibit 2. In ARL 88-03, the Chief Postal Inspector expressly delegates the authority to is sue administrative subpoenas to the Assistant Regional Chief Inspector--Criminal and further provides that if this officer is unavailable, "alternate signers" may be designated so long as they are of the requisite pay grade. *Id.*, at Exhibit 3. Planey declares that he is among one of the individuals who have been designated as alternative

signers authorized to issue subpoenas. *Id.*, at p. 3. Thus, it seems clear that Inspector Planey was fully authorized to issue the subpoena at question.

Mr. Doyle also argues that the [**6] statutory notice requirement has not been satisfied by the Government in this case. [HN5]Although the Inspector General Act does not require that notice of a subpoena served upon a records custodian be provided to the individuals whose records are sought, the provisions of the Right to Financial Privacy Act does add a notice requirement when customer records are sought from a financial institution. 12 U.S.C. § 3405 (stating that a customer should be provided with a notice stating the nature of the inquiry). Mr. Doyle argues that the notice is deficient because while it identifies the records sought, it fails to state the agency's motivation for seeking the records which are the subject of the subpoena.

Mr. Doyle's objection is without merit. While the notice sent on February 7, 1991 does simply describe the records sought, Mr. Doyle was provided with contemporaneous actual notice of the agency's reason for seeking the records. Enclosed along with the notice was a copy of the subpoena itself which states that it was issued "in connection with an official investigation relating to programs and operations of the United States Postal Service, to wit: An alleged on-the-job injury relating to [**7] a possible false claim for Workers' Compensation benefits by a U.S.P.S. employee." Planey Declaration, at Exhibit 1. That the Government's motivation for seeking the records which are the subject of the subpoena is set forth in an enclosure which accompanied the notice rather than the notice [*141] itself is an administrative technicality unworthy of legal recognition.

B. *Documents Sought Are Not Relevant*

Mr. Doyle argues that his personal financial records and the financial records of his athletic store are irrelevant to the issue of whether his claims to federal worker's compensation benefits were fraudulent. This is not true. It is obvious that business records relating to Mr. Doyle and a retail store he is alleged to have operated while on disability from his employment with the Postal Service may well contain highly probative evidence concerning whether his claims for federal worker's compensation benefits were fraudulent. Although Mr. Doyle's business activities may not be inconsistent with his disability, a standard which required the Government to demonstrate that subpoenaed records must be inconsistent with innocence would set too exacting a test for the validity of an Inspector [**8] General subpoena. What is relevant is that the records sought may be consistent with fraud; this conclusion justifies the enforcement of the subpoena on relevancy grounds.

C. *Demand For Records is Overbroad*

Lastly, Mr. Doyle claims the Government's demand of "any and all" business records of Mr. Doyle or Emporia Athletic and Active Wear Outlet dating from December 9, 1989 to the present is overbroad. Mr. Doyle regards this request as nothing more than a fishing expedition by the Government.

It is well-settled that [HN6]the authority of an Inspector General to investigate "is essentially the same as the grand jury's . . . and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited . . . by forecasts of the probable result of the investigation." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216, 90 L. Ed. 614, 66 S. Ct. 494 (1946) (citation omitted). The agency "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. Morton Salt Co.*, 338 U.S. 632, 642-43, 94 L. Ed. 401, 70 S. Ct. 357 (1950). [**9]

The legislative history of the Inspector General Act confirms that [HN7]an I.G.'s subpoena authority is expansive; Congress stated that the Act authorizes an Inspector General "to subpoena such materials as he deems necessary to carry out his duties and responsibilities." S.Rep. No. 95-1071, 95th Cong., 2d Sess. 33 (1978), reprinted in U.S. Code Cong. & Ad. News 2676, 2708. Accordingly, any intimation that the phrasing in 5 U.S.C. App. § 6(a)(4) that an Inspector General is authorized to subpoena records "necessary in the performance of the functions assigned by this Act" is intended as a limitation upon an I.G.'s subpoena power must be rejected. *United States v. Westinghouse Electric Corp.*, 788 F.2d 164, 170 (3d Cir. 1986) ("A constricted interpretation would be at odds with the broad powers conferred on the Inspector General by the statute."). Thus, it can be said that any subpoena issued for the purpose of promoting economy and efficiency or to prevent, detect, or prosecute fraud or abuse is enforceable. Consequently, a reviewing court "must order production of materials sought by an Inspector General unless his subpoena is 'plainly incompetent or irrelevant to [**10] any lawful purpose of the [agency] in the discharge of its duties. . . .'" *United States v. Aero-Mayflower Transit Co.*, 646 F. Supp. 1467, 1470 (D.D.C. 1986) (quoting *Endicott Johnson v. Perkins*, 317 U.S. 501, 87 L. Ed. 424, 63 S. Ct. 339 (1943)).

Measured against these legal standards, the subpoena challenged by Mr. Doyle passes muster. As discussed above, the business records of Mr. Doyle and his retail store are relevant to a possible fraudulent claim for workman's compensation. The subpoena sought records from December 9, 1989, the date of Doyle's alleged injury, until February 4, 1991, the date of the subpoena's

issuance. The records from the period while Doyle was on disability or sick leave status, December 9, 1989 through May 28, 1990, would be clearly [*142] pertinent as they would contribute to an informed judgment regarding the scope and extent of Doyle's private business activities while he was on leave from the Postal Service. Records after May 28, 1990 until the date of the subpoena would likewise be relevant as they would provide a measure of whether Mr. Doyle's involvement in his athletic store business changed following his return to employment, thus adding perspective [**11] to a judgment regarding the permissibility of his private business activities while on disability status.

Conclusion

For the reasons stated above, the Court DENIES Mr. Doyle's motion to quash the Government's subpoena *duces tecum.* The subpoena is authorized by the statute, the records sought are relevant to the underlying investigation, and the demand is not overbroad.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

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

CORE TERMS: subpoena, patient, doctor, custodian, delegation, videotapes, delegate, administrative subpoena, tubal, subpoena power, billing, medical records, artificial insemination, reversal, surgery, entity, reply, power to issue, duplicative, seized, billed, search warrant, Fair Labor Standards Act, business records, client files, partnership, personally, electronic data, General Act, Control Act

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.

OPINION BY: 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 confirmed 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. [1] 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.

> 1 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 ques-

tionable 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 em-

> ployees 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]

UNITED STATES OF AMERICA, Petitioner, v. PAUL L. TEEVEN, in his capacity as President of USA Training Academy, Inc., Newark, DE., Respondent

Misc. Action No. 90-01 LON

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

745 F. Supp. 220; 1990 U.S. Dist. LEXIS 11516

August 28, 1990

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner government sought an order summarily enforcing a subpoena duces tecum issued by the inspector general on respondent academy president to produce certain records and documents as set forth in the subpoena. The academy president opposed the motion.

OVERVIEW: The academy president headed a for-profit educational institution incorporated under the laws of the state of Delaware. The academy offered truck driving and secretarial training courses throughout the United States, with financial aid programs administered by the Department of Education under Title IV of the Higher Education Act, 20 U.S.C.S. § 1070 et seq. Thus, the academy was subject to periodic program reviews or audits. The court granted the request for enforcement of the subpoena, finding that the academy was contractually obligated to maintain certain materials pertinent to the federal student loan and grant programs. The description of the documents set forth in the subpoena was reasonably definite. The academy was bound by federal regulations to maintain and provide access to the very types of information sought by the government. The government was entitled to access the information sought based both on the contractual and regulatory statutes and provisions.

OUTCOME: The court granted the government's request for enforcement of a subpoena providing access to information by the academy.

CORE TERMS: subpoena, audit, auditor, declaration, discovery, grand jury, allegations of wrongdoing, inspection, routine, inspector, card, summons, training, dollars, evidentiary hearing, federal funds, personnel, participated, summarily, interview, eligible, lessons, computer system, IG Act, abuse of process, federal programs, en banc, wrongdoing, deception, placement

LexisNexis(R) Headnotes

Education Law > Departments of Education > U.S. Department of Education > Authority

[HN1]Stafford Loan funds are sent directly by private lenders to the academy, 34 C.F.R. § 682.604(b)(1), on behalf of the eligible students, with nonprofit agencies providing guarantees for the loans, 20 U.S.C.S. § 1078(c). While the student is in school and during a six-month post-graduation grace period, the department pays to the lender the interest that the student will pay upon graduation as well as an additional amount of interest called the "special allowance" and an administrative cost allowance to the guarantee agency. After the student begins to repay the loan, the department continues to pay the "special allowance" until the loan is repaid in full. If the student defaults on the loan, the department is responsible to pay the guarantee agency unpaid principal plus accrued interest.

Education Law > Departments of Education > U.S. Department of Education > Authority

[HN2]Only "eligible" institutions may participate in the Stafford Loan and Pell Grant programs. Once the institution is eligible, it enters into a program participation agreement with the secretary of the department. 20 U.S.C.S. § 1094(a); 34 C.F.R. § 668.12; 34 C.F.R. § 682.600(a)(2). The institution must, inter alia, comply with the agreement and the applicable regulations incorporated in the agreement.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Education Law > Departments of Education > U.S. Department of Education > Authority
[HN3]Pursuant to the Inspector General Act of 1978 (IG Act), 5 U.S.C.S. app. 3 §§ 1-12, the Office of Inspector General (IG) has the duty and responsibility of uncovering fraud, waste and abuse in, and to ensure the integrity of, federal programs such as the Stafford and Pell programs. 5 U.S.C.S. app. 3 §§ 2, 4. When the IG uncovers fraud, waste or abuse, the IG has the responsibility to recommend appropriate action, including criminal, civil and administrative remedies. The IG is given the statutory duty to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the department. 5 U.S.C.S. app. 3 § 4(a)(1). In carrying out the provisions of the IG Act, each IG is authorized 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 by the IG Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court, § 6(a)(4).

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas
Education Law > Departments of Education > U.S. Department of Education > Authority
[HN4]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.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
[HN5]Courts will enforce a 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. Once the government has satisfied this prima facie standard, the court will summarily enforce the subpoena unless the party opposing enforcement of the subpoena makes a sufficient showing that summary enforcement would abuse the court's process. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. In the event that potential abuse of the court's process in summarily enforcing the subpoena is sufficiently presented by the party opposing the summary enforcement, the court may grant such party limited discovery and an opportunity for an evidentiary hearing.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas
[HN6]Whether to enforce an administrative subpoena is a judicial determination, based on the totality of the particular circumstances proven on a given record. Furthermore, it does not serve as a mere rubber stamp to an executive branch investigative body and that the courts are not powerless to structure relief when necessary. The persistent theme running through the Supreme Court's decisions in this area is that an administrative summons can be challenged 'on any appropriate ground. The equitable powers of federal courts to deny enforcement in appropriate cases is very significant.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas
[HN7]If a subpoena is issued for an improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas
[HN8]Case law provides for judicial inquiry to determine whether the summary enforcement of the subpoena would amount to an abuse of the court's process. The burden remains on the party opposing summary enforcement to present sufficient evidence to warrant inquiry into whether summary enforcement would abuse the court's process.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection

[HN9]In order to satisfy its prima facie case, the inspector general may submit affidavits or sworn declarations.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection

[HN10]The burden in complying with the subpoena must be viewed in light of the nature of the information sought by the subpoena.

Education Law > Departments of Education > U.S. Department of Education > Authority

[HN11]Institutions that participate in the Stafford Loan and Pell Grant programs, 34 C.F.R. § 668.23(a), for purposes of audit and examination, § 668.23(b), shall give access to the secretary and his duly authorized representatives to the records and other pertinent information related to those programs, and make them readily available for review at the geographical location where the student will receive his or her degree or certificate of program or course completion, § 668.23(f)(3)(ii).

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Pretrial Matters > Subpoenas

[HN12]The definiteness of description of documents sought by a subpoena must be decided in light of the facts and circumstances of the particular situation. It is only reasonable definiteness that can be required.

Education Law > Departments of Education > U.S. Department of Education > Authority
Governments > Fiduciary Responsibilities

[HN13]A participating institution acts in the nature of a fiduciary in its administration of the Title IV, Higher Education Act programs.

Education Law > Departments of Education > U.S. Department of Education > Authority

[HN14]An institution that participates in the Pell and Stafford programs, for purposes of audit and examination shall give the secretary, the comptroller general, or their duly authorized representative, the inspector general, access to the records required by the program and this part and to any other pertinent books, documents, papers, and records. 34 C.F.R. § 668.23(b).

Education Law > Departments of Education > U.S. Department of Education > Authority
Education Law > Students > Student Records > Disclosure & Release

[HN15]Required records include: In addition to the records required under the applicable program regulations and this part, for each recipient of Title IV, Higher Education Act (HEA) program assistance, the institution shall establish and maintain, on a current basis, records regarding: (i) the student's admission to, and enrollment status at, the institution; (ii) the program and courses in which the student is enrolled; (iii) whether the student is maintaining satisfactory progress in his or her course of study; (iv) any refunds due or paid to the student, the Title IV, HEA program accounts and the student's lender under the programs; (v) the student's placement by the institution in a job if the institution provides a placement service and the student uses that service; (vi) the student's prior receipt of financial aid, 34 C.F.R. § 668.19); (vii) the verification of student aid application data; and (viii) information substantiating all disclosures made to a prospective student under § 668.44 (c)-(f). (2)(i) An institution shall establish and maintain records regarding the educational qualifications of each regular student it admits, whether or not the student receives Title IV, HEA assistance, which are relevant to the institution's admissions standards. 34 C.F.R. §§ 668.23(f)(1), (2)(i).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information
Education Law > Students > Student Records > Access & Inspection
Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

[HN16]The General Education Provisions Act provides that the secretary of the department and the department inspector general are not precluded from accessing certain confidential information. 20 U.S.C.S. § 1232g(b)(1)(C), (D).

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

[HN17]Freedom of Information Act disclosure provisions do not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential. 18 U.S.C.S. § 1905 makes it a crime for a federal employee to publicly disclose trade secrets obtained in the course of his duties.

Education Law > Students > Student Records > Access & Inspection
Education Law > Students > Student Records > Disclosure & Release
Education Law > Students > Student Records > Protected Records
[HN18] 20 U.S.C.S. 1232g(b)(3)(B) provides that: Nothing contained in the section shall preclude authorized representatives of the Secretary of the Department of Education from having access to student or other records which may be necessary in connection with audit and evaluation of federally-supported program, or in connection with the enforcement of federal legal requirements which relate to such programs: Provided, that except when collection of personally identifiable information is specifically authorized by federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of federal legal requirements.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > General Overview
[HN19]Fourth and Fifth Amendment rights regarding searches and seizures can be waived.

COUNSEL: [**1] Patricia C. Hannigan, Esquire, United States Attorney's Office, Wilmington, Delaware, of counsel: Joan E. Hartman, Esquire (argued), Department of Justice, Washington, District of Columbia, Attorneys for Petitioner.

Steven D. Goldberg, Esquire of Theisen, Lank, Mulford & Goldberg, Wilmington, Delaware, of counsel: Martin D. Minsker, Esquire (argued), Randall J. Turk, Esquire and Cynthia A. Thomas, Esquire of Miller, Cassidy, Larroca & Lewin, Washington, District of Columbia, Attorneys for Respondent.

JUDGES: Joseph J. Longobardi, Chief United States District Judge.

OPINION BY: LONGOBARDI

OPINION

[*222] JOSEPH J. LONGOBARDI, CHIEF UNITED STATES DISTRICT JUDGE

Presently before the Court is the petition of the United States (the "Government") for an order summarily enforcing a subpoena duces tecum issued by the Inspector General ("IG") upon the respondent to produce certain records and documents as set forth in the subpoena. *See* Docket Items ("D.I.") 1, 2. *See also* D.I. 1 at Attachment F. The Respondent, Paul L. Teeven, opposes the petition. Also before the Court is the motion of USA Training Academy (the "Academy") for an evidentiary hearing and permission to take discovery in advance of that hearing. D.I. 9.

BACKGROUND

The Academy is a for-profit educational institution incorporated [**2] under the laws of the State of Delaware. The Academy offers truck driving and secretarial training courses throughout the United States. The Respondent, Paul L. Teeven, is the President of the Academy. The Academy's courses are certified to participate in student financial aid programs administered by the Department of Education (the "Department") pursuant to Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq.* Accordingly, the Academy is subject to periodic program reviews or audits by the Department or the IG.

As of award year 1988-1989, the Department has insured approximately 283 million dollars in Stafford Loans for students attending the Academy. D.I. 1 at Horn Declaration, para. 1. Under the Stafford Loan program (formerly known as the Guaranteed Student Loan program) the Department insures loans by financial institutions to students who attend eligible institutions of higher learning. *Id*., P 5.b. [1] [HN1]Stafford Loan funds are sent directly by private lenders to the Academy, 34 C.F.R. § 682.604(b)(1), on behalf of the eligible students, with nonprofit agencies providing guarantees for the loans, 20 U.S.C. § 1078(c). While the student is in school and during [**3] a six-month post-graduation grace period, the Department pays to the lender the interest that the student will pay upon graduation as well as an additional amount of interest called the "special allowance" and an administrative cost allowance to the guarantee agency. After the student begins to repay the loan, the Department continues to pay the "special allowance" until the loan is repaid in full. If the student defaults on the loan, the Department is responsible to pay the guarantee agency unpaid principal plus accrued interest. Currently, there are approximately 54 million dollars in loans to students of the Academy which are in default. The 1987 figures indicate that the default rate at the Academy is 46 percent.

1 In fiscal year 1988, the Department insured a total of approximately 11.8 billion dollars in Stafford Loans, increasing to 89 billion dollars the cumulative amount of loans so insured since

the start of the program in fiscal year 1966. D.I. 1 at Horn Declaration, para. 5.b.

[*223] In award year 1988-1989, the [**4] Academy's students have also received more than 17 million dollars in Pell Grant funds. Under the Pell Grant program (formerly known as the Basic Educational Opportunity Grant program), the Department gives direct grants of funds to eligible institutions of higher learning on behalf of the eligible students who attend those institutions. [2]

2 In fiscal year 1987, the Department disbursed a total of approximately 3.74 billion dollars in Pell grants increasing to about 30 billion dollars the cumulative total amount of such grants since the start of the Pell program in fiscal year 1973. D.I. 1 at Horn Declaration, para. 5.a.

[HN2]Only "eligible" institutions may participate in the Stafford Loan and Pell Grant programs. Once the institution is eligible, it enters into a program participation agreement with the Secretary of the Department (the "Secretary"). *See* 20 U.S.C. § 1094(a); 34 C.F.R. § 668.12; 34 C.F.R. § 682.600(a)(2) (Stafford Loan program). *See also* 20 U.S.C. § 1094(a); 34 C.F.R. §§ 690.71, 690.12(a) (Pell [**5] Grant program). The institution must, *inter alia*, comply with the agreement and the applicable regulations incorporated in the agreement. *See, e.g.*, 34 C.F.R. parts 690, 668 and 600; *see* 20 U.S.C. § 1094(a); 34 C.F.R. §§ 690.7(a)(1), 668.12(b)(2)(i) (Pell Grant program). *See also* 34 C.F.R. parts 682, 668 and 600; 34 C.F.R. §§ 668.12(b)(2)(i), 682.600(b) (Stafford Loan program).

In June of 1988, the Philadelphia, Pennsylvania, Investigative Services Office, a component of the IG, opened a preliminary inquiry into the Academy. D.I. 1 at Horn Declaration, para. 9. In 1989, Audit Services, a separate component within the IG, decided to do an audit of the Academy and attempted to conduct the audit commencing March 14, 1989. *Id*. Part of the data that Audit Services had sought from the Academy was maintained on a computerized record-keeping system. *Id*. The IG auditors have repeatedly but unsuccessfully attempted to obtain that data. *Id*., P 9. [3]

3 The audit reached an impasse when the IG computer specialists requested to review copies of eight computer files off the premises of the Academy. *See* D.I. 12 at 10. These files were ultimately requested in the IG subpoena. Copies of these files were needed by the IG so that reliability and other tests could be taken of them on the IG's different type of computer system. *Id*. at 11-12; *see infra* note 26 for discussion of the need to audit copies of the computer files on the IG's computers as opposed to the Academy's computer system. The Academy's computer system is not compatible to the IG's system.

[**6] The Office of the IG ("OIG") was subsequently informed that in preparing for the audit, agents of the Academy removed documents from the audit site, altered computer records and made false statements to IG auditors. *Id*., P 10; *see, e.g.*, D.I. 1 at Attachment E. The substantial allegations of possible fraud and abuse received by the OIG and the large sums of federal grants paid to the Academy as well as the large volume of Stafford Loans and default rate resulted in the Philadelphia branch of the IG recommending that the Inspector General issue a subpoena for the records needed for the OIG to review and evaluate the allegations. D.I. 1 at Horn Declaration, para. 11. On September 6, 1989, the IG issued a subpoena for the records to the Academy. *Id*., P 12.

The IG asserts that the records sought are needed to determine whether, *inter alia*, the Academy is in compliance with statutory and regulatory standards for institutional eligibility for participation in the Pell and Stafford programs; the Academy insures that prompt refunds are made to Stafford Loan lenders when an eligible student withdraws or is found to be ineligible; the Academy properly evaluates student eligibility [**7] for these programs and tracks their eligibility over the course of the student's enrollment; and the Academy has instituted proper fiscal management, has adequate record keeping and retention policy and has the financial and administrative capability to participate in the Department programs. *Id*., P 12. The subpoena also seeks records which would allow the IG to identify the types of files kept by the Academy as to the Academy's involvement in the Department's programs; to allow identification of those individuals involved in any violations of statutes or regulations; to determine whether relevant records have [*224] been altered, destroyed or concealed and the extent to which fraud, abuse or false statements tainted the Academy's participation in Department programs. *Id*., P 13. The Academy has failed to comply with the subpoena. [4]

4 The subpoena was drafted by Stephen J. Gelfand, the Regional IG for Investigations, Region III. D.I. 12 at 13. Gelfand participated in the July, 1989, search of the Academy but he did not review any of the documents obtained as a result of the search. *Id*. Furthermore, Gelfand has declared that he used nothing gained in the search to draft the subpoena, *id*. at 14, and he has never had access to any matters before the grand jury in this matter. *Id*. Gelfand did not consult with anyone who has had access to the grand jury when he

drafted the subpoena and, at the time, had no knowledge the grand jury had been convened. *Id*.

[**8] On July 26, 1989, pursuant to a search warrant, a search of the Academy was conducted jointly by the U.S. Attorney's Office in Delaware, the Federal Bureau of Investigation ("FBI") and the Region III IG Office of Investigations. D.I. 12 at 13. Two weeks prior to the search, some of the auditors who participated in the March, 1989, audit were asked to participate in the search. *Id*. [5] The documents eventually seized from the Academy were placed in a warehouse. *Id*. An IG auditor, James Cornell, reviewed these documents for three hours; he was then informed that the Academy had filed a motion for the return of the documents. *Id*. Cornell was instructed to stop his review and destroy his work papers, which he did. *Id*. No one else from the IG's Office reviewed the documents after the motion was filed. *Id*. The U.S. Attorney's Office in Delaware eventually decided to return the seized documents to the Academy prior to the time set by the Court for a hearing on the Academy's motion. *Id*.

5 These included James Cornell, the supervisory auditor, and Sue Taeuber, one of the computer specialists.

[**9] DISCUSSION

1. *The Legal Standards*

[HN3]Pursuant to the Inspector General Act of 1978, Pub.L. No. 95-452, codified at 5 U.S.C. App. 3 §§ 1-12, (the "IG Act"), the OIG has the duty and responsibility of uncovering fraud, waste and abuse in, and to ensure the integrity of, federal programs such as the Stafford and Pell programs. *See* 5 U.S.C. App. 3 §§ 2, 4. *See also* S.Rep. No. 95-1071, 95th Cong., 2nd Sess. *reprinted in* 1978 U.S. Code Cong. & Admin. News 2676. When the IG uncovers fraud, waste or abuse, the IG has the responsibility to recommend appropriate action, including criminal, civil and administrative remedies. *Id*. The IG is given the statutory duty "to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the Department. 5 U.S.C. App. 3 § 4(a)(1). In carrying out the provisions of the IG Act, each IG 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 [IG] Act, which subpena [(*sic*.)], in the case of contumacy [**10] or refusal to obey, shall be enforceable by order of any appropriate United States district court . . . .

Id. at § 6(a)(4). [6]

6 Congress was well aware of the need for the IG to have compelled access to the records of recipients of federal funds to ensure that fraud and abuse could be detected.

> [HN4]
>
> 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. No. 95-1071, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. Code Cong. & Admin. News 2676, 2709.

[HN5]"Courts will enforce a 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 [**11] broad or burdensome." *United States v. Westinghouse Elec. Corp*., 788 F.2d 164, 166 (3rd Cir. 1986), *citing United States v. Powell*, [*225] 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 85 S. Ct. 248, 254-55 (1964) and *United States v. Morton Salt Co*., 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357, 368 (1950). Once the Government has satisfied this *prima facie* standard, the court will summarily enforce the subpoena unless the party opposing enforcement of the subpoena makes a sufficient showing that summary enforcement would abuse the court's process. *Westinghouse Elec*., 788 F.2d at 166-67; *see also S.E.C. v. Wheeling-Pittsburgh Steel Corp*., 648 F.2d 118, 128-29 (3rd Cir. 1981) (*en banc*). "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *United States v. Powell*, 379 U.S. at 58, 85 S. Ct. at 255. [7] In the event that potential abuse of the court's process in summarily enforcing the subpoena is sufficiently presented by the party opposing the

summary enforcement, the court may grant such party limited discovery and an opportunity for an evidentiary hearing. *See* Wheeling-Pittsburgh, 648 F.2d at 128-29.

> 7 At oral argument, counsel for the Government conceded that the Court should inquire into whether enforcement of the subpoena would abuse the Court's process. D.I. 25 at 7.

[**12] In *Wheeling-Pittsburgh*, the Third Circuit en banc chose not to impose limitations as to the circumstances which would amount to an abuse of the court's process in determining whether to summarily enforce an administrative subpoena. The court disagreed "with the . . . premise that the Supreme Court has foreclosed incremental development of the law by the courts when faced with allegations of egregious abuse." Wheeling-Pittsburgh, 648 F.2d at 123. The court recognized "that [HN6]whether to enforce an administrative subpoena is a judicial determination, based on the totality of the particular circumstances proven on a given record." *Id.* at 124. Furthermore, the court noted that it would not serve as a mere "rubber stamp" to an executive branch investigative body and that the courts are not "powerless to structure relief when necessary." *Id.* The "persistent theme running through the [Supreme] Court's decisions in this area [is] that an administrative summons can be challenged 'on any appropriate ground.'" *Id.*, *quoting* Reisman v. Caplin, 375 U.S. 440, 449, 11 L. Ed. 2d 459, 84 S. Ct. 508, 513 (1964). The court deemed "the equitable powers of federal courts to deny enforcement in appropriate cases to be very [**13] significant." *Id.* at 125.

The Government argues that the standard set forth by the Third Circuit's *en banc* decision in *Wheeling-Pittsburgh* is no longer viable because that standard was based on Supreme Court decisions involving Internal Revenue Service ("IRS") subpoenae and Congress has since legislatively overruled those cases. It also argues that the appropriate standard to be applied in this case is that the court only has discretion to conduct an evidentiary hearing in the "unlikely" situation where the party opposing the subpoena has presented affidavit evidence that the agency "is acting without authority or where its purpose is harassment of citizens." *See* D.I. 12 at 42. The Government contends that *U.S. v. Aero Mayflower Transit Co., Inc.*, 265 U.S. App. D.C. 383, 831 F.2d 1142, 1146-47 (D.C.Cir. 1987) is controlling. In that case, the Circuit Court stated that "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." *Aero*, 831 F.2d at 1146, *quoting* *SEC v. Dresser Indus.*, 202 U.S. App. D.C. 345, 628 F.2d 1368, 1388 (D.C.Cir.) (*en banc*), *cert. denied*, 449 U.S. 993, 101 S. Ct. 529, 66 L. Ed. 2d 289 (1980). [**14] "Those are the circumstances referred to by the Supreme Court in *Powell*, 379 U.S. at 58 [85 S. Ct. at 255], . . . where a government agency is acting without authority or where its purpose is harassment of citizens." *Aero*, 831 F.2d at 1146-47. [8] The *Aero* decision, however, [*226] rests on the D.C. Circuit's interpretation of the *Powell* line of cases. That interpretation appears to differ from the Third Circuit's interpretation of those cases. To the extent that *Aero* is inconsistent with the standard set forth in *Wheeling-Pittsburgh*, this Court remains bound by the *en banc* decision of the Third Circuit set forth in *Wheeling-Pittsburgh*.

> 8 *Dresser*, which was decided in 1980, relied upon *United States v. LaSalle National Bank*, 437 U.S. 298, 316-17, 57 L. Ed. 2d 221, 98 S. Ct. 2357, 2367 (1978). In *Dresser*, the Circuit Court said that "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." *Dresser*, 628 F.2d at 1388.

[**15] The Court is unpersuaded that the *Wheeling-Pittsburgh* standard has been abandoned as the appropriate standard in this case. [9] The fact that it may have been developed from the IRS cases carries less significance given that the *Wheeling-Pittsburgh* case involved the Securities and Exchange Commission and not the IRS. Furthermore, the subsequent Third Circuit cases relied on by the Government, while they may cast some doubt on *Wheeling-Pittsburgh's* continuing vitality, are distinguishable and do not expressly overrule that case. The first Third Circuit case relied on by the Government is *U.S. v. Educational Development Network Corp.*, 884 F.2d 737 (3rd Cir. 1989) ("EDN"), *cert. denied*, 494 U.S. 1078, 110 S. Ct. 1806, 108 L. Ed. 2d 937 (1990). In *EDN*, the issue before the Third Circuit was whether the use of a subpoena issued by the Department of Defense IG after the criminal division of the United States Attorney's Office filed a Federal Rule of Criminal Procedure 6(e) Notice of Disclosure violated the fifth amendment rights to due process and indictment only by action of a grand jury allegedly held by Educational Development. *EDN*, 884 F.2d at 738. In *EDN*, the appellants relied on the [**16] Supreme Court decision in *United States v. LaSalle National Bank*, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978), "in support of their position that the use of civil investigative powers is improper when there is an ongoing criminal investigation." *Id.* at 741. The Circuit Court distinguished *LaSalle* as a case "decided under § 7602 of the Internal Revenue Code and is relevant only in criminal cases involving the IRS." *Id.* at 742. Those cases, such as *LaSalle, Donaldson v. United States*, 400 U.S. 517, 27 L. Ed. 2d 580, 91 S. Ct. 534

(1971), and *Powell* "do no more than establish standards for determining when an administrative agency that has only civil enforcement powers is engaged in an investigation aimed at developing a criminal case, and is hence acting beyond its statutory authority." *Id.* at 742, *quoting* *Donovan v. Spadea*, 757 F.2d 74, 77 (3rd Cir. 1985). The Third Circuit also recognized that the *Aero* court found *LaSalle* "totally inapposite" since there was no body of law restricting the IG's ability to cooperate with the Justice Department in exercising criminal prosecutorial authority. *EDN*, 884 F.2d at 743 ("The court in *Aero Mayflower* found nothing wrong with the Justice Department's use [**17] of IG subpoenas rather than grand jury subpoenas, since grand jury matters could not be shared with the [Department of Defense]"). In *Moutevelis v. United States*, 727 F.2d 313 (3rd Cir. 1984), also relied upon by the Government in this case to cast doubt on *Wheeling-Pittsburgh*, the taxpayer contended that he was entitled to some discovery before the court dismissed his motion to quash an IRS summons because he argued it was issued for a criminal rather than civil purpose. *Id.* at 315. The Third Circuit said that "the district court was not required to permit discovery for the establishment of a fact which, since the enactment of Section 333(b) of TEFRA is simply irrelevant." *Id.* [10] In *Moutevelis*, the taxpayer made no other allegations "which would otherwise [*227] bear upon the enforceability of the summons." *Id.*

9 Indeed, the Third Circuit specifically cited to the *Wheeling-Pittsburgh en banc* decision in the *Westinghouse Elec.* decision where the court said [HN7]"if a subpoena is issued for an improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process." *Westinghouse Elec.*, 788 F.2d at 166-67. Presumably, the Third Circuit would not have relied on *Wheeling-Pittsburgh* on this issue if, as the Government had argued, it was no longer good law. *See also* *E.E.O.C. v. University of Pennsylvania*, 850 F.2d 969, 980 (3rd Cir. 1988) (recognizing the continued vitality of *Wheeling-Pittsburgh* on abuse of process issue), *aff'd*, 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990).

[**18]

10 The effect of sections 333(b) and (c) of TEFRA was to "establish that an investigation by the Internal Revenue Service 'into any offense connected with the administration or enforcement of the internal revenue laws' is a valid purpose for use of a summons. However, no summons may issue to any person with respect to whom a Justice Department referral is in effect." *Moutevelis*, 727 F.2d at 314.

The legislative history to TEFRA is informative:

> The restrictions on the use of administrative summonses stated in *LaSalle* arise from the provision of present law which limits the use of administrative summons to the determination and collection of taxes. The bill expands this authority to include the right to issue a summons for the purpose of inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws.
>
> The bill does not in any way alter the other requirements under present law that the Secretary make the showings required under *U.S. v. Powell* . . . .

S.Rep. No. 97-494, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, [**19] 1032. Thus, that which would have been an improper purpose for an IRS subpoena under *LaSalle* (*i.e.*, institutional posture towards criminal referral), no longer is such. *See* *Moutevelis*, 727 F.2d at 314-15 (discussing "bright line" test set forth under TEFRA). This institutional posture of criminal referral by the IRS no longer may be relied upon by a taxpayer for purposes of arguing that enforcement of such a subpoena would abuse the court's process. That, however, is not involved in the present case. That alone, however, in the absence of an overruling of *Wheeling-Pittsburgh* does not sound the death knell to *Wheeling-Pittsburgh*.

Thus, this Court is of the opinion that *Wheeling-Pittsburgh* [HN8]provides for judicial inquiry to determine whether the summary enforcement of the subpoena would amount to an abuse of the Court's process. The Third Circuit cases cited by the Government, while casting some doubt on the continuing viability of the *Wheeling-Pittsburgh* standards, do not overrule that case; accordingly, this Court is bound by *Wheeling-Pittsburgh*. However, having so concluded, the burden remains on the party opposing summary enforcement to present sufficient [**20] evidence to warrant inquiry into whether summary enforcement would abuse the court's process.

2. *Arguments of the Parties* [11]

11 There is no need for the Court to consider the issue of whether the fourth amendment's exclusionary rule applies to civil cases because, as the Academy has stated:

> its case [is] that enforcement of the IG subpoena . . . would abuse

> the Court's process. No proceedings are before the Court from which the Academy has sought to exclude the documents as evidence. The Academy has sought to prevent the IG only from obtaining the documents . . . not from using the documents in a later proceeding.

D.I. 17 at 20.

(a) Prima Facie Case

[HN9]In order to satisfy its *prima facie* case, the IG may submit affidavits or sworn declarations. *See, e.g.*, *Wheeling-Pittsburgh*, 648 F.2d at 128; *see also In re EEOC*, 709 F.2d 392, 400 (5th Cir. 1983). The Academy indicated at oral argument that the IG has satisfied its *prima facie* burden in all respects except that the Academy argues the [**21] subpoena is too indefinite and unduly burdensome. [12] *See* D.I. 25 at 48. The subpoena at issue is within the authority of the IG. The declarations clearly establish that the IG of the Department has statutory responsibility to prevent and detect fraud and abuse in the Department's programs and operations. This includes the Academy's participation in the Stafford Loan and Pell Grant programs. Furthermore, the materials sought appear to be reasonably relevant to the detection of fraud and abuse with respect to those federal programs.

> 12 The Academy also argued that the Horn Declaration filed contemporaneously with the petition for summary enforcement was not properly sworn under penalty of perjury. The IG corrected this deficiency by filing a corrected declaration which was properly sworn. Furthermore, the Academy argued that the Horn Declaration did not properly support the IG's *prima facie* case because it was allegedly based on incompetent hearsay. The IG corrected this potential problem by submitting the Gelfand Declaration given by the person who drafted the subpoena. *See* D.I. 12 at A1.

[**22] The Academy argues that the subpoena is unduly burdensome because the Academy [*228] needs continuing access to its files "which could well be inconsistent with it making them available to the IG." D.I. 16 at 18. [13] Furthermore, the Academy argues that it does not have the space to accommodate IG personnel on its premises and at the same time permit the Academy to conduct its own internal investigations and prepare its defenses to possible future charges. *Id*. The Academy also argues that if the Court orders enforcement of the subpoena, the IG should be required to pay the costs associated with copying the subpoenaed documents. *Id*. at 19.

> 13 The IG has offered to review and copy the materials on the Academy's premises with the exception of the computer files which it needs to review on its own system, to remove any burden to the Academy in not having access to its files. D.I. 12 at A5, para. 10.

The Academy has contractually agreed to maintain those materials pertinent to the federal student loan and grant programs [**23] in which they participate. *See, e.g.*, 34 C.F.R. § 668.23. [14] Furthermore, the Academy agreed to provide access to such materials to the Department and its duly authorized representatives. *Id*. While this contractual and regulatory obligation does not automatically and necessarily foreclose further inquiry into the summary enforcement of the IG subpoena, it does serve as a basis to reject, possibly with conditions, the Academy's argument of undue burden. [HN10]The burden in complying with the subpoena must be viewed in light of the nature of the information sought by the subpoena. Here, the IG is seeking to investigate the Academy for purposes of uncovering evidence of fraud, mismanagement and abuse. *See, e.g.*, D.I. 25 at 9-10. As such, the IG is performing a function important to the integrity of the nation's student financial aid programs. *Cf. United States v. Intern. Bus. Mach. Corp.*, 83 F.R.D. 97, 109 (S.D.N.Y. 1979) (search for truth in cases of undoubted importance to the public weal weigh heavily against considerations of burdensomeness).

> 14 That section provides that [HN11]institutions that participate in the Stafford (GSL) Loan and Pell Grant programs, 34 C.F.R. § 668.23(a), for purposes of audit and examination, *id*. at § 668.23(b), shall give access to the Secretary and his duly authorized representatives to the records and other pertinent information related to those programs, *id*., and make them "readily available for review . . . at the geographical location where the student will receive his or her degree or certificate of program or course completion." *Id*. at § 668.23(f)(3)(ii). The Academy agreed in its program participation agreement to be bound by these regulations. *See, e.g.*, D.I. 1 at Appendix C ("The [Academy] understands and agrees that it is subject to . . . the Student Assistance General Provisions regulations, 34 C.F.R. Part 668").

[**24] The Academy asserts that the description of the information sought by the subpoena is too indefinite to be enforced. *See* D.I. 11 at 35-41. [HN12]The

definiteness of description of documents sought by a subpoena must be decided in light of the facts and circumstances of the particular situation. It is only reasonable definiteness that can be required. *See, e.g.*, *Westinghouse Elec.*, 788 F.2d at 166; *Intern. Bus. Mach. Corp.*, 83 F.R.D. at 107. In clarifying the items sought by the subpoena, the IG has represented that the documents being sought by the subpoena "are the documents that USA Training is required by law and contract to keep and make available to the Secretary and the IG pursuant to 34 C.F.R. § 668.23(f)(1)." D.I. 12 at 35. [15] Due to the nature of the items requested, the fact that most, if not all, are required to be maintained by contract and regulation, *see* D.I. 25 at 13, and the large number of documents necessarily involved, the description of the documents set forth in the subpoena (as modified by the Gelfand Declaration, *see* D.I. 12 at A5-A7) is reasonably definite. *Cf. Intern. Bus. Mach. Corp.*, 83 F.R.D. at 107 (where large numbers of documents are [**25] involved and the identity of each specific document may be unknown until disclosure is made, "common sense dictates that questions framed in terms of categories or types of documents are sufficient").

15 Furthermore, Mr. Gelfand, the draftsman of the subpoena, provided additional clarifications to the Academy as to those matters sought by the subpoena. *See* D.I. 12 at A5-A7, para. 12.

(b) Abuse of Process

The Academy raises several arguments why summary enforcement of the subpoena [*229] would abuse the court's process. These reasons asserted are: (1) the subpoena is premised on information obtained through fraud, trickery and deceit perpetrated by the IG upon the Academy during the audit of the Academy; (2) the subpoena is premised upon information acquired through an allegedly unconstitutional criminal search and seizure at the Academy; and (3) enforcement of the subpoena would entail violation of the rules of grand jury secrecy. *See* D.I. 11 at 7-8.

(i) *Audit Deception*

In support of its claim of fraud, trickery [**26] and deceit, the so-called "audit deception" allegations, the Academy offers the following evidence. The IG commenced an audit of the Academy on March 14, 1989. *See* D.I. 8A at 10001, para. 3, Declaration of Garvin dated February 22, 1990 (hereinafter "Garvin Declaration I"). The IG auditors were at the Academy for approximately two weeks conducting interviews of Academy personnel and reviewing Academy records. *Id*., P 4. "James Cornell was one of the agents present during the audit, and he told [Garvin] that he didn't know what the agents who were working with the Academy's computer were doing as their part of the audit, that he was just doing a routine audit." *Id*., P 5. Garvin also stated that during the audit entrance conference, Cornell mentioned that there were audit, investigative and combined activities undertaken by the IG. D.I. 17 at A1000044, para. 5 ("Garvin Declaration III"). When Garvin asked "which were we[,]" Cornell told Garvin "in substance that the IG was here for a routine audit and that we[, the Academy,] were not accused of any wrongdoing." *Id*. During the March 30, 1989, meeting with the IG auditors, "one of the IG representatives, in substance, [**27] again told us that the audit was routine and that the Academy was not accused of any wrongdoing." *Id*. at A100045, para. 6. Throughout the audit, the IG auditors:

> have assured the Academy that there are no allegations of wrongdoing by the school, and that the Academy was selected for an audit solely because of its size and the amount of federal funds its students are receiving. The auditors have also assured the Academy that the audit is routine and designed merely to ensure that there are no irregularities in the Academy's handling of federal funds supplied to the Academy by the Department of Education pursuant to the Pell and GSL [(Stafford)] programs.

D.I. 8B at 200087-88, para. 17, Declaration of Garvin, dated July 31, 1989 (hereinafter "Garvin Declaration II"). The Academy also offers Garvin's Declaration to the effect that the Academy continued to rely on the IG's assurances that the audit was routine and that the Academy was selected for the audit based on its size and volume of federal aid used by its students. *See, e.g.*, Garvin Declaration III at paras. 7, 9, 14, 19, etc. The Academy argues that if it had known that the IG auditors were on its premises pursuant [**28] to allegations of wrongdoing by the Academy, the Academy would not have voluntarily complied with the IG audit and would have instead forced the IG to obtain a subpoena or a warrant. Further, counsel for the Academy would have attempted to be present at all interviews conducted by the IG auditors of the Academy's personnel.

The IG has offered sworn declarations establishing that the IG auditors were in fact doing a routine audit and the statements made by the IG auditors to Garvin were true. Hugh M. Monaghan, the Regional IG for Audit, OIG, Region III, for the Department, the IG representative who initiated the March audit of the Academy, has set forth in his declaration that he authorized the audit based upon a computer printout dated October 7, 1988, prepared by the Office of Audit's Advanced Techniques

Branch. D.I. 12 at A8, A15. [16] Monaghan reviewed the printout in November [*230] of 1988 and IG auditors, under his direction, commenced preliminary work that month towards formulating an audit plan. *Id*. at A8. He "had no knowledge of any allegations of wrongdoing by the [Academy] when [he] selected it for audit. The audit was intended to be a routine one." *Id*. at A8-A9. As part [**29] of IG routine practice prior to an audit, Monaghan contacted the Regional IG for Investigations in February, 1989, to determine whether there were any pending investigations of the Academy and, if so, if the audit would interfere with it. *Id*. at A9. None of the details of the investigation were discussed between the Investigations Branch and the Audit Branch. *Id*. [17] The Regional IG of Investigations informed Monaghan that the audit could proceed without interfering with the investigation and that the audit could proceed only if it were planned and executed wholly apart from the investigation. *Id.; see also* D.I. 12 at A3. During the time that the "audit" of the Academy was underway, the Investigations Branch did not share any information with the IG auditors. *Id*. at A3, A9, A18.

16 The computer printout indicated that the Academy was the second largest recipient of Stafford and Pell program funds in the United States and the largest recipient within Region III. D.I. 12 at A8, A15. The printout indicates that over a one year period (July 1, 1986, through June 30, 1987) the Academy received more than 64 million dollars in Stafford and Pell program funds. *Id*.

[**30]

17 The Office of Regional Inspector General did give Monaghan three categories of documents. Two of these were in the public record. These were Academy catalogues and a copy of a complaint that had been filed in court by the State of Ohio against the Academy. The third category was student complaints contained in the file maintained by the Department's Division of Eligibility and Certification which the Regional Inspector General had borrowed and which would have been otherwise available to Monaghan. D.I. 12 at A9.

It appears from the record that prior to the date the audit was suspended, James Cornell, the supervisory auditor, was asked about the nature of the audit. [18] *Id*. at A20, P 6; A23, P 3. While Cornell was instructed to refer any questions of whether there were allegations of wrongdoing against the Academy to the Regional IG for Investigations, *id*. at A10, P 6; A19, P 4, 20, 5; no one ever specifically asked Cornell if there were allegations of wrongdoing against the Academy. *Id*. at A19, P 4; A20, P 5. Specifically, Cornell declared that:

> At one [**31] point during the audit survey, Mr. Garvin asked me whether [the Academy] had been selected for audit based upon allegations of wrongdoing. I again reiterated that [the Academy] had been selected for audit based on its size and not based on any allegations of wrongdoing. This statement was true and correct. Mr. Garvin did not ask me whether there were any allegations of wrongdoing by [the Academy] or whether there was any pending investigation; had he asked me these questions I would have referred him to the Regional Inspector General for Investigations as I had been instructed.

Id. at A19-A20, P 5; *see also id*. at A19, P 4 (to similar effect as to the audit entrance conference). Cornell also never told any employee of the Academy that there were no allegations of wrongdoing by the Academy. *Id*. at A19, P 4. The audit review was stopped on April 20, 1989. The IG Auditors were asked two weeks prior to the July 26, 1989, search of the Academy to participate in the execution of the search. [19]

18 Garvin has declared that: "Periodically throughout the audit, IG *auditors* have assured the Academy that there are no allegations of wrongdoing by the school . . . ." D.I. 8B at A200087, para. 17 (emphasis added). There is no evidence of who these other auditors were. Garvin also declared that at the March 30, 1989, meeting with the IG auditors (Cornell, Houk, and Taeuber), "one of the IG representatives, in substance, again told us that the . . . Academy was not accused of wrongdoing." D.I. 17 at A100045, para. 6. There is no evidence that anyone other than Cornell was asked any questions regarding the nature of the audit.

[**32]

19 The Third Circuit has made clear that the it is not improper for the IG to issue a civil subpoena even though it may be used to develop a criminal case. *See EDN*, 884 F.2d at 742-43.

The allegations of audit abuse presented by the Academy, even if accepted as true, simply do not carry their burden. Assuming that the Academy was told that the audit was routine, one purpose of any routine IG audit is to determine whether there is any impropriety or wrongdoing by the audited party. Indeed, such is the mission of the IG who is charged with the responsibility of rooting out fraud and abuses by participants in federal

programs. As a result of the IG audit, regardless of the initial motivation behind the audit, the omnipresent [*231] possibility exists that information may come to light that could result in additional civil or criminal investigations and possibly formal charges. This should be no surprise to the Academy because of the IG's civil and criminal responsibilities. *See* D.I. 25 at 32. Thus, to the extent that the Academy relied on the representation that the audit was routine, it should [**33] have been expected that information obtained from such an audit could lead to a criminal investigation.

The Academy was bound by federal regulations to maintain and provide access to the very types of information sought by the IG. The Academy is a fiduciary for more than a quarter of a billion dollars in federal and federally-insured funds that it has received. [20] As a condition to receiving those funds, the Academy was contractually aware of IG audits and agreed to provide access to those records pertinent to the programs in which it participated for purposes of audit and examination. *See, e.g.*, 34 C.F.R. § 668.23.

> 20 As a condition of receiving federal funds, the Academy takes on the obligations of a fiduciary towards the funds that it receives. *See* 34 C.F.R. § 668.82(a) [HN13]("A participating institution acts in the nature of a fiduciary in its administration of the Title IV, HEA programs"). "In the capacity of a fiduciary, the [Academy] is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under [the Pell and Stafford] programs." 34 C.F.R. § 668.82(b).

[**34] The types of records that the IG sought to review in the March audit and which it now seeks to review pursuant to the subpoena are those that the regulations of the Secretary of Education require the Academy to keep and make available for inspection as a condition of the Academy's receipt of federal funds. [21] The Academy contractually agreed to IG audits in its program participation agreements and in its contractual agreements to abide by all of the Department's regulations, including access to records requirements, as a condition of receiving federal funds. *See* D.I. 1 Attachment C to the Horn Declaration. Thus, even assuming that the IG auditors did lead the Academy to believe that there were no allegations of wrongdoing against the Academy, those materials sought were subject to IG audit review. This does not mean that the Court will turn a blind eye to appropriate allegations of an abuse of the court's process when confronted with a petition to summarily enforce an IG subpoena. Taken together, the audit deception allegations in this case do not support the conclusion that summary enforcement would amount to an abuse of the Court's process. [22]

> 21 The relevant regulations provide that [HN14]an institution, such as the Academy, that participates in the Pell and Stafford programs, "for purposes of audit and examination, . . . shall give the Secretary, the Comptroller General, or their duly authorized representative [(*i.e.*, the IG)] access to the records required by the program and this part and to any other pertinent books, documents, papers, and records." 34 C.F.R. § 668.23(b).
>
> The [HN15]required records include:
>
> > (f)(1) In addition to the records required under the applicable program regulations and this part, for each recipient of Title IV, HEA program assistance, the institution shall establish and maintain, on a current basis, records regarding -- (i) The student's admission to, and enrollment status at, the institution; (ii) The program and courses in which the student is enrolled; (iii) Whether the student is maintaining satisfactory progress in his or her course of study; (iv) Any refunds due or paid to the student, the Title IV, HEA program account(s) and the student's lender under the GSL . . . programs; (v) The student's placement by the institution in a job if the institution provides a placement service and the student uses that service; (vi) The student's prior receipt of financial aid (see § 668.19); (vii) The verification of student aid application data; and (viii) Information substantiating all disclosures made to a prospective student under § 668.44 (c) through (f) of this part.
>
> > (2)(i) An institution shall establish and maintain records regarding the educational qualifications of each regular student it admits, whether or not the student receives Title IV, HEA assistance, which are relevant to the institution's admissions standards.

34 C.F.R. §§ 668.23(f)(1) and (2)(i).

[**35]

22 The Academy's reference to *S.E.C. v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981), does not change this result. In *ESM*, the Fifth Circuit said that "in holding that fraud, deceit or trickery is grounds for denying enforcement of an administrative subpoena, we exercise the well-established power of the courts to prevent abuse of process." *ESM*, 645 F.2d at 317. The court further stated that in considering each case on its facts, the court must "evaluate the seriousness of the violation under all the circumstances, including the government's good faith and the degree of harm imposed by the unlawful conduct." *Id., quoting United States v. Bank of Moulton*, 614 F.2d 1063, 1065 (5th Cir. 1980). In the instant matter, this court has merely concluded that the audit deception allegations do not carry the burden on the abuse of process issue. While the IG's responses to the Academy's questions as to the nature of the IG audit may have been guarded, they were unequivocal as to the specific questions asked. If for no other reason, the responses could not be fraudulent because the Academy must be charged with the knowledge that even a routine IG audit could lead to civil or criminal investigations. [**36]

[*232] Furthermore, even assuming that the Academy could have refused to voluntarily comply with the IG's request to conduct the audit and therefore force the IG to seek a subpoena, the result would not have been different. The fact is that the same type of information pertinent to the IG audit would have been sought by the subpoena. Indeed, it appears that all the information required to be maintained by the regulations is necessarily relevant to the IG investigation with regard to the Stafford and Pell programs. Thus, in this regard, no harm has come to the Academy by reason of the IG audit. [23]

23 Interestingly, the Academy, at oral argument indicated that if all the IG personnel who participated in the March audit and the July search and their files were "walled off" and new IG personnel were put on this case, then the audit of the Academy could proceed. D.I. 25 at 27. If, in fact, that were to occur, there appears to be no basis for the Academy to resist a subsequent subpoena that would issue because the IG could pursue categories of information required to be maintained pursuant to regulations. Surely, all such information would be pertinent to the IG's investigation.

[**37] The Academy points out that the subpoena is based, at least in part, on certain interviews of the Academy's employees on the Academy's premises in March of 1989. D.I. 16 at 11, citing to D.I. 12 at A21, para. 9; A24, para. 16. Indeed, nothing in the program participation agreement or the regulations establishes that the Academy has expressly consented to such on-site interviews of its personnel. D.I. 16 at 10. [24] One category of information that was a "product" of one of these interviews are "records concerning USA Training Academy's job placement service . . . ." D.I. 12 at A21, para. 9; *see also* D.I. 1 at Attachment F, para. 5. Even if it is assumed that such information was a product of the interview, the Academy was required to "establish and maintain, on a current basis, records regarding . . . (v) The student's placement by the [Academy] in a job if the institution provides a placement service and the student uses that service . . . ." 34 C.F.R. § 668.23(f)(1)(v). As such, the IG would have had a basis for requesting such information pursuant to section 668.23(f)(1)(v). In the event that the Academy did not have such information, they could have so responded to the subpoena. [**38]

24 However, a proposed amendment to 34 C.F.R. § 668.23(b) suggests that this was the preexisting practice, at least as far as the Government understood it, and the amendment seeks to clarify that practice. The proposed regulation provided as follows:

> The Secretary proposes to amend paragraph (b) of [section 668.23, Audits, records and examination] to *clarify* that a participating institution must give the Secretary, the Inspector General of the Department of Education, and the Comptroller General, or their duly authorized representatives timely access to the institution's financial aid-related records and access to institutional personnel involved with the administration of Title IV, HEA program funds. Recently, some institutions have denied the Office of Inspector General (OIG) the right to copy documents related to their participation in the Title IV, HEA programs. Some institutions have also inordinately delayed providing records to the OIG. This proposal *clarifies* the Secretary's *existing policy*, which appears to have been

> subject to misinterpretation by some institutions.
>
> 54 Fed. Reg. 11356 (March 17, 1989) copied at D.I. 16 at A3 (emphasis added).

[**39] The other information allegedly a "product" of the on-site interviews are the computer files sought by the subpoena. *See* D.I. 12 at A23-A24, paras. 4-6. The list of computer files was provided to the IG representative in March, 1989, by two employees of the Academy who were familiar with the Academy's computer system. D.I. 12 at A23, para. 4. These files are not student data files but rather are "descriptions of the data that are contained in eight student [*233] data files." *Id*. at A24-A25, P 7. [25] "Mr. Murray[, one of the Academy's computer employees,] represented to [the IG auditors] during the [March] audit survey that the eight student data files so described contain information relevant to our audit. The subpoena requests the underlying data files." *Id*. Neither of the computer employees of the Academy who provided this information dispute this. *See, e.g.*, D.I. 8A at A100004; D.I. 8C at A200523. If the Academy's computer employees had not disclosed the existence of such files to the IG auditors in March of 1989, there appears to be no reason why the IG could not have made a request for examination of such files anyway. Additionally, the IG could have requested [**40] such categories of information in a subpoena even if they had not learned of the specific file names from the Academy's employees. While the IG may not have known the specific names of such files, the information in those files, if relevant, would have had to have been provided barring some other unknown impropriety. Indeed, the Academy had traditionally taken the posture that the IG auditors were welcome to examine the computer files provided such examination was done so on the Academy's premises. The problems only arose when the IG requested that copies of such files be made so that the IG could conduct its examination on its own computers. [26]

> 25 *See* D.I. 12 at A23-A27 for the reasons why copies of these files are needed by the IG for review with the IG's own computer system.
>
> 26 The IG's computer analysts wanted to perform reliability assessments and statistical surveys of the data on the computer files to enable them to choose an appropriate universe of student files for an intensive audit. The analysts also requested copies of the Academy's computer programs that are supposed to be designed to test the accuracy and reliability of the data entered into the computer system in order to insure the integrity of the federal funds received by the Academy. The copies of the eight computer files sought by the IG are necessary because the Academy uses a Data General computer system that requires custom written programs and the IG auditors use an Audit Analyzer program that runs only on IBM mainframes. Furthermore, while the Academy offered the assistance of its computer programmers to devise programs for the IG auditors to use, that would necessarily compromise the confidentiality of the auditors work. *See* D.I. 12 at 10-12. These reasons satisfy the Court that copies of the computer files are necessary for the IG to properly conduct its examination. Conditions may be necessary, however, to insure the integrity of the files and their continued availability to the Academy. [**41]

The Academy has also alleged that the computer files contain proprietary and confidential information precluding the disclosure of such files to the IG. D.I. 11 at v. These assertions are without merit. Even if some of the information contained in the files is confidential, [HN16]the General Education Provisions Act provides that the Secretary of the Department and the Department IG are not precluded from accessing such confidential information. *See* 20 U.S.C. §§ 1232g(b)(1)(C) and (D). *See also id*. at § 1232g(b)(3). [27] Furthermore, assuming that the computer files do contain proprietary trade secret information, there are prohibitions against the production of such information to competitors of the Academy. [28] *See, e.g.*, 5 U.S.C. § 552(b)(4) ([HN17]Freedom of Information Act disclosure provisions do not apply to matters that are "trade secrets and commercial or financial [*234] information obtained from a person and privileged or confidential"); 18 U.S.C. § 1905 (making it a crime for a federal employee to publicly disclose trade secrets obtained in the course of his duties). [29]

> 27 [HN18]Section 1232g(b)(3) provides that:
>
> > Nothing contained in this section[, 20 U.S.C. § 1232g Family educational and privacy rights] shall preclude authorized representatives of . . . (B) the Secretary [of the Department of Education], . . . from having access to student or other records which may be necessary in connection with audit and evaluation of Federally-supported program, or in connection with the enforcement of Federal legal requirements which relate to such programs: *Provided*, that except when collection of personally identifiable information

> is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

20 U.S.C. § 1232g(b)(3).

[**42]

28 The Academy has asserted that it has developed the computer programs and that there are no such programs available to the general public for the types of processes performed by those programs. This would apparently make such programs highly desirable to the Academy's competitors.

29 Furthermore, during the oral argument of this matter, the attorney for the IG represented that the IG would make every effort to protect the secrecy of the computer programs. The Court's suggestion of a confidentiality order was also not opposed.

The Academy's allegations of audit deception based on the circumstances of this case do not amount to a requisite showing that it would abuse the Court's process to summarily enforce the subpoena.

(ii) *Search and Seizure*

The Academy next asserts that the IG subpoena is the product of an unconstitutional search and seizure executed in retaliation for the Academy's refusal to accede to the IG's demands to turn over the school's databases. The Academy argues that all four of the persons to whom the subpoena is made returnable participated in the July search of the [**43] Academy. [30] Moreover, the Academy argues that the bulk of the materials seized and searched during the July search of the Academy are among the records called for by the IG subpoena and that the IG may not now subpoena the Academy for documents based on information gained as a result of the allegedly illegal July search. D.I. 11 at 22. The Academy argues that enforcement of the subpoena would result in a violation of the Academy's rights under the fourth amendment and the due process clause and abuse the judicial process of this Court. D.I. 11 at 27.

30 They also allege that two of these representatives from the IG had supervisory functions during the search and that one of them, Steven Gelfand, made the decision to conduct the search. Gelfand has declared that the decision to seek a search warrant was a joint decision made by the U.S. Attorney's Office in Delaware, the FBI and the OIG. *See* D.I. 12 at A4, para. 7.

The IG responds to this by arguing that the legality of the July search is irrelevant to this proceeding. [**44] D.I. 12 at 26. This is so, argues the IG, for three reasons. First, relying on the Supreme Court's decision in *Zap v. United States*, 328 U.S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277 (1946), the IG argues it would have been entitled to enter the Academy's premises without a warrant and any knowledge gained in the course of such an inspection could later be lawfully used. *Id*. at 27-28. This argument is based on the federal program participation contracts between the Academy and the Department. Second, the IG argues that even if the alleged defects in the warrant were relevant in this proceeding, the subpoena consists almost entirely of a list of routine documents that the Academy is required by regulation to maintain. *Id*. at 27, 29. Furthermore, the IG argues that nothing in the subpoena is in any way based upon information or documents obtained during the search. *Id*. Thirdly, the IG argues that even if the subpoena did include evidence obtained during the search, the exclusionary rule is not applicable to this proceeding and the subpoena could not be quashed. *Id*. at 27-28, 30-31.

In *Zap*, the petitioner was convicted of violating a federal criminal statute against defrauding the Government. The [**45] petitioner had entered into contracts with the Navy Department involving certain experimental work on airplane wings and to conduct test flights. The contract provided that: "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to cost shall be made as may be directed by the Government." *Zap*, 328 U.S. at 627, 66 S. Ct. at 1279. Furthermore, a statute provided for the inspection and audit of contractors, such as the petitioner. *Id*. 328 U.S. at 626-27, 66 S. Ct. at 1278. Agents of the FBI, acting under the auspices and by the authority of an accountant and a cost inspector of the Navy Department, audited the petitioner's books and records at his place of business. *Id*. at 627, 66 S. Ct. at 1278. The petitioner was absent during part of the audit but his employees cooperated with the agents and supplied them with the books and records. *Id*. While the petitioner protested to this when he returned from his absence, the agents continued the examination [*235] with the assistance of the petitioner's employees. *Id*. One of the agents requested a check. *Id*. This check was eventually admitted at trial as evidence of the petitioner's fraud on [**46] the Navy Department. *Id*. at 628, 66 S. Ct. at 1279. The sole issue

before the Supreme Court was the propriety of the District Court's allowing the check to be admitted into evidence. *Id.*

The Supreme Court began its analysis of the issue by noting that the [HN19]fourth and fifth amendment rights regarding searches and seizures can be waived. *Id.* The Court found that the Government could utilize any knowledge gained from the inspection. *Id.* at 629, 66 S. Ct. at 1279. [31] The Court reached this conclusion based on the agreement between the petitioner and the Government to allow the inspection. *Id.* Furthermore, the Court reached this conclusion even assuming that the taking of the check was unlawful. *Id.* During the inspection, photostats or copies could have been made and could have subsequently been introduced into evidence without the originals. *Id.* The court concluded that it was within the sound discretion of the trial court to admit the check into evidence. *Id.* at 630. The *Zap* holding has since been recharacterized by the Supreme Court as an application of the consent exception to the fourth amendment warrant requirement. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041, 2043 (1973). [**47] *See also First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 720 (11th Cir. 1982).

31 The Court reasoned that:

> When petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. Whatever may be the limits of that power of inspection, they were not transcended here . . . . The inspection was made during regular hours at the place of business. No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff . . . .
>
> *Zap*, 328 U.S. at 628, 66 S. Ct. at 1279.
>
> The agents . . . were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the Government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge . . . . Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained . . . . The agreement to allow an inspection carried consequences at least so great.
>
> *Id.* at 629, 66 S. Ct. at 1279.

[**48] As previously discussed, the relevant regulations require the Academy to give access to certain of its records pertaining to the federal loan and grant programs to the Department's IG for purposes of audit and examination. *See, e.g., supra* slip op. at 15-16, 23-24. Because of these regulations and the Academy's agreement to be bound by such regulations, the Academy, in effect, waived any reasonable expectation that it may have otherwise had to keep these records private from the Department and its authorized agents for purposes of audit and examination and discovering fraud and abuse in the Academy's participation in the Stafford and Pell programs. This is not the same as saying the Academy waived its rights to be free from unconstitutional searches and seizures. *First Alabama Bank*, 692 F.2d at 719. The Court need not go that far to resolve this matter. Rather, the issue involved here is whether there is a sufficient basis to conclude from all the circumstances that the Academy had no reasonable expectation of privacy in the documents in question. The conclusion is, obviously, they did not. It would not abuse the Court's process to summarily enforce the IG subpoena in light of the [**49] July search. [32]

32 It is interesting to note that had the IG subpoenaed the Academy for the production of the materials it now seeks, immediately upon the Academy's failure to comply with the IG's request for the data files (*i.e.*, prior to the July search) this issue would never have presented itself. In that case, it appears that the Academy would have had to contest summary enforcement

on grounds this Court has rejected in this opinion (*i.e.*, burdensomeness, indefiniteness, audit deception).

[*236] Here, the Academy is concerned that Gelfand, the Regional IG for Investigations, may have utilized some knowledge that he may have gained during his participation in the July search in his drafting of the subpoena. [33] The Academy has, however, failed to offer any evidence that any item in the subpoena was derived from the July search. Furthermore, the IG has already stated in its brief that the "documents being sought by the subpoena . . . are the documents that USA Training is required by law and contract to keep and [**50] make available to the Secretary and the IG pursuant to 34 C.F.R. § 668.23(f)(1)." D.I. 12 at 35. [34] Limited in this way it appears that the IG could have drafted the subpoena to include all of those records of the types listed in the regulations at any time before the search and certainly by deduction any time thereafter. The Academy, therefore, has failed to show that any of the items sought by the subpoena were in any way derived from Gelfand's actions during the July search. The same is true even if Gelfand did, in fact, obtain some unspecified knowledge from the July search and used it in drafting the subpoena. The IG was entitled to access such information and had a basis to request such information as a result of contract and regulation.

33 The Academy points out that "Gelfand does *not* state . . . what documents he reviewed, or was told about, *during the search itself*." D.I. 17 at 17 (emphasis in original). The Academy further points out that in the FBI briefing booklet left behind after the search, Gelfand was a member of the search team that searched the Personnel Building Lessons Department and that certain portions of the subpoena "are certainly geared . . . directly into 'lessons' information." *Id.*

[**51]

34 Gelfand has stated that the documents sought in the subpoena are general categories of documents that are routinely kept by schools that participate in the Stafford and Pell programs. D.I. 12 at A2, para. 3.

> Nothing in the subpoena is unique to USA Training Academy other than our request for "C" cards and for eight computer data files. The existence of the "C" cards were described to me by a witness prior to the date of the search. The computer data files are the same files that were requested by the Regional Inspector General for Audit by letter to Paul L. Teeven dated April 4, 1989, more than three months prior to the search; I obtained the list of these files from two employees of the Advanced Techniques Branch of Audit Services who had participated in the audit survey. In drafting the subpoena I also consulted with James Cornell, the supervisory auditor present at USA Training during the audit survey. Mr. Cornell gave me information concerning job placement service at USA Training Academy, which I used to draft paragraph 5 of the subpoena.
>
> *Id.* Additionally, Gelfand stated that he did not consult with David Klein in drafting the subpoena. *Id.*, P 4. [**52]

The Academy's argument that the IG has completely failed to meet its burden of proving that the Academy freely and voluntarily consented to the search and "surrendered its constitutional, statutory and regulatory rights to refuse voluntary compliance with the IG's inspection requests, and to insist instead on legal process to enforce those rights", D.I. 16 at 7, misses the point. With the argument, the Academy is clouding the issues presently before this Court. It is not that the contractual and regulatory access obligations of the Academy serve as a justification for the July search. Rather, those obligations are relied on to enforce the subpoena before this Court. That subpoena was issued by the IG pursuant to the IG Act in part to determine whether the Academy was fulfilling its contractual and regulatory obligations and to obtain access to the information in the hands of the Academy relevant to that mission. While the Academy argues that it had a right to require the IG to resort to legal processes (*i.e.*, a valid warrant or an IG subpoena) to enforce the access obligations on the Academy, the Academy [**53] certainly cannot seriously contend that the Department IG does not have a right to access to the federal programs information for IG Act purposes.

The Academy argues that four of the "agents" before whom the subpoena is made returnable actively participated in the July search. D.I. 11 at 20-21. These individuals are: Steven J. Gelfand, the Regional IG for Investigations; Special Agent David A. Klein; James Cornell, Assistant Regional IG for Audit; and Special Agent Richard Leaf. *Id.* The Academy also asserts that "the bulk of the materials seized [*237] and searched . . . are among the records called for by the IG's subpoena." *Id.* at 21. The Academy places special emphasis on the com-

puter records sought by the subpoena which, the Academy argues, were a major part of the records seized in the July search. *Id*.

Gelfand has affirmatively stated that "nothing in the subpoena is based in any way upon information gathered in the course of the search." D.I. 12 at A2, para. 2. Additionally, the IG has supplied other evidence that satisfies the Court that even if there were items sought by the subpoena that were not already accessible to the IG by contract and regulation, such items [**54] did not derive from the search. For example, two items in the subpoena that are "unique" to the Academy, the "C" cards and the eight computer data files, derive from information predating the July search. *See* D.I. 12 at A-2, para. 3; *see also, supra* slip op. at 27-30 (discussing the computer files).

The "C" cards are "cards on which the Academy's counselors note their telephone contacts with students or their attempts to contact students. A counselor may note on the card if a student says he or she has completed some lessons and will mail them in but the Academy does not consider notes like this to be records of lessons completed." D.I. 8A at 100002-A100003, para. 10. Gelfand has declared that "the existence of 'C' cards were described to me by a witness prior to the date of the search." D.I. 12 at A2, para. 3. Furthermore, Gelfand was "informed by a witness" that "answers to lessons" were recorded from telephone calls by Academy counselors. *Id*. at A6, P 12d. The lessons were documented on the "C" cards as well as on the Academy's computer. *Id*. Gelfand further stated that he was "informed by witnesses that [Academy] employees had been directed to remove the C cards and [**55] to conceal them from IG auditors." These "C" cards could lead to relevant information as to whether "the student is maintaining satisfactory progress in his or her course of study." 34 C.F.R. § 668.23(f)(1)(iii). As such, these records are within the categories of materials maintained by the Academy as part of its obligation of participation in the federal programs. Indeed, the Academy has conceded that counselors "may note on the cards if a student says he or she has completed some lessons and will mail them in . . . ." D.I. 8A at A100002-A100003, para. 10. As such, if the IG had requested records pursuant to 34 C.F.R. § 668.23(f)(1)(iii), the Academy ultimately would have had to produce the C cards.

The Academy relies on *United States v. Bank of Commerce*, 405 F.2d 931 (3rd Cir. 1969), in support of its position that it can maintain a subpoena abuse of process argument based on a fourth amendment violation. In *Bank of Commerce*, the court stated the "were the [IRS] summonses directed at the very records seized in violation of appellant's Fourth Amendment rights . . . the appellant's claim would be entitled to consideration before enforcement were ordered . . . ." *Bank of Commerce*, [**56] 405 F.2d at 935. The court held "that the district court should hear and determine appellant's Fourth Amendment claim and thus assure itself that its process will not be abused." *Id.; see also Gluck v. United States*, 771 F.2d 750, 756-57 (3rd Cir. 1985).

This Court has not precluded consideration of the Academy's position that, in an appropriate case, that argument may be appropriate. This Court has found, however, that this is not such a case because there is no evidence that any of the information sought in the subpoena derived from any assumed fourth amendment violation. Merely arguing or assuming an abuse of process argument without adequate factual support to rebut the IG's sworn declarations does not present a sufficient basis upon which the Court should deny summary enforcement. Furthermore, as previously discussed, the IG has presented adequate support that the subpoena derived not from the claimed fourth amendment violation but rather from preexisting and independently derived knowledge.

The Court is concerned with what appears to be an attempt to turn this summary enforcement proceeding into a quasi-criminal [*238] suppression hearing. Followed to an extreme, the Academy's [**57] arguments could result in forever foreclosing the IG's civil investigation of the allegations of wrongdoing against the Academy. The IG Act simply does not contemplate this result and the Court must be vigilant to ensure that the OIG is not unnecessarily hampered in its legitimate attempt to ferret out instances of fraud and other wrongdoing.

(iii) *Grand Jury Matter*

The Academy argues that summary enforcement of the subpoena would violate the grand jury secrecy rules. The argument is that Agent Klein is one of those to whom the subpoenaed materials are returnable and he is also assisting the U.S. Attorney's Office in conducting the related grand jury investigation. D.I. 11 at 28. [35] "This dual agency by Agent Klein[, argues the Academy,] violates Fed.R.Crim.P. 6(e), and the rule of grand jury secrecy." *Id*. The Academy is concerned that Agent Klein would utilize grand jury information in analyzing and evaluating the materials received under the IG subpoena. *Id*. at 30.

35 The Academy also argues that Agent Klein may take a "central role in the investigation." D.I. 11 at 34.

[**58] Klein was named as a return agent for the subpoena prior to his being assigned to the grand jury investigation. D.I. 12 at A2, para. 4. In its arguments on this matter, the IG has stated that "in the event that USA Training produces records Mr. Klein will not review

them, in order to keep the grand jury and administrative processes separate." D.I. 12 at 32. Furthermore, upon his assignment to the grand jury investigation, Mr. Klein will no longer participate in any civil or administrative investigation in this matter. D.I. 12 at A2, para. 4. The result is that the Academy's argument is now moot.

(c) Discovery and Evidentiary Hearing

The Academy asserts that the record now reflects non-frivolous legal defenses, *see* *Wheeling-Pittsburgh*, 648 F.2d at 128, concerning which there are factual disputes to be resolved. D.I. 17 at 3. Accordingly, the Academy argues it is entitled to discovery and an evidentiary hearing. *See, e.g.*, D.I. 10 at 8. In support, the Academy asserts that there is a record conflict as to whether the IG represented to the Academy that there were no allegations of wrongdoing by the Academy; and the Academy was misled by the IG's representations regarding [**59] no allegations of wrongdoing which were allegedly material to the Academy and relied on by the Academy. D.I. 17 at 3-4. The Academy also points out the undisputed fact that the IG subpoena was based, at least in part, on the March, 1989, audit and that there is a possibility that the subpoena was based, in part, on the July search necessitating cross-examination of the IG's denial of taint. *Id*. The Academy's position is that "even if the IG's 'purpose' in his audit and his search was 'civil', his fraudulent conduct in connection with the audit and his admitted participation in an unconstitutional search and seizure constitute valid 'abuse of process' defenses to enforcement of a subpoena which is the product of such wrongful agency conduct." D.I. 17 at 7.

This Court's preceding analysis mandates that the Academy's request for discovery and an evidentiary hearing must be rejected. The IG has limited the subpoena to those matters that the Academy was required to maintain by contract and regulation. As previously discussed, the information obtained during the March, 1989, audit was information that the IG was already entitled to access and would have eventually been subject to IG audit [**60] and examination review. The same can be said of the July search. Furthermore, the Academy has not shown any tainted material requested by the Academy resulting from the July search.

The Academy's reliance on *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979), is misplaced. In that case, the court was concerned that the IRS was being used improperly as an "'information gathering agency for other departments,' in violation of the *LaSalle* standard." *Serubo*, 604 F.2d [*239] at 813. As to the thirteen challenged IRS subpoenas, the Circuit Court said that "individual determinations of non-criminal purpose were clearly required." *Id*. The District Court had "assumed that there was a *Donaldson-LaSalle* violation, but accepted the agent's representation of absence of taint without affording the defendants access to the wherewithal to conduct an effective cross-examination." *Id*. Because the government had the burden of showing a "'taint-free' basis for the evidence it relied on in the criminal prosecution", the Circuit Court remanded the case to allow the defendant to conduct limited discovery. *Id*.

In *Serubo*, discovery was afforded to the defendants because *LaSalle* [**61] and its progeny (*see, e.g., United States v. Genser*, 582 F.2d 292 (3rd Cir. 1978) ("*Genser I*"), and *United States v. Genser*, 595 F.2d 146 (3rd Cir. 1979) ("*Genser II*")), set forth that the IRS could not issue a section 7602 summons after the IRS agents recommended criminal prosecution to the Justice Department; where there was an institutional decision by the IRS to refer the matter to the Justice Department but delayed in so doing to gather additional evidence for prosecution; or when the IRS was used as a mere evidence gathering agency for other departments. *Serubo*, 604 F.2d at 811. *Genser II* had held that if any individual IRS summons had "issued solely for a criminal purpose, the fruits of that summons would have to be suppressed, even in the face of an overwhelmingly civil purpose of the investigation as a whole." *Genser II*, 595 F.2d at 150. As to the thirteen summonses in *Serubo*, the IRS was at the time of their issuance working under the supervision of a Justice Department Strike Force in an ongoing criminal investigation. *Serubo*, 604 F.2d at 813. Hence, there was a concern that the IRS was being used as an information gatherer for the Justice [**62] Department. *Id*. For each of these thirteen subpoenae, then, an individual determination of non-criminal purpose was required. *Id*. Discovery was then ordered because the government had only submitted the testimony of an IRS agent that none of the information from these subpoenae was used by the grand jury or as a lead to any information which would be used at the criminal trial. *Id*. This failed to meet the government's *Genser II* burden of showing a "taint-free" basis for the evidence it relied on in the criminal prosecution. *Id*. When examined in this way, it is clear that *Serubo* is simply not applicable to the instant matter.

The basis relied upon in *Serubo* to show that discovery is required applied to the situation presented by a section 7602 IRS subpoena prior to the adoption of the TEFRA bright-line rule previously discussed. There is no indication that a similar standard is applicable to this case. Furthermore, on the record before the Court in this case, the OIG's various declarations cannot be said to be unsupported conclusions. There is no prohibition on the IG that was similar to the section 7602 prohibition on the IRS as interpreted by *LaSalle* [**63] There was no fraud by the IG during the course of the March, 1989,

audit. Furthermore, the information sought by the subpoena comprises information to which the IG was either contractually entitled, is contained in the regulations and required to be maintained or had already discovered prior to the July search. As such, the Academy's request for discovery and an evidentiary hearing must be denied.

CONCLUSION

The IG's petition for summary enforcement of its subpoena is granted. The Academy's motion for discovery and an evidentiary hearing is denied. In addition, the issue of who will bear the expense of copying the requested information should first be left to the parties to resolve informally before the Court will intervene, if and when that becomes necessary.

UNITED STATES OF AMERICA (Office of Inspector General, Department of Health and Human Services), Petitioner, v. MEDIC HOUSE, INC., Respondent

Case No. 89-0941-CV-W-1

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

736 F. Supp. 1531; 1989 U.S. Dist. LEXIS 15021

December 8, 1989, Decided
December 8, 1989, Filed

CORE TERMS: subpoena, criminal investigations, grand jury, discovery, bad faith, administrative subpoena, improper conduct, criminal prosecution, nursing homes, malicious, trickery, disrupt, tactics, deceit, respondent's requests, inspectors general, specific evidence, authority to issue, substantial basis, indefinite, conducting, referral, secrecy, summons, reply, respondent's counsel, exclusionary rule, subpoena power, enforcement action, criminal proceedings

JUDGES: [**1] Dean Whipple, United States District Judge.

OPINION BY: WHIPPLE

OPINION

[*1533] ORDER

DEAN WHIPPLE, UNITED STATES DISTRICT JUDGE.

The petition here, filed October 2, 1989, seeks a summary order requiring compliance with an administrative subpoena. Respondent filed a memorandum in opposition to the petition on October 24, 1989. The answer seeks (1) to quash the subpoena, (2) denial of an order of enforcement, (3) alternatively, discovery by respondent, (4) a hearing after discovery, (5) a stay of any civil proceedings or sanctions by petitioner against respondent, (6) a protective order regarding documents relevant to any civil investigation until completion of any related criminal proceedings. Petitioner responded on November 24, 1989. Respondent filed a reply brief on December 6, 1989. For the reasons set forth below, respondent's requests will be denied, the petition for enforcement will be granted, [*1534] and respondent will be directed to comply with the subpoena.

I. *Facts*

In October 1988, the Office of the Inspector General ("IG") for the Department of Health and Human Services ("HHS") began an investigation of respondent Medic House, Inc. The investigation focused upon allegations that respondent had engaged in improper billing, kickbacks, and other [**2] fraudulent conduct in the course of soliciting business and submitting Medicare claims for the provision of diabetic supplies to nursing homes. The IG is responsible for investigating alleged abuse of HHS programs, including Medicare. 5 U.S.C.App. 3 § 4(a).

Initially respondent's managers cooperated by meeting with IG Special Agent Frank Kram on October 21, 1988. They permitted him to visit respondent's billing office, and they provided some relevant information. They also indicated several times in the next five months a willingness to provide more information as requested and to cooperate fully with the investigation.

On January 21, 1989, at respondent's request, respondent met with an assistant United States attorney and Kram to discuss respondent's possible criminal liability. At the meeting the IG and agent asked for some specific records. In March 1989, respondent supplied some

records, but not those which had been requested. On March 27, 1989, respondent notified the IG that it would not provide the requested records.

Petitioner issued an administrative subpoena *duces tecum* on April 18, 1989, and it was served by personal delivery on April 19, 1989. The return date on it [**3] was May 5, 1989. By letter dated April 28, 1989, respondent's counsel objected to virtually every request in the subpoena.

Kram reviewed the subpoena, revised it, reduced the number of requested items, and narrowed the scope of some others. A revised subpoena was issued on May 23, 1989, served by personal delivery on May 25, 1989, and was returnable on June 9, 1989. On June 6, 1989, the IG received from respondent's counsel a letter which was virtually identical to the April 28, 1989 letter objecting to virtually every request.

Counsel for the IG sent a letter on July 6, 1989, to respondent's counsel, responding to the objections and seeking compliance. Respondent's counsel wrote on July 14, 1989, that it would provide one group of records, but nothing else. Thereafter, the IG began this enforcement action.

II. *Arguments*

Petitioner argues that this court has a strictly limited role in evaluating a request for enforcement of an administrative subpoena. The sole issue, petitioner argues, is whether the court's process would be abused by enforcement. Petitioner argues it meets the seminal test of *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950), as applied in *United* [**4] *States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3rd Cir. 1986), so the subpoena should be enforced. Petitioner states that, as required by *Morton Salt*, the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the agency's inquiry. In its reply to respondent's opposition, petitioner also contends its request is made in good faith. Thus, petitioner argues, it has set forth a prima facie case for enforcement.

Respondent raises a variety of arguments in opposition to enforcement. It contends the IG has no authority to issue the subpoena, that the request is not relevant to its inquiry, that the demand is too vague, and that the requested materials already are in petitioner's possession or can be found elsewhere. Finally, respondent argues enforcement would violate respondent's rights under the fourth, fifth and sixth amendments of the United States Constitution.

III. *Discussion*

A. Enforcement Test

As noted by respondent, three requirements for enforcement are set forth in *United States v. Morton Salt Co., supra*, 338 U.S. at 652. A fourth [*1535] point was articulated in *United States v.* [**5] *Powell*, 379 U.S. 48, 58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964). The four-part test is: (1) The inquiry must be within the authority of the agency. (2) The demand for information must not be too indefinite. (3) The information sought must be reasonably relevant to the inquiry. (4) The information must not already be in the government's possession.

1. *Agency's Authority*

Respondent first argues that the IG has no authority to investigate criminal violations of the Social Security Act, as set forth in Section 1128B (42 U.S.C. § 1320a-7b). Respondent contends that the investigative authority, if any, promulgated in 5 U.S.C.App. 3 § 4 requires respondent to refer any alleged criminal violations to the Attorney General. The respondent erroneously contends that the IG is outside its authority in conducting an investigation of possible criminal violations.

The Inspector General Act of 1978 (5 U.S.C.App. 3 §§ 1-11), as amended in 1988, establishes broad powers for the IG to fulfill its purpose "to prevent and detect fraud and abuse" as articulated in 5 U.S.C.App. 3 § 2(2)(B). Under Section 4(a)(4)(A) and (B), the IG is charged with conducting, supervising, or coordinating relationships among various governmental and non-governmental [**6] agencies and entities with respect to all matters relating to the prevention and detection of fraud and abuse, or the identification and prosecution of participants in such fraud or abuse. In 5 U.S.C.App 3 § 9, an IG office was established for HHS, and the attendant functions, powers and duties were transferred to the office accordingly in that section.

The courts have recognized the IG's authority to conduct criminal investigations and to issue subpoenas in conjunction with those investigations. *See, e.g., United States v. Educational Dev. Network Corp.*, 884 F.2d 737, 740-744 (3rd Cir. 1989) (hereafter, "EDN") (recognizing IG's authority to issue subpoena in criminal investigation); *United States v. Aero Mayflower Transit Co., Inc.*, 265 U.S. App. D.C. 383, 831 F.2d 1142, 1145 (D.C.Cir. 1987) (hereafter, *Aero*) (recognizing both civil criminal investigative authority with coextensive subpoena power). *See also, United States v. Westinghouse Elec. Corp., supra*, 788 F.2d at 170 (hereafter, "Westinghouse") (IG's subpoena power to be interpreted broadly); *United States v. Art Metal-U.S.A. Inc.*, 484 F. Supp. 884, 887 (D.N.J. 1980) (likelihood of independent criminal proceedings [**7] is no bar to enforcement of IG's subpoena).

Regardless of whether criminal allegations are likely to develop from the IG's investigation, the IG has authority to issue the subpoena here. The authority is established by statute and recognized by the courts.

2. *Vagueness and Burden of Demand*

Respondent suggests the subpoena is too indefinite, unduly burdensome, and would disrupt normal operation of its business. It relies upon *E.E.O.C. v. St. Louis Dev. Disabilities Treatment Center*, 118 F.R.D. 484, 486 (E.D.Mo. 1987). Respondent contends that the subpoena has no dates or geographical dimensions, so it could not know whether it could ever comply with the subpoena. Further, respondent believes compliance would disrupt operations seriously.

Respondent's argument appears to be less than candid. Petitioner responds that the paragraphs 4, 5, 9, and 10 of the subpoena inherently are limited to the 1 1/2-year period in which respondent was contacting nursing homes in regard to the purchase of diabetic monitors and testing supplies. Paragraphs 9 and 10 seek guidelines respondent distributed to employees on Medicare coverage and the trade publications, bulletins, newsletters and other materials [**8] on Medicare coverage which respondent received from outside sources. Petitioner represents that relatively few guidelines, instructions and materials have been published or distributed on the stated subjects. Petitioner suggests that the volume of material would be so small that it could not reasonably be expected to disrupt the business operations. Perhaps most significant, however, is that the IG offered to defer the [*1536] rest of its request if respondent would produce a set of five-by-eight cards maintained on all nursing homes contacted by respondent. Respondent's refusal to comply with even such a small request suggests the amount of burden was not the reason for refusal.

Under the circumstances, respondent has failed to carry its burden of showing that the subpoena is too vague, or too burdensome, to require compliance. A review of the subpoena reveals it to be sufficiently direct and precise. Furthermore, respondent's unsubstantiated belief -- that compliance would disrupt business operations -- is insufficient, standing alone, to avoid the subpoena.

3. *Relevance*

Respondent first asserts that the subpoena apparently concerns an investigation into possible criminal violations. Having [**9] argued that the IG has no authority to conduct criminal investigations, respondent argues that the subpoena cannot be relevant to a lawful investigation. As stated above, however, this court recognizes (as others have) that the IG has authority to conduct investigations of possible criminal violations. Therefore, the first relevance argument fails.

Respondent also argues that the subpoena's request in paragraph 1 is irrelevant. Apparently it argues that, as a "supplier", it is not required to report routinely the identity of each person with ownership or control interest in such entity. In the absence of such a reporting requirement, respondent stretches to the remarkable conclusion that such information never could be relevant to a fraud investigation. This argument is specious.

4. *Information in Possession*

Respondent argues that petitioner either has the information it seeks, or has independent means to obtain it. It relies in part on 5 U.S.C.App. 3 § 6(a)(4), which provides that documents may be obtained from other federal agencies. Petitioner replies, and the court agrees, that such a position is unacceptable. A substantial part of the significance of materials is the condition [**10] in which they are maintained by the owner. Even if the same sort of information can be obtained elsewhere, that availability is not the same as acquiring it from the record-keeper in the natural condition in which it is kept.

Respondent contends that the information can be obtained by accumulating it from a variety of sources, including diverse federal agencies, nursing homes and patients. The variety of sources virtually guarantees that the information would not be found in a condition similar to that maintained by respondent for the same information. Thus, what might be gathered from other sources is not the "same" information, as contemplated in *United States v. Powell, supra*, 379 U.S. at 58.

B. Abuse of Process

Where, as here, petitioner establishes a prima facie case for enforcement under *Morton Salt* and *Powell, supra*, the burden shifts to the respondent to show that enforcement would be an abuse of the court's process. *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1444-1445 (10th Cir. 1985). The burden is a heavy one. *Id.* Respondent challenges enforcement of the subpoena as an abuse of process by claiming denial of constitutional [**11] rights, and improper conduct.

1. *Constitutional Rights*

Respondent suggests petitioner has acted in bad faith because of the possibility of parallel civil and criminal lawsuits. The deprivation of constitutional rights guaranteed by the fifth and sixth amendments would occur because such rights do not attach in civil investigations. Respondent urges that petitioner should not have access to materials and information in a civil suit if petitioner

would not have access to such information in a criminal suit. That is, respondent contends that any civil investigation should be suspended pending completion of the criminal investigation. It contends a criminal investigation would [*1537] permit less discovery because of the constitutional limits.

Contrary to respondent's position, the IG's authority to conduct parallel criminal and civil investigations has been recognized by the courts. *See, United States v. Educational Dev. Network Corp., supra*, 884 F.2d at 740-744; *United States v. Aero Mayflower, supra*, 831 F.2d at 1145-6; *cf., Sec. and Exch. Comm'n v. Dresser Industries, Inc.*, 202 U.S. App. D.C. 345, 628 F.2d 1368, 1374 (D.C. Cir.) (*en banc*), *cert. denied*, 449 U.S. 993, 66 L. Ed. 2d 289, 101 S. Ct. 529 (1980) ("In the [**12] absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.")

Respondent first suggests that it is entitled to investigation by a grand jury, rather than the IG. Petitioner correctly notes that, while indictment by grand jury is guaranteed by the fifth amendment, there is no guarantee that investigation would be only by a grand jury. Furthermore, the grand jury's investigation need not be any narrower than that of the administrative subpoena in question.

Petitioner also correctly notes that respondent errs in its understanding of grand jury secrecy, as required by Rule 6(e), Fed.R.Crim.P. Such secrecy applies only to materials presented to a grand jury. So far, apparently no grand jury has requested or obtained anything from respondent, so the secrecy rule need not apply yet. Here, no referral to the Justice Department for criminal prosecution has been made, and no grand jury has been called. While Rule 6(e) prevents disclosure of what is presented to the grand jury, it does not prevent an IG agent from disclosing to prosecutors, other agencies or a grand jury what the agent has discovered.

The fifth [**13] amendment right to be free from self-incrimination likewise is not violated by this subpoena. First, it is directed to the corporate records' custodian, who is not entitled to assert a fifth amendment right as grounds to resist a subpoena for corporate records. *Braswell v. United States*, 487 U.S. 99, 108 S. Ct. 2284, 2290-2295, 101 L. Ed. 2d 98 (1988).

Second, in this preliminary stage of the investigation, fifth amendment rights are not yet implicated. There has been no referral for criminal prosecution, or any grand jury action, or any charges filed, or any arrests, or any custodial interrogation. *See Sec. and Exch. Comm'n v. Dresser Industries, Inc., supra*, 628 F.2d at 1376-1378 and 1388. Even if there had been a referral for criminal prosecution, and/or a separate criminal investigation was under way, the IG still could issue a subpoena for civil investigation -- absent specific evidence of agency bad faith or malicious governmental tactics. *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 905 (Temp.Emerg.Ct.App. 1984), quoting *Dresser Industries, supra*, 628 F.2d at 1375.

Respondent's reliance on *United States v. LaSalle National Bank*, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978) is misplaced. *See,* [**14] *United States v. Aero Mayflower Transit Co., Inc., supra*, at 1145- 1146. In *LaSalle*, the Supreme Court held that the Internal Revenue Service could not become an information-gathering agency for the Justice Department's criminal prosecutions. *LaSalle*, 437 U.S. at 317. However, the finding was based upon the complete absence of any authority for use of IRS summonses solely for criminal investigations. *Id*. n. 18. [1] By contrast, the IG in this instance has express authority to conduct criminal investigations, so *LaSalle* cannot support respondent's position.

1 After *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.

2. *Improper Conduct*

Respondent contends the IG is proceeding in bad faith to use the less-restrictive procedures for administrative and civil investigations to circumvent the more [*1538] rigid constitutional limits on criminal cases. Accordingly, respondent seeks to stay all [**15] proceedings until any criminal investigation is complete, and to be permitted discovery of petitioner -- no doubt to seek evidence of bad faith or malicious tactics.

Respondent also asserts that the IG agent's "friendly overtures" and failure to disclose a pending formal investigation were improper. It relies on *Securities Exch. Comm'n v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 317-318 (5th Cir. 1981), which noted that "fraud, deceit or trickery" is grounds for denying enforcement of an administrative subpoena. It also includes a test for when improper conduct would be an abuse of process.

In *United States v. Merit Petroleum, Inc., supra*, 731 F.2d at 905, the court applied a high standard by requiring a showing of special circumstances demonstrating specific evidence of bad faith or malicious tactics. Respondent has set forth no such special circumstances, nor has it submitted specific evidence of bad faith. Rather, it notes that potential criminal exposure exists, and then

concludes therefrom that the agency must be acting improperly in conducting a criminal investigation under civil investigation rules. This argument overlooks the fact that the same information which could [**16] be relevant to a criminal case could be sought pursuant to a legitimate civil investigation. Of course, it also overlooks the authority, and duty, to conduct investigations into possible criminal activities.

The access to discovery also was examined in the *Merit Petroleum* case, where the court said, at 905:

> The granting or denial of discovery in a subpoena enforcement case is within the discretion of the district court. *United States v. Thriftyman, Inc., supra*, 704 F.2d [1240] at 1249 [(TECA 1983)]; *United States v. RFB Petroleum, Inc., supra*, 703 F.2d [528] at 533 [(TECA 1983)]. Subpoena enforcement proceedings are not intended to be "'exhaustive inquisitions into the practices of regulatory agencies.'" *United States v. Thriftyman, supra*, 704 F.2d at 1249. This Court most recently discussed the importance of a "speedy resolution" of enforcement actions in *United States v. Texas Energy Petroleum Corp.*, 719 F.2d 394, 397, 398 (TECA 1983).
>
> * * * *
>
> It is clear that Merit has failed to present specific facts sufficient to establish any substantial preliminary showing of bad faith or improper purpose which would justify any further delay in enforcement of [**17] 1981 subpoena. There was no error in denying discovery.

Without some substantial basis for believing bad faith, improper purpose, or malicious tactics, this court is unwilling to quash the subpoena. Furthermore, without some substantial basis, there will be no permission for a fishing expedition in quest of a reason to suspect improper conduct. The legitimate investigatory duties of inspectors general should not be hamstrung by the "exhaustive inquisitions" eschewed in *Merit Petroleum*.

Respondent's only hint of improper conduct, or "fraud, deceit or trickery", is the IG agent's "friendly overtures and the agency's failure to disclose a pending formal investigation." The test promulgated in *ESM Gov't Sec., supra*, 645 F.2d at 317-318, is (1) whether the agency intentionally or knowingly misled the subject of the subpoena, (2) whether that party actually was misled, and (3) whether the subpoena was the result of improper access to the party's records. In this instance, there is not sufficient showing of intentional or knowing efforts to mislead.

Some kind of affirmative action (or inaction when there was a duty to act) is necessary before fraud, deceit or trickery can be [**18] found. *See United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970), *cert. denied*, 400 U.S. 831, 27 L. Ed. 2d 62, 91 S. Ct. 62; *see also, Spahr v. United States*, 409 F.2d 1303, 1306 (9th Cir.), *cert. denied*, 396 U.S. 840, 24 L. Ed. 2d 91, 90 S. Ct. 102 (1969). Recalling *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), and *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969), the court in *ESM Gov't Sec.* noted that an agent has no duty to state a [*1539] criminal investigation is under way, unless his silence affirmatively would mislead a person to believe no such investigation is in progress. *Securities Exch. Comm'n v. ESM Gov't Sec., supra*, 645 F.2d at 315 and n. 6. The court further observed, in n. 6, that failure to inform that a criminal investigation was being made did not amount to misconduct requiring exclusion of evidence.

The *ESM Gov't Sec.* case also is significant here in that the court there acknowledged that enforcement of administrative subpoenas is a matter for district courts under their supervisory power, rather than under the exclusionary rule. *Id.* at 317. The court said, at 317:

> * * * We do not hold, however, that any violation of the fourth amendment in the procurement of administrative [**19] subpoena compels denial of its enforcement.
>
> Consequently, the court should not invoke automatic exclusionary rule. "The correct approach for determining whether to enforce a summons requires that the court evaluate the seriousness of the violation under all the circumstances, including the degree of harm imposed by the unlawful conduct." *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980). Each case must be examined on its facts.

In this instance, there is no substantial basis for believing any improper conduct has occurred. There is no reason to believe that anyone engage in any fraud, deceit or trickery which would preclude enforcement of the subpoena. Finally, no justification has been shown for permitting discovery by respondent.

Absent sufficient reason to withhold enforcement, this proceeding should not "become a means for thwarting the expeditious discharge of the agency's responsibilities." *National Labor Relations Board v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3rd Cir. 1979). Indeed, respondent has not shown that, if a hearing were granted, it could submit any evidence to warrant withholding enforcement. This should be, and will be, a summary proceeding.

[**20] It is

ORDERED that respondent's request to quash the subpoena and deny an order of enforcement is denied. It is further

ORDERED that respondent's alternative request for discovery, a hearing after discovery, and a stay of proceedings also is denied. It is further

ORDERED that respondent's requests for sanctions and for a protective order also are denied. It is further

ORDERED that the relief sought by petitioner in its petition, filed October 2, 1989, is granted. It is further

ORDERED that the respondent shall produce within 45 days all documents described in the subpoena *duces tecum* before a duly designated representative of the Inspector General at a date, time and place to be established by agreement of the parties. It is further

ORDERED that, if the parties are unable to agree by December 20, 1989, on a mutually convenient date, time and place, petitioner party shall notify the court forthwith in writing so the court may establish such date, time and place.

DATED: December 8th, 1989

Kansas City, Missouri

LEXSEE

Norma June Cordt, Petitioner, vs. Office of the Inspector General, United States Postal Service, Respondent.

Civ. No. 99-1589 (RHK/RLE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2000 U.S. Dist. LEXIS 13615

May 31, 2000, Decided

DISPOSITION: [*1] Petitioner's Motion for Order Preventing United States Government from Obtaining Access to Her Financial Records [Docket No. 1] DENIED. Respondent's Motion for Order Dismissing Petitioner's Challenge and Directing Compliance with Administrative Subpoena No. 0889 [Docket No. 7] GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner moved for an order preventing respondent from obtaining access to her financial records, and respondent moved for an order dismissing petitioner's challenge, and directing compliance with its administrative subpoena.

OVERVIEW: Petitioner, a United States Postal Service employee, was under investigation by respondent, United States Postal Service, for the suspected embezzlement of postal funds. Respondent issued a subpoena pursuant to the Right to Financial Privacy Act (RFPA), 12 U.S.C.S. §§ 3401-3422, that, if enforced, would have required the credit union to provide respondent with certain of petitioner's financial records. Petitioner failed to present any support for her contention that the subpoena was invalid because it lacked a civil purpose. Had Congress intended to restrict the issuance of the subpoena under the RFPA, it was at liberty to do so. No authority was provided to support the proposition that a subpoena issued by an Inspector General for records under the RFPA may not be pursued for criminal purposes.

OUTCOME: The motion for an order preventing the United States Government from obtaining access to petitioner's financial records was denied because the subpoena was valid even though it was pursued for criminal purposes. The motion for an order dismissing petitioner's challenge and directing compliance with the administrative subpoena was granted.

CORE TERMS: subpoena, postal, financial records, customer, summons, law enforcement, embezzlement, subpoenae, notice, accountability, window, clerk, financial institution, procedural requirements, recommendation, shortage, stamp, search warrant, suspected, purported, summonses, invalid, administrative subpoena, cash flow, issues presented, formal written request, criminal prosecution, criminal proceedings, information contained, disclosure

LexisNexis(R) Headnotes

Banking Law > Consumer Protection > General Overview
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act
[HN1]The Right of Financial Privacy Act (RFPA), 12 U.S.C.S. §§ 3401-3422, protects the secrecy of customers' financial records in banks, by limiting both the ability of federal law enforcement to obtain access to the information, as well as the bank's freedom to distribute such information. Under the RFPA, the government may have access to, or obtain copies of, information contained in a customer's financial records from a financial institution only if the customer authorizes the disclosure, the government obtains a subpoena or summons, or the records are sought pursuant to a search warrant or formal written request. If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the customer simultaneous

notice of the access. 12 U.S.C.S. §§ 3405(2), 3406(b), 3407(2), 3408(4)(A). The most salient feature of the RFPA is the narrow scope of the entitlements it creates in order to minimize the risk that customers' objections to subpoena will frustrate agency investigations.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
[HN2]See 12 U.S.C.S. § 3405.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act
[HN3]Under the Right to Financial Privacy Act (RFPA), 12 U.S.C.S. §§ 3401-3422, the issues presented by a challenge to a subpoena often focus on whether there is a legitimate law enforcement inquiry, whether the requested records are relevant to that inquiry, and whether the government has complied with the RFPA's procedural requirements. 12 U.S.C.S. § 3410(c).

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Criminal Law & Procedure > Discovery & Inspection > Subpoenas > Challenges & Modifications
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act
[HN4]Under the terms of the Right to Financial Privacy Act, 12 U.S.C.S. §§ 3401-3422, a law enforcement inquiry is defined as a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute. 12 U.S.C.S. § 3401(8). In determining if a stated law enforcement purpose is legitimate, a court is free to consider the recitations on the face of the subpoena, as well as supporting affidavits, or declarations, that are submitted in support of the subpoena.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
Civil Procedure > Pretrial Matters > Subpoenas
Securities Law > U.S. Securities & Exchange Commission > Administrative Proceedings > Right to Financial Privacy Act
[HN5]Under the Right to Financial Privacy Act (RFPA), 12 U.S.C.S. §§ 3401-3422, prior to the issuance of the subpoena, the customer whose financial records are sought is required to be provided with notice of the request and the basis for the request. 12 U.S.C.S. § 3402(1). Also, the RFPA requires that a copy of the subpoena be served on the applicable financial institution, as well as on the customer whose records are sought. 12 U.S.C.S. § 3405. In addition, the agency must serve the customer with forms advising them of the right and procedure to challenge the subpoena.

COUNSEL: For NORMA JUNE CORDT, petitioner: Peter Benson Wold, Wold Jacobs & Johnson, Mpls, MN.

For INSPECTOR GENERAL, UNITED STATES POSTAL SERVICE, OFFICE OF, respondent: Rachel K Paulose, US Attorney, Mpls, MN.

For INSPECTOR GENERAL, UNITED STATES POSTAL SERVICE, OFFICE OF, respondent: Daniel E Ellenbogen, Not Admitted.

JUDGES: Raymond L. Erickson, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Raymond L. Erickson

OPINION

MEMORANDUM ORDER

At Duluth, in the District of Minnesota, this 31st day of May, 2000.

I. *Introduction*

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A), upon the Motion of the Petitioner Norma June Cordt ("Cordt") for an Order preventing the United States Postal Service ("Postal Service") from obtaining access to her financial records, [*2] and upon the Postal Service's Motion for an Order dismissing Cordt's challenge, and directing compliance with its administrative Subpoena. Deeming oral argument to be unnecessary, we have considered the Motions upon the parties' written submissions. For reasons which follow, Cordt's Motion is denied, and the Postal Service's Motion is granted.

II. *Factual and Procedural Background*

Cordt is a United States Postal employee, who is under investigation by the Postal Service for the suspected embezzling of postal funds during the period from

approximately June of 1997, through July of 1999. Cordt began her employment with the Postal Service as a window clerk at the Post Office, in St. Cloud, Minnesota, in July of 1992. As a window clerk, Cordt's responsibilities included cash handling and daily cash drawer accounting. As detailed by the Postal Service, window clerks are assigned a predetermined amount of stamp stock, based upon the sales in their Post Office. See, *Declaration of James H. McCollow*, at 1. This stamp accountability is audited every four months. Following the audits, if a discrepancy of one hundred dollars or more is found, then the results are reported to the Postal [*3] Inspection Service. Large discrepancies are considered by the Postal Service to be indicators of embezzlement.

In 1997, Postal Inspectors began to investigate Cordt, because of an accountability shortage of $ 3,204. *Id.* In 1998, and early 1999, additional accountability shortages of $ 2,177, and $ 3,250 were uncovered. *Id.* Subsequent to the discovery of the 1999 shortage, a confidential tip was received by the Postal Service, which advised that Cordt had sustained substantial gambling losses. *Id.* Consequently, her postal financial records, that is, her PS 1412 Forms, [1] were obtained from the St. Cloud Post Office, and examined, in order to determine whether any additional shortages had been incurred from the date of the early 1999 count. As related by the Postal Inspector:

> A review of [Cordt's] PS FORM 1412s showed that * * * Cordt made numerous "error corrects" every day. An error correct is basically an adjustment to the window clerk's stamp accountability.
>
> * * *
>
> An error correct can also be used to embezzle postage sales. The window clerk creates a fictitious error, does an error correct which reduces the stamp accountability, then takes that amount [*4] of cash out of the drawer.

Id., at 2.

As a result of the investigation into Cordt's suspected embezzlement, on September 24, 1999, the Postal Service issued Subpoena No. 0889, under the provisions of the Right of Financial Privacy Act, Title 12 U.S.C. §§ 3401-3422 ("RFPA"), to the St. Cloud Federal Employee's Credit Union. The Subpoena seeks financial records involving the financial accounts maintained by Cordt at the institution. The Postal Service believes that these bank records will demonstrate a possible motive for embezzlement by showing the cash flow, and the availability of funds, during the period in which the embezzlement is purported to have taken place.

> 1 PS FORM 1412 is a daily summary of all financial transactions made by a window clerk. See, *Declaration of James H. McCollow*, at 2.

Apparently as a result of the provisions of RFPA, copies of the Subpoena, and instructions for filing any objections to it, were served upon Cordt in September of 1999. See, [*5] *Government's Memorandum of Points and Authorities, Ex. A.* In response, Cordt filed a timely objection to the Subpoena on October 15, 1999. According to Cordt, the Postal Service is not authorized to issue a Subpoena for financial records unless there is a civil purpose for doing so, and no formal recommendation has been made to the Justice Department to pursue criminal prosecution. See, *Petitioner's Memorandum in Support of Motion*. However, the Postal Service contends that Cordt's argument should be rejected, because it is based upon a unique, and inapplicable, provision of the Internal Revenue Code, and upon a flawed understanding of the RFPA.

III. *Discussion*

A. *Standard of Review*. [HN1]The RFPA protects the secrecy of customers' financial records in banks, by limiting both the ability of Federal law enforcement to obtain access to the information, as well as the bank's freedom to distribute such information. See, *Puerta v. United States*, 121 F.3d 1338, 1340 (9th Cir 1997). "Under the RFPA, the government may have access to, or obtain copies of, information contained in a customer's financial records from a financial institution only if the customer authorizes [*6] the disclosure, the government obtains an administrative or judicial subpoena or summons, or the records are sought pursuant to a search warrant or formal written request." *Anderson v. La Junta State Bank*, 115 F.3d 756, 757 (10th Cir. 1997), citing *Title 12 U.S.C. § 3402*; see also, *Puerta v. United States*, supra at 1340 (noting that the RFPA prohibits Government access to information contained in customers' financial records, unless one of the statutory exceptions, such as customer authorization or a Subpoena applies); *Neece v. IRS*, 96 F.3d 460, 462 (10th Cir. 1996); *United States v. U.S. Bancorp*, 12 F. Supp. 2d 982, 984 (D. Minn. 1998)(noting that the RFPA prohibits financial institutions from providing the Government with information concerning their customers' financial records, unless the customer authorizes the disclosure of such information or the Government obtains a valid Subpoena or Search Warrant); *Adams v. Board of Governors of Federal Reserve Bd.*, 659 F. Supp. 948, 954-55 (D. Minn. 1987). "If the government gains access to financial records through a warrant, [*7] subpoena,

court order, or written request, it must give the financial institution's 'customer' simultaneous notice of the access." *United States v. Daccarett*, 6 F.3d 37, 50 (2nd Cir. 1993), citing *Title 12 U.S.C. § 3405(2)* (administrative Subpoena and Summons); *Title 12 U.S.C. § 3406(b)* (Search Warrant); *Title 12 U.S.C. § 3407(2)* (judicial Subpoena); *Title 12 U.S.C. § 3408(4)(A)* (formal written request). "However, the 'most salient feature of the Act is the narrow scope of the entitlements it creates', because congress wanted to 'minimize the risk that customers' objections to subpoenae will delay or frustrate agency investigations.'" *United States v. Daccarett*, 6 F.3d 37, 50 (2nd Cir. 1993), quoting *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745-746, 81 L. Ed. 2d 615, 104 S. Ct. 2720 (1984).

Together, Sections 3405 and 3410 of the RFPA set forth the statutory requirements for issuing an administrative Subpoena under the Act, as well as the procedural requirements for challenging that Subpoena. [HN2]As provided in Section 3405:

> A Government authority [*8] may obtain financial records under section 3402(2) of this title pursuant to an administrative subpoena or summons otherwise authorized by law only if --
>
> (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;
>
> (2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution together with * * * [a] notice which shall state with reasonable specificity the nature of the law enforcement inquiry * * *.

Title 12 U.S.C. § 3405.

[HN3]Under the RFPA, the issues presented by a challenge to a Subpoena often focus on whether there is a legitimate law enforcement inquiry, whether the requested records are relevant to that inquiry, and whether the Government has complied with the Act's procedural requirements. See, *Title 12 U.S.C. § 3410(c)*; *Breakey v. Inspector General of the United States Department of Agriculture*, 836 F. Supp. 422 (E.D. Mich. 1993).

B. *Legal Analysis*. Here, Cordt does not challenge the Subpoena, that [*9] was issued by the Postal Service, on the basis of any purported procedural deficiency, or because it was not issued in furtherance of a legitimate law enforcement inquiry. [2] Rather, Cordt contends that, if there is a likelihood of criminal proceedings, an agency seeking an individual's records pursuant to the Subpoena power, which has been granted under the Inspector General Act, must have a civil purpose, and the Agency must not have made a formal recommendation to the Justice Department to prosecute.

2 We note that the Postal Service has sufficiently demonstrated that any challenges to the procedural or substantive validity of the subpoena would be unwarranted, as it is clear that the financial records sought are reasonably related to a legitimate law enforcement inquiry, and that the procedural requirements of the RFPA have been satisfied. [HN4]Under the terms of RFPA, a "law enforcement inquiry is defined as "a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute." *Title 12 U.S.C. § 3401(8)*. In determining if a stated law enforcement purpose is legitimate, a Court is free to consider the recitations on the face of the Subpoena, as well as supporting Affidavits, or Declarations, that are submitted in support of the Subpoena. See, *In re Blunden*, 896 F. Supp. 996, 1000 (C.D. Cal. 1995); *Donovan v. U.A. Local 38 Plumbers and Pipe Trades Pension Fund*, 569 F. Supp. 1488, 1490 (N.D. Cal. 1983). Here, Cordt is under investigation for the theft of postal funds, in violation of Title 18 U.S.C. § 1711. See, *Declaration of James H. McCollow*, at 1. Further, Cordt's financial records are relevant to this investigation, as they are needed to demonstrate the possible motive for the alleged embezzlement by determining the cash flow, and availability of funds, during the time of purported embezzlement.

[HN5]Further, under the RFPA, prior to the issuance of the subpoena, the customer whose financial records are sought is required to be provided with notice of the request and the basis for the request. See, *Title 12 U.S.C. § 3402(1)*. Also, the RFPA requires that a copy of the subpoena be served on the applicable financial institution, as well as on the customer whose records are sought. See, *Title 12 U.S.C. § 3405*. In addition, the agency must serve the customer with forms advising them of the right and procedure to challenge the subpoena. *Id.*

> Here, Cordt does not contest the fact that she was provided with a copy of the subpoena, and its accompanying notice, as required by the RFPA. Further, it appears that the additional procedural requirements of the RFPA have been satisfied, as the copy of the subpoena, and the accompanying notice to Cordt, state that the subpoena is being issued in connection with an investigation under the Inspector General Act, regarding accountability for missing postal funds, and also provides a detailed explanation of the procedures used to challenge the subpoena. See, *Government's Memorandum of Points and Authorities, Ex. A.*

[*10] In support this argument, Cordt relies on two cases. The first, *United States v. Genser*, 602 F.2d 69 (3rd Cir. 1979), involved a challenge to several Summonses that had been issued by the Internal Revenue Service ("IRS"), pursuant to Title 26 U.S.C. § 7602. Ultimately, the Court determined that the challenge was unsuccessful, and stated that "it is not just an institutional commitment to recommend prosecution that renders a summons issued under **§ 7602** invalid; rather, it is the absence of a civil purpose for that summons that triggers the LaSalle rule." *United States v. Genser*, supra at 70 (referring to the legal rule enunciated in *United States v. LaSalle National Bank*, 437 U.S. 298, 311-14, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978), that the enforcement of an IRS Summons is prohibited once the criminal process has effectively been commenced)[emphasis added]. However, since the Court's analysis in *Gesner* dealt exclusively with a provision of the Internal Revenue Code, and made no mention of the RFPA, it has no bearing, directly or indirectly, upon this case, or the issues before us.

Next, in support of her contention, that the [*11] Postal Service's Subpoena is invalid because of a lack of a civil purpose, Cordt relies upon *United States v. Art Metal-U.S.A., Inc.*, 484 F. Supp. 884 (D.N.J. 1980). In *Art Metal*, the Court examined the validity of a Subpoena *duces tecum* that had been issued pursuant to the Inspector General Act, *Title 26 U.S.C.A. § 7122(a)*, for certain tax and related business records of taxpayers, in connection with an investigation of payoffs and other fraudulent practices arising out of a Government Services Administration Contract. Despite the Defendant company's argument, the Court held that the likelihood of criminal prosecution alone is insufficient to bar enforcement of the Subpoena. *United States v. Art Metal-U.S.A., Inc.*, supra at 886. Specifically, the Court stated:

> The Third Circuit has recently placed upon *LaSalle*, the following gloss. Once the IRS has formally recommended 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 (3rd Cir. 1979). However, if there has been merely an institutional [*12] (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 the enforcement is able to show that there is no civil purpose for the summons. *United States v. Genser*, 602 F.2d 69, 71 (3rd Cir. 1979).
>
> Applying the *Genser* construction of *LaSalle* to administrative summonses or subpoenae 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 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.

Id.

As was the case with *Genser*, Cordt's reliance on the language of *Art Metal* is misplaced. In *Art Metal*, the Court's discussion encompassed Subpoenae, that were issued under the Inspector General Act, and the Court made no reference to the RFPA. Hence, Cordt has failed to present any support for her contention that the Subpoena, which had been issued by the Postal Service in connection with its internal investigation, was invalid [*13] because it lacked a civil purpose. Had Congress intended to restrict the issuance of Subpoenae, under the RFPA, as it had restricted Subpoenae in other statutory contexts, Congress was at liberty to do so. We should not read into Congress's enactment of the RFPA restrictions that Congress elected not to incorporate, at least in the absence of a Constitutional deprivation -- which is not here presented -- or a compelling basis, under the principles of statutory construction, to do so. Cordt offers no such showings. [3]

> 3 As Cordt implicitly concedes, the Subpoena was not issued out of mere idle curiosity on the Postal Service's part, as her challenge is not directed at the procedural propriety of the Subpoena, or at the fact that the Subpoena related to an area of both civil and criminal inquiry, which was appropriate to the proper administration of public funds in the operation of the Postal Service. While not expressly required, ample probable

cause has been presented for the Postal Service's further investigation of a suspected criminal offense, by Cordt, and the Subpoena requested information that was plainly relevant to that investigation.

[*14] In sum, the issue presented here involves a Postal Service Subpoena, that was issued pursuant to the RFPA, and that, if enforced, would require the St. Cloud Federal Employees Credit Union to provide the Postal Service with certain of Cordt's financial records. Although the Postal Service's investigation of Cordt is being conducted pursuant to the Inspector General Act of 1978, that is not the statutory basis upon which the Subpoena was based. Rather, the Subpoena issued under the provisions of the RFPA, as referenced in the Notice that was provided to Cordt. See, *Government's Memorandum of Points and Authorities, Ex. A.* As such, Cordt's arguments are misguided, and inapplicable to the present circumstances. No authority has been provided, nor have we uncovered any, to support the proposition that a Subpoena, which has been issued by an Inspector General for records under the RFPA, may not be pursued for criminal purposes. Rather, as underscored by the Postal Service, the decisional authorities to date reflect no such restriction in RFPA Subpoenae. See e.g., *Chang v. Tennessee Valley Authority*, 82 F. Supp. 2d 817 (E.D. Tenn. 1999)(enforcing Office of the Inspector [*15] General Subpoena, under RFPA, for records requested for potential use in a criminal investigation). Therefore, Cordt's Motion must be denied.

NOW, THEREFORE, It is --

ORDERED:

1. That the Petitioner's Motion for an Order Preventing the United States Government from Obtaining Access to Her Financial Records [Docket No. 1] is DENIED.

2. That the Respondent's Motion for an Order Dismissing the Petitioner's Challenge, and Directing Compliance with Administrative Subpoena No. 0889 [Docket No. 7] is GRANTED.

BY THE COURT:

Raymond L. Erickson

UNITED STATES MAGISTRATE JUDGE

LEXSEE

Analysis
As of: Mar 18, 2011

BRUNO CHOINIERE vs. UNITED STATES OF AMERICA

Cause No. 3:07-CV-27 RM,(Arising from Cause No: 3:05-CR-56)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

2009 U.S. Dist. LEXIS 3314

January 14, 2009, Decided
January 16, 2009, Filed

SUBSEQUENT HISTORY: Request granted, Request denied by Choiniere v. United States, 2009 U.S. Dist. LEXIS 12837 (N.D. Ind., Feb. 18, 2009)

PRIOR HISTORY: United States v. Choiniere, 2007 U.S. Dist. LEXIS 6637 (N.D. Ind., Jan. 26, 2007)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was convicted of health care fraud under 18 U.S.C.S. § 1347, concealing overpayment of health care benefits under 42 U.S.C.S. § 1320a-7b(a)(3), and engaging in monetary transactions involving property derived from health care fraud under 18 U.S.C.S. § 1957. Defendant filed a petition for relief under 28 U.S.C.S. § 2255. Defendant also sought discovery and moved for appointment of counsel.

OVERVIEW: Defendant, a chiropractor, was accused of fraudulently billing Medicare, Medicaid, and private health insurers in connection with a lumbar support belt. The court held that the government was not required to wait until an administrative agency investigation was complete before filing a criminal prosecution. Nor was defendant entitled to relief based on ineffective assistance of counsel. Any claim that Medicaid and Medicare agents were improperly involved in defendant's criminal prosecution would have failed. Defendant did not establish prejudice resulting from counsel's failure to advise him of his right to consular assistance under Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; defendant did not have any special need for consular services. A claim of insufficient evidence to support the § 1347 conviction also would have failed; there was sufficient evidence to find that defendant acted willfully and knowingly. Defendant failed to show good cause for discovery under R. Governing § 2255 Proc. U.S. Dist. Cts. 6(a). As defendant's claims lacked merit, appointment of counsel under 18 U.S.C.S. § 3006A(a)(2) was not warranted.

OUTCOME: Defendant's § 2255 petition, his discovery requests, and his motion for appointment of counsel were denied.

CORE TERMS: belt, health care, consulate, ineffective, patient, brace, criminal prosecution, chiropractor, referral, discovery, sentence, wasn't, clinic's, deficient, manual, billed, indictment, knowingly, defraud, maximum, grand jury, criminal investigation, consular, billing, hasn't, money laundering, assistance of counsel, evidentiary hearing, probability, sentencing

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence
[HN1]Relief under 28 U.S.C.S. § 2255 is reserved for extraordinary situations. Relief under § 2255 is available only for errors of constitutional or jurisdictional magnitude, or where the error represents a fundamental defect which inherently results in a complete miscarriage of justice.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence
Criminal Law & Procedure > Habeas Corpus > Evidentiary Hearings > Federal Prisoners
[HN2]A court may deny a 28 U.S.C.S. § 2255 motion without an evidentiary hearing if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U.S.C.S. § 2255(b).

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
[HN3]A federal district court has jurisdiction over offenses against the laws of the United States. 18 U.S.C.S. § 3231.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Administrative Law > Separation of Powers > Jurisdiction
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
[HN4]The government is not required to pursue an administrative avenue for recovery before filing a criminal prosecution when one is alleged to have violated both administrative guidelines and a federal criminal statute. Indeed, the government may exercise its discretion to enforce the law by a criminal prosecution regardless of the availability of an administrative review process. The government need not wait for the defendant to exhaust his administrative appeals because the exhaustion requirement is only applicable to individuals appealing administrative rulings.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > General Overview
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
Public Health & Welfare Law > Social Security > Medicare > Appeals Process & Judicial Review
[HN5]While most individuals contesting a determination that they are not compliant with Medicare regulations must present their cases to the relevant agency prior to review in federal court, that rule is not applicable to criminal actions commenced by the government. 42 U.S.C.S. § 405(h) and (g) do not require the government to seek an administrative remedy before prosecuting.

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence
[HN6]An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under 28 U.S.C.S. § 2255, whether or not the petitioner could have raised the claim on direct appeal.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN7]In order to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense rendering the proceeding fundamentally unfair and the result unreliable. A court must deny an ineffective claim if the petitioner makes an insufficient showing on either prong.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Cause
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Prejudice
[HN8]With the exception of claims for ineffective assistance of counsel, constitutional issues that were not raised on direct appeal can be brought in a habeas petition only if the petitioner demonstrates cause for the procedural default as well as actual prejudice from the failure to appeal, or where the petitioner establishes that the district court's failure to consider the issue would result in a fundamental miscarriage of justice.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Inferences & Presumptions > Presumptions
[HN9]To establish deficient performance by counsel, a defendant must establish specific acts or omissions of his counsel that constitute ineffective assistance. The court then decides whether his counsel's acts or omissions fell below an objective standard of reasonableness and outside the wide range of professionally competent assistance. In making this determination, the court considers the reasonableness of counsel's conduct in the context of the case as a whole, viewed at the time of the conduct.

Scrutiny of counsel's performance is highly deferential, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN10]The reasoning in Strickland applies to a claim that counsel failed to raise the correct issues on appeal. Counsel's performance is deficient if counsel omits a significant and obvious issue without a legitimate strategic reason. Counsel is not required to raise every non-frivolous issue on appeal. One of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects.

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN11]To establish prejudice due to counsel's deficient performance, a defendant must do more than show that the errors had some conceivable effect on the outcome of the proceeding. He must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different, meaning a probability sufficient to undermine confidence in the outcome. Stated differently, the defendant must establish that effective assistance would have given him a reasonable shot at acquittal. The defendant must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance. Similarly, prejudice arises from appellate counsel's error when that omitted issue may have resulted in a reversal of the conviction, or an order for a new trial.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN12]In weighing the effect of counsel's errors, a court must consider the totality of the evidence. A verdict or conclusion that is overwhelmingly supported by the record is less likely to have been affected by errors than one that is only weakly supported by the record.

Administrative Law > Separation of Powers > Jurisdiction
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
[HN13]Parallel or overlapping criminal and civil investigations generally are not objectionable.

International Law > Sovereign States & Individuals > General Overview
[HN14]The Vienna Convention is an international treaty that governs relations between individual nations and foreign consular officials. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 provides a detained foreign national with certain rights and requires the detaining authority to: (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of his rights under art. 36 without delay. These rights are commonly referred to as the right to consular assistance and are codified in federal regulations to ensure compliance with art. 36.

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
International Law > Sovereign States & Individuals > General Overview
[HN15]Defense attorneys representing a foreign national should know to advise their clients of the right to consular access and to raise the issue with the presiding judge. To show prejudice, a defendant must explain the nature of the assistance he might have received had he been alerted to his rights under Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. To merit an evidentiary hearing, the defendant must indicate how he proposes to show a realistic prospect of consular assistance and provide some credible indication of facts reasonably available to him to support his claim.

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
International Law > Sovereign States & Individuals > General Overview
[HN16]To establish ineffective assistance of counsel based on failure to inform a defendant of his rights under Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, a defendant must show that his consulate would have assisted him. The decision to render assistance to a foreign detainee, which gives significance to the obligations imposed by the Convention, rests in the discretion of the consulate. To obtain an evidentiary hearing, the defendant has to make a credible assertion of the assistance the consulate would have provided, but is not required to submit offi-

cial documents, statements or affidavits from the consulate in advance of the hearing. At the hearing, the defendant needs to provide evidence sufficient to prove he was prejudiced by the failure to notify him of his art. 36 rights.

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
International Law > Sovereign States & Individuals > General Overview
[HN17]To establish prejudice based on counsel's failure to inform a defendant of his rights under Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, the defendant must establish that the consulate could have assisted with his case and would have done so. He needs to provide some credible indications of facts reasonably available to him to support his claim.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN18]In assessing whether there has been prejudice for purposes of an ineffective assistance of counsel claim, courts look at all of the evidence presented at trial, and an attorney's errors are more likely to be prejudicial when a verdict is based on weak evidence than when there is overwhelming support for the verdict in the record.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN19]Attorneys may have a tactical reason not to make weak arguments which may distract the court from the strong arguments and as a result make it less likely to rule in a defendant's favor. Trial counsel need not track down every lead or personally investigate every evidentiary possibility before choosing a defense and developing it.

Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > Insurance Fraud > Elements
Criminal Law & Procedure > Scienter > Willfulness
[HN20]United States v. Dearing does not stand for the proposition that the only way to establish the willfulness element under 18 U.S.C.S. § 1347 is to prove that the defendant had been notified that his conduct was unlawful and yet continued to engage in that conduct.

Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > Insurance Fraud > Elements
[HN21]18 U.S.C.S. § 1347 makes it a crime to knowingly and willfully execute, or attempt to execute, a scheme or artifice (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services. 18 U.S.C.S. § 1347.

Civil Procedure > Pleading & Practice > Motion Practice > Supporting Memoranda
Civil Procedure > Parties > Self-Representation > Pleading Standards
Criminal Law & Procedure > Habeas Corpus > Procedure > General Overview
[HN22]Pro se litigants are entitled to some leeway in preparing and presenting their arguments, but a party's pro se status does not exempt him from the long-standing prohibition on raising new claims in reply briefs.

Criminal Law & Procedure > Habeas Corpus > Procedure > Discovery
[HN23]When a habeas corpus petitioner provides reasons for discovery requests, the district court has discretion to grant discovery upon a showing of "good cause." R. Governing § 2255 Proc. U.S. Dist. Cts. 6(a). Good cause exists where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief.

Criminal Law & Procedure > Habeas Corpus > Procedure > Discovery
[HN24]Speculation does not constitute good cause permitting discovery in a habeas corpus proceeding. A defendant is not entitled to conduct a fishing expedition with the hope of finding something.

Criminal Law & Procedure > Grand Juries > Secrecy > Disclosure > General Overview
Criminal Law & Procedure > Grand Juries > Secrecy > Disclosure > Judicial Proceedings
[HN25]To obtain grand jury material, despite the presumptive secrecy imposed by Fed. R. Crim. P. 6(e), a

litigant must show that the information is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only material so needed.

Criminal Law & Procedure > Grand Juries > Secrecy > Disclosure > Particularized Need Standard > General Overview

[HN26]A request for grand jury material must be more than a request for authorization to engage in a fishing expedition which might turn up helpful evidence. Put simply, the secrecy of the grand jury proceeding will not be broken except where the party seeking disclosure can show a compelling necessity or a particularized need.

Criminal Law & Procedure > Counsel > Assignment
Criminal Law & Procedure > Counsel > Right to Counsel > Postconviction

[HN27]There is no right to appointed counsel at the post-conviction stage. Under 18 U.S.C.S. § 3006A(a) (2), a court may appoint counsel if the interests of justice so require. Courts weigh five factors in exercising this discretion: (1) whether the merits of the claim are colorable; (2) the ability of the indigent to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent to present the case; and (5) the complexity of the legal issues raised by the complaint.

COUNSEL: [*1] Bruno Choiniere, Petitioner, Pro se, MILAN FCI FEDERAL CORRECTIONAL INSTITUTION, MILAN, MI.

For United States of America, Respondent: Donald J Schmid - AUSA, LEAD ATTORNEY, US Attorney's Office - SB/IN, South Bend, IN; Sharon J Johnson - AUSA, LEAD ATTORNEY, US Attorney's Office - Ham/IN, Hammond, IN.

JUDGES: Robert L. Miller, Jr., Chief Judge, United States District Judge.

OPINION BY: Robert L. Miller, Jr.

OPINION

OPINION AND ORDER

A grand jury indicted Bruno Choiniere, then a licensed chiropractor, on thirty-four counts of health care billing fraud, money laundering, and fraudulent concealment of overpayment of health care benefits stemming from a back belt that he developed and billed to Medicare, Medicaid, and private insurance companies. After an eleven-day trial, a jury returned a guilty verdict on all counts. Mr. Choiniere was sentenced to 151 months' imprisonment, with two years supervised release. Mr. Choiniere appealed, raising jury instruction and sentencing issues; the court of appeals affirmed Mr. Choiniere's conviction and sentence.

On September 2, 2008, Mr. Choiniere, acting pro se, filed this petition under 28 U.S.C. § 2255, subsequently filing supplemental briefs in support of his petition. Mr. Choiniere [*2] raises numerous issues in his petition primarily attacking the court's subject matter jurisdiction and arguing ineffective assistance of counsel at both the trial and appellate level. Mr. Choiniere also makes several requests for discovery and appointment of counsel. For the following reasons, the court denies Mr. Choiniere's petition, requests for discovery and motion to appoint counsel.

BACKGROUND

Mr. Choiniere, a French Canadian citizen and licensed chiropractor since 1992, practiced in South Bend, Indiana from 2002 until his 2005 indictment. In 2003, while working at a health clinic, Mr. Choiniere developed a back belt after hearing patients complaining of back braces that were too rigid. Mr. Choiniere's back belt was made of leather, some strips of plastic and velcro. Mr. Choiniere spent several months developing his belt to mimic the back's inward curve to combat the pressure against the spine caused by sitting. The back belt was designed for use with two pillows that he also developed. Mr. Choiniere began dispensing the belt and pillows to patients at the clinic.

Mr. Choiniere eventually left the health clinic and went out on his own. He promoted his belt by holding "back pain [*3] relief clinics" specifically targeted to elderly, handicapped and low income persons. During those clinics, Mr. Choiniere either performed cursory examinations or none at all: no x-rays or MRI tests were taken, there was no heat or ice therapy and usually no chiropractic adjustments. The examinations didn't follow the usual protocol for chiropractic examinations. Mr. Choiniere would take medical histories of his patients only sometimes and testified that if he was too busy, he would fill out the patient's chart when he returned to his office or home from the clinic. The government presented evidence that Mr. Choiniere manipulated the records for purposes of receiving reimbursements for his belts. Mr. Choiniere offered the clinic attendees free food (usually sandwiches or donuts), free short massages from a massage therapist, free consultations and on a few occasions gave his patients free pillows. Two salespersons working on commission assisted him.

The jury heard testimony that Mr. Choiniere dispensed belts to many persons who didn't have back pain and for whom wearing a lumbar support wasn't medically appropriate. Some people who received the belts were more than seven months pregnant, [*4] others had kidney and liver conditions, and one patient had a grapefruit sized tumor on her spine. Some witnesses testified that everyone examined received a brace, while others testified that Mr. Choiniere turned people away because they didn't qualify. There were instances where Mr. Choiniere billed twice for a single belt or billed for a belt that was never actually delivered to the patient or that the patient had rejected. At times, Mr. Choiniere offered refunds to complaining patients.

Mr. Choiniere billed Medicare and Indiana Medicaid more than $ 1,300 for the belt, representing that it was a "custom-fabricated molded-to-patient lumbar-sacral support." The jury heard evidence that this was untrue, and that the belt should have been billed for less than $ 50. In less than two years, Mr. Choiniere billed Medicare, Indiana Medicaid, and private insurance companies about $ 2 million for the back belt. He was paid more than $ 1.5 million.

Counts 1-3 of Mr. Choiniere's indictment charged him with engaging in a scheme to defraud Medicare, Indiana Medicare and twenty-one private health insurers in violation of 18 U.S.C. § 1347. Those counts alleged that Mr. Choiniere obtained money from [*5] Medicare, Indiana Medicare, and the private health insurers by false pretenses and statements, in that he didn't dispense custom fabricated back braces as represented, submitted phony and fraudulent medical necessity letters, double-billed for belts, and improperly solicited patients. Count 4 charged Mr. Choiniere with concealing and failing to disclose information that affected his initial or continued right to payments from Medicare and Indiana Medicare in order to fraudulently keep payments in an amount greater than was due in violation of 42 U.S.C. § 1320a-7b(a)(3). The remaining counts charged Mr. Choiniere with engaging in thirty monetary transactions between July 2003 and March 2005 each involving more than $ 10,000 in property derived from his health care billing fraud in violation of 18 U.S.C. § 1957.

Six days after Mr. Choiniere was arrested, the United States Attorney's Office notified the Canadian Consulate in Chicago of Mr. Choiniere's arrest. After hearing testimony from more than seventy-five government witnesses and sixteen defense witnesses, including the defendant, the jury returned a guilty verdict on all counts. He appealed, arguing that the district court committed [*6] reversible error when it refused to give two proposed intent to defraud jury instructions and wrongly applied a sentencing enhancement for using minors in furtherance of his scheme. The court of appeals affirmed Mr. Choiniere's conviction and 151-month tence. United States v. Choiniere, 517 F.3d 967, 974 (7th Cir. 2008).

Most of the arguments in Mr. Choiniere's § 2255 petition relate to his claim that this court lacked subject matter jurisdiction to convict him, that administrative agents were improperly involved in obtaining a search warrant of his documents after the case had been referred to the Department of Justice for criminal prosecution, and that his rights under the Vienna Convention were violated. Mr. Choiniere also argues that his counsel was ineffective for not raising those issues during trial or on appeal, not seeking a motion to suppress evidence, not impeaching certain witnesses, not subpoenaing Mr. Choiniere's telephone records, and not raising an argument as to the insufficiency of evidence.

The government filed a response asserting that jurisdiction was proper pursuant to 18 U.S.C. § 3231, that it promptly notified the Canadian consulate in Chicago of Mr. Choiniere's [*7] arrest, and that Mr. Choiniere's counsel's performance was neither deficient nor prejudicial. The government reasons that the issues Mr. Choiniere believes his counsel should have raised were either invalid, immaterial or too insignificant to have affected the jury's determination.

Mr. Choiniere filed a reply alleging additional grounds of ineffective assistance involving the definition of "proceeds" in the money laundering statute and the application of Apprendi to his sentencing.

ANALYSIS

[HN1]Relief under § 2255 is reserved for extraordinary situations. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996) (citing Brecht v. Abrahamson, 507 U.S. 619, 633-634, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). "Relief under § 2255 is available only for errors of constitutional or jurisdictional magnitude, or where the error represents a fundamental defect which inherently results in a complete miscarriage of justice." Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir. 1994) (quotations omitted), *overruled on other grounds by* United States v. Ceballos, 302 F.3d 679 (7th Cir. 2002). [HN2]A court may deny a § 2255 motion without an evidentiary hearing if "the motion and the files and records of the case conclusively show that the prisoner [*8] is entitled to no relief." 28 U.S.C. § 2255(b). Because the motion and files and records in this case conclusively demonstrate that Mr. Choiniere isn't entitled to relief, the court needs no evidentiary hearing to decide the matters.

Subject Matter Jurisdiction

Mr. Choiniere maintains that after Managed Health Services (MHS) [1] conducted an audit that resulted in a

two page peer review report, he requested an appeal of the report, but was denied because the case had been referred to the United States Attorney's Office. [2] Mr. Choiniere believes that the case should have been remanded to the agency for further development and that this court could only review the agency's determination once the administrative process was complete. He argues that the charges in the Indictment arose under the "Medicare Act" and so were within the agency's exclusive jurisdiction. Before the case could be referred, Mr. Choiniere contends that pursuant to 42 U.S.C. § 405, the agency needed to either exclude him from the federal health care programs or provide him the opportunity to appeal the agency's adverse determination.

1 MHS is a contract administrator for Medicare and Medicaid, which is administrated by [*9] the Center for Medicare and Medicaid Services, a component of the United States Department of Health and Human Services.

2 Mr. Choiniere indicates that MHS referred the case to the Indiana Medicaid Fraud Control Unit, who referred the case for joint investigation to the office of Inspector General of HHS, and before reaching a final disposition, the agency referred the case to the DOJ to proceed with criminal prosecution.

[HN3]This court has jurisdiction over offenses against the laws of the United States. 18 U.S.C. § 3231. [HN4]The government isn't required to pursue an administrative avenue for recovery before filing a criminal prosecution when one is alleged to have violated both administrative guidelines and a federal criminal statute. See United States v. Kruper, No. 3:07-CR-76, 2007 U.S. Dist. LEXIS 77160, 2007 WL 3046455, * 1 (N.D. Ind. 2007) (unpublished) (citing United States v. Paternostro, 966 F.2d 907, 911 (5th Cir. 1992)). "Indeed, the government may exercise its discretion to enforce the law by a criminal prosecution regardless of the availability of an administrative review process." See United States v. Kruper, 2007 U.S. Dist. LEXIS 77160, 2007 WL 3046455, * 1 (citing United States v. Seibert, 403 F. Supp. 2d 904, 921 (S.D. Iowa 2005) [*10] (holding that the government need not wait for [the defendant] to exhaust his administrative appeals because the exhaustion requirement is only applicable to individuals appealing administrative rulings.) (internal citations omitted)).

Mr. Choiniere's cited cases are irrelevant here because they discuss civil cases and don't prevent the government from enforcing a criminal statute; they merely stand for the proposition that individuals must exhaust administrative remedies before bringing actions in federal court. See e.g. United States v. Seibert, 403 F. Supp. 2d at 917-21 (denying defendants' claim that the indictment for health care fraud should be dismissed because he was first entitled to proceed through the administrative appeal process). [HN5]"While . . . most individuals contesting a determination that they are not compliant with Medicare regulations must present their cases to the agency prior to review in federal court, that rule is not applicable to criminal actions commenced by the government." United States v. Seibert, 403 F. Supp. 2d at 918-919 (internal quotations and citation omitted). Sections 405(h) and (g) don't require the government to seek an administrative remedy before [*11] prosecuting. Id. at 920.

Ineffective Assistance Counsel

Mr. Choiniere's remaining claims are procedurally defaulted, except to the extent they arise under his claim of ineffective assistance of counsel. [3] [HN6]"[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). [HN7]Mr. Choiniere must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense rendering the proceeding fundamentally unfair and the result unreliable. See Jones v. Page, 76 F.3d 831, 840 (7th Cir. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The court must deny an ineffective claim if the petitioner makes an insufficient showing on either prong. Id. at 697.

3 [HN8]With the exception of claims for ineffective assistance of counsel, constitutional issues that weren't raise on direct appeal, can be brought in a habeas petition only if the petitioner demonstrates "cause for the procedural default as well as actual prejudice from the failure to appeal," Barker v. United States, 7 F.3d 629, 632 (7th Cir. 1993), [*12] or where the petitioner establishes that the district court's failure to consider the issue would result in a fundamental miscarriage of justice, see Galbraith v. United States, 313 F.3d 1001, 1006 (7th Cir. 2002) (internal quotation marks and citation omitted).

[HN9]To establish deficient performance, Mr. Choiniere "must establish specific acts or omissions of his counsel that constitute ineffective assistance." See Berkey v. United States, 318 F.3d 768, 772 (7th Cir. 2003). The court then decides whether his counsel's acts or omissions "fell below an objective standard of reasonableness" and "outside the wide range of professionally competent assistance." See Barker v. United States, 7 F.3d 629, 633 (7th Cir. 1993) (citing Strickland v.

Washington, 466 U.S. at 690). In making this determination, the court considers "the reasonableness of counsel's conduct in the context of the case as a whole, viewed at the time of the conduct . . ." United States v. Lindsay, 157 F.3d 532, 534-535 (7th Cir. 1998). Scrutiny of counsel's performance is highly deferential, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003).

[HN10]The [*13] reasoning in Strickland also applies to a claim that counsel failed to raise the correct issues on appeal. Mason v. Hanks, 97 F.3d 887, 892 (7th Cir. 1996). Counsel's performance is deficient if counsel omits a "significant and obvious issue" without a legitimate strategic reason. Mason v. Hanks, 97 F.3d at 893 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). "[C]ounsel is not required to raise every non-frivolous issue on appeal." Martin v. Evans, 384 F.3d at 852 (citing Mason v. Hanks, 97 F.3d at 893). "One of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects." U.S. v. Best, No. 2:08-CV-59, 2008 U.S. Dist. LEXIS 73259, 2008 WL 4414686, *5 (N.D. Ind. 2008) (quoting Page v. United States, 884 F.2d 300, 302 (7th Cir. 1989)).

[HN11]To establish prejudice, Mr. Choiniere must do more than show that "the errors had some conceivable effect on the outcome of the proceeding." Strickland v. Washington, 466 U.S. at 693. He must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different,' meaning 'a probability sufficient to undermine confidence [*14] in the outcome.'" Eckstein v. Kingston, 460 F.3d 844, 848 (7th Cir. 2006) (quoting Strickland v. Washington, 466 U.S. at 694). Stated differently, Mr. Choiniere must establish that "effective assistance would have given him a reasonable shot at acquittal." Gibbs v. Van Natta, 329 F.3d 582, 584 (7th Cir. 2003); see Andrashko v. Borgen, 88 Fed. Appx. 925, 929 (7th Cir. 2004) (unpublished) (petitioner must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance). Similarly, prejudice arises from appellant counsel's error "when that omitted issue 'may have resulted in a reversal of the conviction, or an order for a new trial.'" Mason v. Hanks, 97 F.3d at 893 (citing Gray v. Greer, 800 F.2d at 646).

[HN12]"In weighing the effect of counsel's errors, the court must consider the totality of the evidence . . . . [A] verdict or conclusion that is overwhelmingly supported by the record is less likely to have been affected by errors than one that is only weakly supported by the record." Eckstein v. Kingston, 460 F.3d at 848 (quoting Hough v. Anderson, 272 F.3d 878, 891 (7th Cir. 2001)).

Administrative Agents' Involvement in Criminal Prosecution

Mr. [*15] Choiniere alleges that the Indiana Medicaid Fraud Control Unit, part of the Office of the Indiana Attorney General, and the Inspector General of the U.S. Department of Health and Human Services were involved in obtaining a search warrant after the case had been referred to the DOJ for purposes of criminal investigation. Mr. Choiniere contends that Medicare agents improperly acted as case agents in his criminal prosecution in violation of 42 U.S.C. 1320a-7c and 1396b(q).

In the context of the IRS's investigatory power, the Supreme Court has noted that once a matter has been referred for criminal prosecution, government civil authorities cannot continue to obtain and prepare information for the government's prosecutors. United States v. LaSalle Nat. Bank, 437 U.S. 298, 315-316, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978). In LaSalle National Bank, the IRS, pursuant to 26 U.S.C. § 7602, used its civil summons power to pursue an investigation for the purpose of unearthing evidence of criminal conduct. Id. at 301, 304. The Court found that although the civil and criminal elements of a tax enforcement action are "inherently intertwined," Congress neither intended to increase the discovery power of the DOJ for the criminal action [*16] or to infringe upon the use of the grand jury for criminal discovery when it gave the IRS broad summons powers in civil actions. Id. at 312. If the defendant challenges a summons, the IRS must show that it issued the summons in good faith and before it referred the case to the DOJ for criminal investigation. Id. at 318. [4]

> 4 The reasoning in LaSalle National Bank has at least been partially limited by a 1982 amendment to § 7602. See United States v. G & G Adver. Co., 762 F.2d 632, 634 n. 1 (8th Cir. 1985) ("The requirement that the summons not issue for a solely criminal investigation . . . has been negated by the 1982 amendment to § 7602(b) which allows inquiry into 'any offense,' so long as the case has not been turned over to the Justice Department."); United States v. Cahill, 920 F.2d 421, 428 (7th Cir. 1990) (stating that there is debate whether LaSalle National Bank remains good law after the 1982 amendments, but proceeding as though it does).

In United States v. Cahill, the Seventh Circuit reviewed LaSalle National Bank when addressing the defendant's claim that a civil investigation conducted by the Federal Home Loan Bank Board was used impermissibly

to gather information for [*17] its criminal investigation. United States v. Cahill, 920 F.2d 421, 428 (7th Cir. 1990). The court distinguished LaSalle National Bank, stating that unlike the IRS, the FHLBB has only limited civil authority and has no ability to investigate criminal cases; the type of abuse found in LaSalle National Bank therefore is minimized when the FHLBB pursues a civil investigation. Id. at 428. The court also distinguished LaSalle National Bank because the two investigations were, at all times, separate, distinct and independent of each other. As such, the civil investigation wasn't conducted for the purpose of obtaining evidence for the criminal prosecution. Id.

Other jurisdictions have declined to apply LaSalle National Bank outside the context of the IRS. In fact, courts have found that the government can use health care administrative subpoena power to investigate charges in a pending indictment pursuant to 18 U.S.C. § 3486, which authorizes the Attorney General to subpoena records and information relevant to "any investigation" of a "Federal health care offense." [5] See Doe v. United States, 253 F.3d 256, 264 (6th Cir. 2001) (noting that the Court's decision in LaSalle was "based not on constitutional [*18] considerations, but on Congress's failure to give the IRS the statutory authority to use its subpoena power in this fashion"); see also United States v. Lazar, M.D., 2006 U.S. Dist. LEXIS 92374, 2006 WL 3761803, *6-8 (W.D. Tenn. 2006) (finding that the government could use its health care administrative subpoena powers to investigate charges in a pending indictment, reasoning that "[t]he LaSalle rule applies solely to the statutory scheme of the [IRS] . . ."') (citations omitted) and cases cited therein; see generally 1 Criminal Practice Manual § 16:4 (2008).

> 5 The Code broadly defines a "Federal health care offense" as a violation of, or a conspiracy to violate, a number of health-care related offenses, including 18 U.S.C. § 1347 (health care fraud). 18 U.S.C. § 24(a)(1).

[HN13]Parallel or overlapping criminal and civil investigations generally aren't objectionable. See United States v. Medic House Inc., 736 F. Supp. 1531, 1537 (W.D. Mo. 1989) ("Even if there had been a referral for criminal prosecution, and/or a separate criminal investigation was under way, the [Inspector General] still could issue a subpoena for civil investigation - absent specific evidence of agency bad faith or malicious governmental tactics."); see [*19] also United States v. Shinderman, M.D., 432 F. Supp. 2d 149, 152 (D. Maine 2006) (rejecting "the argument that when the government's civil investigation turned into a criminal investigation or when the government undertook dual civil and criminal investigations, somehow its civil investigating authority lapsed"); United States v. Montefiore, 1998 U.S. Dist. LEXIS 5492, 1998 WL 188849, *5-6 (E.D. Pa. 1998) (finding that the alleged cooperative efforts between HUD Inspector General, the HUD investigators, the USAO, and the FBI were permissible); United States v. Educational Devel. Network Corp., 884 F.2d 737, 741-743 (3rd Cir. 1989) (finding that where the USAO and Department of Defense Inspector General were conducting a joint investigation, the USAO didn't act in bad faith when presenting facts uncovered through IG subpoenas and search warrant to grand jury).

Mr. Choiniere makes broad allegations that the civil case and criminal case were impermissibly intertwined and as a result, the evidence seized by the administrative agencies after the case was referred to the DOJ for criminal prosecution should be suppressed. [6] The court of appeals in United States v. Cahill, 920 F.2d 421, distinguished LaSalle National [*20] Bank without addressing whether it is applicable outside the IRS context or more specifically, whether it is applicable to joint investigations of health care fraud. This court holds that LaSalle National Bank is limited and not applicable to the present case. It is common in this type of white collar investigation to have parallel proceedings by different government agencies. See generally, Evans, Virginia and Roann Nichols, *Parallel Proceedings: Joint Civil and Criminal Prosecution of Healthcare Cases*, AHLA 2006 FRAUD AND COMPLIANCE FORUM, (2006). Mr. Choiniere hasn't referred to evidence to establish that the government acted in bad faith when conducting its investigation and obtaining evidence or that the administrative agents were acting beyond their regulatory powers. He merely makes conclusory allegations that the agents shouldn't have been involved in the search after referral of the case to the DOJ. A suppression motion on this basis would have been unsuccessful; that Mr. Choiniere's counsel didn't raise a motion on these grounds was neither deficient nor prejudicial.

> 6 The parties haven't provided the court with specifics as to the investigation conducted or search warrants [*21] issued in this case. For purposes of Mr. Choiniere's petition, the court assumes that the investigations were intertwined.

Article 36 of the Vienna Convention

Mr. Choiniere argues that his counsel was ineffective for not advising him of his rights under Article 36 of the Vienna Convention. [HN14]The Vienna Convention "is an international treaty that governs relations between individual nations and foreign consular cials." Osagiede v. United States, 543 F.3d 399, 402 (7th Cir. Sept. 9, 2008) (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 336, 126 S. Ct. 2669, 165 L. Ed. 2d 557

(2006)). Article 36 provides a detained foreign national with certain rights and requires the detaining authority to: "(1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of 'his rights' under Article 36 without delay." Osagiede v. United States, 543 F.3d at 402 (citing Vienna Convention, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261). These rights are commonly referred to as the "right to consular assistance," and are codified in federal regulations to ensure compliance with Article 36. Osagiede v. United States, 543 F.3d at 402 [*22] (citing 28 C.F.R. § 50.5 (2003) and 8 C.F.R. § 236.1(e) (2003)). The Osagiede court detailed the importance of consulate assistance: "[t]his assistance can be invaluable because cultural misunderstandings can lead a detainee to make serious legal mistakes . . . ." Osagiede v. United States, 543 F.3d at 403. The consulate can offer many services to the detainee, including providing critical resources for legal representation and case investigation, conducting investigations, filing amicus briefs, locating witnesses and evidence from the home country, and even intervening directly in a proceeding if necessary. Id.

In Osagiede, the defendant, a Nigerian national, was arrested and although federal agents sent a consular notification form to the Nigerian Consulate, the defendant was never notified of his right to contact the Nigerian consulate pursuant to Article 36 and the federal regulations. Osagiede v. United States, 543 F.3d at 404. The defendant petitioned for habeas corpus relief based on ineffective assistance of counsel. Id. The court found that the government denied the defendant his consular assistance and his lawyer did nothing about it. Id. The court stated that [HN15]defense attorneys [*23] representing a foreign national should know to advise their clients of the right to consular access and to raise the issue with the presiding judge. Id. at 411. As such, the defendant's counsel was deficient; the court then turned to the prejudice prong of Strickland. Id. at 411-412.

To show prejudice, the defendant must "explain the nature of the assistance he might have received had he been alerted to his Article 36 rights." Osagiede v. United States, 543 F.3d at 413. The court further stated that "to merit an evidentiary hearing, [the defendant] must indicate how he proposes to show a realistic prospect of consular assistance and provide some credible indication of facts reasonably available to him to support his claim." Id. The court found that the record revealed that the defendant had a special need for services within the power of the consulate; there were tape recordings of individuals with strong Nigerian accents that were difficult to decipher and the consulate might have provided funds for a proper analysis of these tapes or might have identified regional dialects, offered an accurate voice analysis or even translated the wiretaps. Id. The Nigerian consulate also might have [*24] located the defendant's cousin who was connected to the case, but had returned to Nigeria.

The Osagiede court also noted that [HN16]the defendant must show that the Nigerian consulate would have assisted him. Osagiede v. United States, 543 F.3d at 413. "The decision to render assistance to a foreign detainee, which gives significance to the obligations imposed by the Convention, rests in the discretion of the Nigerian consulate." Id. To obtain an evidentiary hearing, the defendant had to make a credible assertion of the assistance the consulate would have provided, but wasn't required to submit official documents, statements or affidavits from the Nigerian consulate in advance of the hearing. Id. At the hearing, the defendant would need to provide evidence sufficient to prove he was prejudiced by the failure to notify him of his Article 36 rights. Id. at 413, n. 13.

Mr. Choiniere submits an affidavit claiming that he was never advised of his rights under Article 36 and received no communication from his consulate. The government responded by attaching a copy of the fax sent to the Canadian Consulate shortly after Mr. Choiniere was arrested. The government doesn't contend that Mr. Choiniere [*25] was notified of his right to consular assistance. [HN17]To establish prejudice, Mr. Choiniere must establish that the consulate could have assisted with his case and would have done so. Id. at 413. He needs to "provide some credible indications of facts reasonably available to him to support his claim." Osagiede v. United States, 543 F.3d at 413.

The record doesn't suggest that Mr. Choiniere had any special need for services typically within the power of the consulate. He doesn't allege that he needed assistance locating witnesses or evidence, translating documents, or understanding the United States's legal system. Mr. Choiniere had the financial means to hire his own defense attorney and an investigator to assist in his defense. Further, Mr. Choiniere also hasn't shown that even if he was informed of his right to contact the consulate, the consulate would have provided assistance. This case therefore is distinguishable from Osagiede in that the record before the court doesn't show evidence of possible prejudice. This court finds that Mr. Choiniere's claims relating to the Vienna Convention don't warrant an evidentiary hearing.

Credibility, Discovery, and Sufficiency of Evidence

Mr. Choiniere [*26] raises additional claims involving credibility of witnesses, discovery of documents and sufficiency of evidence. Mr. Choiniere first claims

that he was prejudiced because the jury heard incorrect testimony from two government witnesses that chiropractors couldn't lawfully prescribe back braces for purposes of billing Medicare; he says his attorney should have impeached these witnesses and offered accurate evidence. While the accuracy of the witnesses' testimony is more complicated than Mr. Choiniere seems to think, [7] the court needn't address that issue and assumes for purposes of Mr. Choniere's petition that his contention is valid.

> 7 While certain government witnesses acknowledged that as an authorized supplier of durable medical equipment, Mr. Choiniere could supply back braces, they effectively testified that he couldn't bill Medicare for the braces without a physician referral/order. The CMS Medical Benefit Policy Manual, Chapter 15, Section 130, provides that back braces are covered under Medicaid "when furnished incident to physicians' services or on a physician's order." The term "physician" includes a chiropractor but only for treatment by means of manual manipulation of the [*27] spine to correct a subluxation. 42 U.S.C. § 1395x(r). "Coverage of chiropractic services is specifically limited to treatment by means of manual manipulation, i.e., by use of the hands. Additionally, manual devices . . . may be used by chiropractors in performing manual manipulation of the spine. However, no additional payment is available for use of the device, nor does Medicare recognize an extra charge for the device itself. . . . No other diagnostic or therapeutic service furnished by a chiropractor or under the chiropractor's order is covered." The Medical Benefit Policy Manual, Chapter 15, section 240. 1; see so 42 CFR 410.21.
>
> As noted by Mr. Choiniere, CMS Medicare Claims Processing Manual, Chapter 12, Section 220 states that "[e]xcept for restrictions to chiropractor services as stipulated in §§ 1861 (s)(2)(A) of the Social Security Act, chiropractors (specialty 35) can bill for durable medical equipment, prosthetics, orthotics and supplies if, as the supplier, they have a valid supplier number . . ." (Emphasis added). Section 1861 (s) (2) (A) of the Social Security Act provides that "[t]he term 'medical and other health services' means any of the following items or services: [*28] . . . services and supplies . . . furnished as an incident to a physician's professional service, of kinds which are commonly furnished in physicians' offices and are commonly either rendered without charge or included in the physicians' bills . . ." Mr. Choiniere hasn't shown that he could prescribe the braces that he supplied based on his treatment as a chiropractor under these provisions, especially given the limitations of chiropractic services allowed under Medicare.

Mr. Choiniere wasn't being prosecuted because he was prescribing or supplying back braces as a chiropractor. He was prosecuted because he was over-billing Medicare, Medicaid and private health insurers for the back braces and in some cases prescribing the braces for no medical purpose. Any testimony that chiropractors couldn't lawfully prescribe back braces was collateral to the issues before the jury and wasn't presented to them for determination. Given the extent of the government's evidence as to the counts in the indictment, Mr. Choiniere hasn't raised a reasonable probability that the trial's outcome would have differed had his counsel impeached or contradicted these witnesses on that point. See Velarde v. United States, 972 F.2d 826, 828 (7th Cir. 1992) [*29] (no reasonable probability that outcome would have been different had defendant's counsel attempted to correct perjured testimony); see also Eckstein v. Kingston, 460 F.3d 844, 848 (7th Cir. 2006) (noting that [HN18]in assessing whether there has been prejudice, courts look at all of the evidence presented at trial and an attorney's errors are more likely to be prejudicial when a verdict is based on weak evidence than when there is overwhelming support for the verdict in the record). Mr. Choiniere's claim that he could lawfully bill Medicare for back braces as a chiropractor wouldn't have eroded the strength of the government's case of health care fraud.

Mr. Choiniere also argues that his counsel was ineffective for not subpoenaing telephone records to show he called physicians for medical referrals. The issue at trial wasn't whether Mr. Choiniere called certain primary care physicians, but rather whether he received referrals from these physicians. Mr. Choiniere's billings indicated that he had received referrals from certain physicians, but some of those physicians testified at trial that they had never made any such referrals. Phone records might have established that Mr. Choiniere called [*30] the physicians, but wouldn't have rebutted the testimony presented at trial.

Mr. Choiniere also submitted an affidavit stating that he provided three written physician referrals to his counsel and information that two other patients had to consult their respective physicians before he obtained a referral. Evidence that Mr. Choiniere received some referrals doesn't contradict the government's evidence presented at trial that Mr. Choiniere falsified other referrals. [HN19]Attorneys may have a "tactical reason not to make weak arguments . . . [which] may distract the court from the strong arguments and as a result make it less likely to rule in the defendant's favor." See United States

v. Rezin, 322 F.3d 443, 446 (7th Cir. 2003). "[T]rial counsel [need not] track down every lead or . . . personally investigate every evidentiary possibility before choosing a defense and developing it." United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990) (quoting Sullivan v. Fairman, 819 F.2d 1382, 1392 (7th Cir. 1987)).

The record doesn't indicate how Mr. Choiniere's phone records or the three written physician referrals would have a reasonable probability of affecting the outcome of trial. Similarly, [*31] the evidence is insufficient to establish that an investigation of other patients who obtained referrals or physicians who had made referrals would have given him a reasonable shot at acquittal.

Mr. Choiniere further contends that there was insufficient evidence to support a conviction under 18 U.S.C. § 1347 [8] because he wasn't aware that his conduct was unlawful. Because this claim is procedurally defaulted, the court focuses on Mr. Choiniere's argument that his counsel was ineffective for failing to raise this issue during trial or on appeal. Mr. Choiniere cites to United States v. Dearing, 504 F.3d 897 (9th Cir. 2007) in support of his claim that to establish the willfulness element of 18 U.S.C. § 1347, the government had to prove that the administrative agency notified him that his conduct was illegal, yet he continued such illegal practices. The defendant in Dearing was part-owner of a mental health clinic and visited the facility once or twice a month for business meetings. United States v. Dearing, 504 F.3d at 899. The court found the evidence sufficient to support a conviction for health care fraud because he was put on notice of the clinic's fraudulent billing actions, made [*32] no effort to correct these actions and dissuaded serious internal investigation into the company's problems. United States v. Dearing, 504 F.3d at 901. [HN20]Dearing doesn't stand for the proposition that the only way to establish the willfulness element is to prove that the defendant had been notified that his conduct was unlawful and yet continued to engage in that conduct.

> 8 [HN21]The statute makes it a crime to "knowingly and willfully execute[ ], or attempt[ ] to execute, a scheme or artifice: ... (1) to defraud any health care benefit program; or ... (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services . . . ." 18 U.S. C. § 1347; see also United States v. Davis, 471 F. 3d 783, 785, n.1 (7th Cir. 2006).

The jury was instructed that the government had to prove beyond a reasonable doubt that Mr. Choiniere participated in a scheme to defraud by means of false pretenses, representations or promises and did so knowingly and with the intent to defraud. (Jury Instr. No. 17). [*33] The jury was further instructed that the phrase "intent to defraud" means that the "acts charged were done knowingly with the intent to deceive or cheat the victims in order to cause a gain of money or property to the defendant." (Jury Instr. No. 17). After hearing the wording of 18 U.S.C. § 1347, the jury was told that a defendant acts "knowingly" when he is conscious and aware of his actions, realizes what he is doing or what is happening around him and doesn't act because of ignorance, mistake, or accident and acts "willfully" when he knowingly performs an act, "deliberately and intentionally, as contrasted with accidentally, carelessly or unintentionally." (Jury Inst. No. 26). Jury Instruction No. 25 further provided:

> During this trial there has been extensive evidence as to government regulations concerning health care claims with the government. If you find from the evidence that there was a failure of the defendant to comply with the various administrative regulations, this is not automatically an act of health care fraud. The defendant must act with intent to defraud.

"The district court properly instructed the jury on each of the elements necessary to convict Choiniere of the [*34] charges presented to the jury." United States v. Choiniere, 517 F.3d 967, 972 (7th Cir. 2008).

A Medicare coding expert, a neurosurgeon, a certified orthotist, and two chiropractors all testified that the belt wasn't a "custom-fabricated molded-to-patient lumbar-sacral support" belt, as Mr. Choiniere had represented to Medicare. The belt wasn't custom fabricated or molded to patients; instead Mr. Choiniere would usually have different sizes of belts at the clinics for sale to his clients. The jury heard testimony that the belt was a prefabricated lumbar support, similar to a weightlifting belt, that should have been billed for less than $ 50. Mr. Choiniere billed Medicare and Indiana Medicaid $ 1,370 per belt.

Before prescribing the belts, Mr. Choiniere either performed cursory examinations or none at all; he didn't x-ray his patients or perform any other tests. Mr. Choiniere usually didn't even perform chiropractic adjustments. The evidence showed that Mr. Choiniere manipulated patient records so he would receive reimbursements for his belts. The jury also heard testimony that

Mr. Choiniere dispensed belts to patients who didn't have back pain and for whom it wasn't medically appropriate [*35] to wear a lumbar support.

There was sufficient evidence presented to allow the jury to determine that Mr. Choiniere acted willfully and knowingly, and therefore, any argument by Mr. Choiniere's counsel to the contrary would have been unsuccessful.

The record also indicates that Mr. Choiniere's counsel argued that the billing codes for the back braces were confusing and that the defendant had billed in good faith without criminal intent. His counsel vigorously cross-examined the government's witnesses, put on a number of defense witnesses conveying this theory to the jury, moved for judgment on the evidence, proposed several jury instructions relating to intent, and argued on appeal that certain intent to defraud instructions should have been submitted to the jury. These actions establish that Mr. Choiniere received effective representation.

Arguments Raised in Reply Brief

In an appendix filed with Mr. Choiniere's reply, he raises new arguments in support of his ineffective assistance of counsel claim. Mr. Choiniere contends that his counsel was ineffective on appeal for failing to address several cases, including United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002) and United States v. Santos, 342 F. Supp. 2d 781 (N.D. Ind. 2004), [*36] *aff'd* Santos v. United States, 461 F.3d 886 (7th Cir. August 25, 2006); *aff'd* United States v. Santos, 553 U.S. 507, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (June 2, 2008) (definition of "proceeds" in the money laundering statute) [9] and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (sentencing defendant beyond the prescribed statutory maximum).

> 9 For purposes of ineffective assistance of counsel, the relevant decisions are those that were available to counsel at the time of Mr. Choiniere's appeal, namely United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002) and Santos v. United States, 461 F.3d 886 (7th Cir. August 25, 2006). These decisions however were affirmed by the Supreme Court in 2008.

These arguments are waived because they were made for the first time in an attachment to his reply brief. [HN22]Pro se litigants are entitled to some leeway in preparing and presenting their arguments, but Mr. Choiniere's pro se status doesn't exempt him from the long-standing prohibition on raising new claims in reply briefs. Wright v. U.S., 139 F.3d 551, 553 (7th Cir. 1998); see also Amerson v. Farrey, 492 F.3d 848, 852 (7th Cir. 2007).

The new arguments wouldn't succeed if [*37] the court addressed their merits. The defendant in United States v. Santos had been convicted of illegal gambling and money laundering promotion. United States v. Santos, 128 S. Ct. at 2023. The issue before the Supreme Court was whether the term "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), meant "receipts" or "profits." United States v. Santos, 128 S. Ct. at 2023. The Court reviewed the Seventh Circuit opinion in United States v. Scialabba, 282 F.3d 475, 478 (7th Cir. 2002), which held that the federal money-laundering statute's prohibition of transactions involving criminal "proceeds" -- 18 U.S.C. § 1956(a)(1) -- applies only to transactions involving criminal profits, not criminal receipts. United States v. Santos, 128 S. Ct. at 2023. In a plurality opinion written by Justice Scalia, the Court agreed. Id. at 2025. [10]

> 10 The swing vote came from Justice Stevens; while he agreed with that definition of proceeds as applied to the crime of illegal gambling, he disagreed that this definition should apply to all predicate crimes. United States v. Santos, 128 S. Ct. at 2030-2031. In agreement with the dissent, he noted that in other contexts - namely, when the [*38] sale of contraband and the operation of organized crime syndicates are involved - the legislative history of the statute suggests that Congress intended for all receipts to count as "proceeds." Id. at 2032. According to Stevens, the word "proceed" would therefore have different meanings in different contexts. Id.

Mr. Choiniere was convicted under 18 U.S.C. § 1957, not § 1956. Mr. Choiniere's jury was instructed that he must have knowingly engaged or attempted to engage in a monetary transaction in criminally derived property exceeding $ 10,000. (Jury Instr. No. 19). The jury was given the definition of "criminally derived property" found in § 1957: "any property constituting, or derived from, proceeds obtained from a criminal offense." (Jury Instr. No. 20). Although the instructions didn't define "proceeds," it isn't clear that the holdings in Scialabba and Santos apply to § 1957. The Southern District of Illinois found that "[a]lthough the Court has held that Scialabba applies to the petitioner's substantive convictions under § 1956(a)(1), it is not persuaded that the holding in Scialabba would apply to . . . § 1957 . . . ." See Baker v. United States, 2006 U.S. Dist. LEXIS 71032, 2006 WL 2850029, *4 (S.D. Ill. 2006). [*39] Mr. Choiniere's counsel didn't act outside the wide range of professionally competent assistance by not requesting a jury instruction on the definition of proceeds or raising the issue on appeal.

Even if this narrower definition of "proceeds" applies to § 1957, Mr. Choiniere doesn't refer to any evidence that could establish that had the jury been given an instruction defining proceeds as "profits", there is a reasonable probability that he would have been acquitted on some of those counts. See United States v. Price, No. 2:07-CV- 12, 2008 U.S. Dist. LEXIS 58915, 2008 WL 3085882, *2 (N.D. Ind.) (finding no prejudice by counsel's failure to request a multiple conspiracy instruction where the evidence was insufficient to establish such a conspiracy). In fact, Mr. Choiniere doesn't even make this allegation; he simply contends that his counsel was ineffective for not arguing Scialabba and Santos on appeal. Because Mr. Choiniere doesn't assert that some of the money laundering convictions were based on transactions involving gross proceeds, he can't establish that his counsel's representation was deficient or caused him to be prejudiced.

Mr. Choiniere also contends that his counsel should have addressed Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) [*40] on appeal. Again, because this claim was raised for the first time in an attachment to Mr. Choiniere's reply brief, it is waived. Regardless, Apprendi only applies when a defendant is sentenced above the statutory maximum sentence for an offense. See United States v. Partee, 301 F.3d 576, 578 (7th Cir. 2002) (citing United States v. Jones, 245 F.3d 645, 651 (7th Cir. 2001)). Mr. Choiniere was convicted of health care billing fraud (18 U.S.C. § 1347), fraudulent concealment of overpayment of health care benefits (42 U.S.C. § 1320a-7b(a)(3)), and money laundering (18 U.S.C. § 1957). The maximum statutory penalty for each of these crimes is 10 years, 10 years and 5 years, respectively. For purposes of sentencing, the court grouped the counts together and sentenced Mr. Choiniere to a term of 151 months' imprisonment. Although Mr. Choiniere's sentence is greater than the maximum sentence on any one count, it is far below the maximum sentence for the aggregate.

Mr. Choiniere was sentenced within the statutory maximum sentence to which he was exposed; the court could have imposed consecutive sentences, but instead grouped them together and sentenced Mr. Choiniere to 151 months (well within [*41] the combined statutory maximum). See United States v. Hernandez, 330 F.3d 964, 982 (7th Cir. 2003) (finding no prejudice even though the defendant's sentenced exceeded the statutory maximum for one or more of the counts, where it didn't extend beyond the sentence that the court could have imposed had it stacked the sentences of all the counts consecutively); see also United States v. West, 207 Fed. Appx. 719, 722-723 (7th Cir. 2006). Mr. Choiniere wouldn't have received a shorter sentence based on the reasoning in *Apprendi*, see Oregon v. Ice, 129 S. Ct. 711, 172 L. Ed. 2d 517, 2009 U.S. LEXIS 582, 2009 WL 77896 (January 14, 2009) (in addressing a state sentencing statute, the Court found that the Sixth Amendment doesn't prohibit judges from imposing consecutive sentences based on facts not found by a jury; declining to extend the application of Apprendi), so he wasn't prejudiced by his counsel's alleged deficient performance.

Mr. Choiniere's new allegations, even if not waived, would be insufficient to support a finding of ineffective assistance of counsel, so no evidentiary hearing would be required. See Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir. 1989).

Discovery Motions and Request for Counsel

Mr. Choiniere has [*42] filed numerous requests for discovery and a motion for appointment of counsel. He seeks the transcripts from the grand jury and search warrant proceedings to support his claim of lack of subject matter jurisdiction, improper involvement of administrative agents in the criminal prosecution, and inaccurate testimony regarding his authority to prescribe back braces. He also seeks HHS's and the DOJ's employee manual/handbook concerning their civil and criminal investigative procedures for similar purposes. Mr. Choiniere further seeks the release of all agency records supporting any final action in which he was a party. Finally, Mr. Choiniere seeks all indictments filed in this court from 2000 to the present issued under 18 U.S.C. § 1347 and 42 U.S.C. § 1320a-7b to support his claim that the government acted in a manner inconsistent with the above statutes by failing to prove that he"knowingly" and "willfully" engaged in health care fraud.

[HN23]When a habeas corpus petitioner provides reasons for discovery requests, the district court has discretion to grant discovery upon a showing of "good cause." Rules Governing Section 2255 Proceedings, 6(a). Good cause exists where "specific allegations [*43] before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." United States v. Hull, No. 2:02-CV-2, 2006 U.S. Dist. LEXIS 24224, 2006 WL 752481 at *8 (N.D. Ind. 2006) (citing Bracy v. Gramley, 520 U.S. 899, 909, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)).

This court isn't convinced that the documents Mr. Choiniere seeks would lead to facts demonstrating his entitlement to relief. As discussed, this court had subject matter jurisdiction over Mr. Choiniere's criminal prosecution. Further discovery on this issue would be unavailing. Additionally, Mr. Choiniere hasn't shown how the requested discovery would demonstrate that his counsel was ineffective. He seeks documents to support his claim that the administrative agents were improperly

involved in the criminal prosecution, but he only makes conclusory allegations to support this claim; he provides no specific facts or evidence. Mr. Choiniere hasn't asserted specific allegations to convince the court that he could, if the facts were fully developed, demonstrate his entitlement to relief on this basis. See Jones v. United States, 231 Fed. Appx. 485, 488 (7th Cir. 2007) (unpublished) ([HN24]"[Speculation does not [*44] constitute good cause."); United States v. Curtner, 2008 U.S. Dist. LEXIS 26998, 2008 WL 905923, *1 (C.D. Ill. 2008) (noting that a defendant isn't entitled to conduct a fishing expedition with the hope of finding something). Similarly, as established, Mr. Choiniere's claims relating to the sufficiency of evidence are without merit.

Mr. Choiniere's request for the grand jury transcripts is also denied. [HN25]"To obtain grand jury material, despite the presumptive secrecy imposed by [Rule] 6(e), a litigant must show that the information 'is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed.'" United States v. Campbell, 324 F.3d 497, 499 (7th Cir.2003) (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979)). [HN26]A "request for grand jury material must be more than a request for authorization to engage in a fishing expedition" which might turn up helpful evidence. See In re EyeCare Physicians of Am., 100 F.3d 514, 518 (7th Cir. 1996) (quoting Lucas v. Turner, 725 F.2d 1095, 1101 (7th Cir. 1984)). "Put simply, the secrecy of the grand jury [*45] proceeding will not be broken except where the party seeking disclosure can show a 'compelling necessity' or a 'particularized need.'" Matter of Grand Jury Proceedings, Special September 1986, 942 F.2d 1195, 1198 (7th Cir. 1991) (citing Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 222)). Mr. Choiniere hasn't made that showing here.

Mr. Choiniere also moved for appointment of counsel to assist in his § 2255 petition. [HN27]There is no right to appointed counsel at the post-conviction stage. See Powell v. Davis, 415 F.3d 722, 727 (7th Cir. 2005). Under 18 U.S.C. § 3006A(a) (2), the court may appoint counsel if "the interests of justice so require." Courts weigh five factors in exercising this discretion: "(1) whether the merits of the claim are colorable; (2) the ability of the indigent to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent to present the case; and (5) the complexity of the legal issues raised by the complaint." United States v. Fowler, 1:03-CR-38, 2007 U.S. Dist. LEXIS 77656, 2007 WL 3046773, *4 (N.D. Ind. 2007) (citing Wilson v. Duckworth, 716 F.2d 415, 418 (7th Cir. 1983)).

After [*46] reviewing Mr. Choiniere's many filings in this court, it is apparent that he is well capable of articulating the contours of his arguments. The absence of counsel in this case wouldn't result in an unfair proceeding; as already discussed, Mr. Choiniere's claims have no merit and he wouldn't stand any better chance of prevailing upon further investigation or with the assistance counsel.

CONCLUSION

For the reasons stated above, the court DENIES Mr. Choiniere's § 2255 petitions (document nos. 34, 37, 49, 51), [11] discovery requests (document nos. 38, 39, 40, 41, 42, 48) [12] and motion for appointment of counsel (document no. 52) [13].

11 The court has considered Mr. Choiniere numerous petitions in this case: motion for relief from judgment (document no. 34); amendment to motion (document no. 37); second amendment to motion (document no. 49); and motion to vacate, set aside or correct sentence (document no. 51). These same documents were filed in the criminal case - 3:05-CR-56 - as documents nos. 208, 212, 225 and 227, respectively.

12 These same documents were filed in the criminal case as document nos. 213, 214, 215, 216, 217 and 224.

13 This document was filed in the criminal case as document no. [*47] 228.

SO ORDERED.

ENTERED: January 14, 2009

/s/ Robert L. Miller, Jr.

Chief Judge

United States District Court

LEXSEE

Positive
As of: Mar 18, 2011

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.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant Legal Services for New York City (LSNY) requested that plaintiffs, two non-profit organizations that provided legal services to eligible low income individuals in New York City, provide requested information to LSNY and the Office of the Inspector General of defendant legal services corporation (OIG) pursuant to the contracts. The organizations refused to provide such information to LSNY. The parties cross moved for summary judgment.

OVERVIEW: LSNY provided funding to the organizations pursuant to several contracts negotiated and executed in New York and governed by New York law. The OIG decided to audit the accuracy of the reporting data provided to the legal services corporation. The organizations refused to provide to LSNY, and LSNY refused to provide to the OIG, the full name of each client. The organizations 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. The court held that there was no legal basis for the court to conclude that disclosure of the existence or nature of a client's representation in this context would reveal a client secret. Moreover, disclosure of the client names requested was required by law.

OUTCOME: The LSNY and the legal services corporation's motions for summary judgment were granted. The organizations' cross-motion for summary judgment was denied.

CORE TERMS: summary judgment, legal services, secret, disclosure, funding, auditor, requested information, retainer agreements, attorney-client, recipient, assurance, monitor, LSC Act, monitoring, subpoena, disclose, auditing, entity's, requesting, ethical, cross-motion, appropriations act, citations omitted, Amendments Act, client trust fund, information requested, require disclosure, administrative subpoena, issues of material fact, records time

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1]Under Fed. R. Civ. P. 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. 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. The moving party bears the burden of demonstrating that no genuine issue of material fact exists.

Legal Ethics > Client Relations > Confidentiality of Information
[HN2]See N.Y. Code Prof. Resp. DR 1200.19, N.Y. Comp. Code R. & Regs. tit. 22, § 1200.19.

Legal Ethics > Client Relations > Confidentiality of Information
[HN3]A lawyer may reveal secrets when required by law or court order. N.Y. Code Prof. Resp. DR 1200.19, N.Y. Comp. Code R. & Regs. tit. 22, § 1200.19(c). 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. N.Y. Code Prof. Resp. DR 1200.19, N.Y. Comp. Code R. & Regs. tit. 22, § 1200.19(c).

Governments > Legislation > Effect & Operation > Operability
Public Health & Welfare Law > Social Services > Legal Aid
[HN4]Section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (1996), supersedes the restrictions of § 2996e(b)(3) of the Legal Services Corporation Act of 1974, 42 U.S.C.S. § 2996 et seq.

Legal Ethics > Client Relations > Confidentiality of Information
Public Health & Welfare Law > Social Services > Legal Aid
[HN5]See Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (1996).

Legal Ethics > Client Relations > Confidentiality of Information
Public Health & Welfare Law > Social Services > Legal Aid
[HN6]See 42 U.S.C.S. § 2996e(b)(3).

Legal Ethics > Client Relations > Confidentiality of Information
[HN7]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. N.Y. Code Prof. Resp. DR 1200.19, N.Y. Comp. Code R. & Regs. tit. 22, § 1200.19(c)(2).

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Federal Government > Employees & Officials
[HN8]The Inspector General Amendments Act of 1988, 5 U.S.C.S. app. 3, designates the Legal Services Corporation (LSC) as a "designated Federal entity" and grants the Office of the Inspector General of LSC 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 by this Act. 5 U.S.C.S. app 3 §§ 8G(a)(2), 6(a)(4).

Constitutional Law > Congressional Duties & Powers > General Overview
Governments > Federal Government > U.S. Congress
[HN9]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.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN10]New York's ethical rules allow attorneys to reveal client secrets when required by laws such as §

509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-59 (1996). N.Y. Code Prof. Resp. DR 1200.19, N.Y. Comp. Code R. & Regs. tit. 22, § 1200.19(c)(2).

Constitutional Law > Equal Protection > Poverty
Constitutional Law > Equal Protection > Scope of Protection
[HN11]Indigence alone is not a suspect class under equal protection analysis.

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.

OPINION BY: 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. [1]

1 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. [2] LSNY provides funding to plaintiffs pursuant to contracts ("the Contracts") negotiated and executed in New York and governed by New York law.

2 Legal Services for the Elderly ("LSE") was formerly a plaintiff in this action. Pursuant to a stipulation 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

[HN1]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 secret. Section 1200.19 of New York's Disciplinary Rules, 22 N.Y.C.R.R. 1200.19, states that [HN2]"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 [HN3]"[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). [3] However, [HN4]section 509(h) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, [HN5]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.

> [HN6]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, [HN7]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] . . . ."

3 42 U.S.C. § 2996e(b)(3) reads:

(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). [4] (Schwartz Decl., Exh. E at 12, § 9.) Additionally, a provision in the Contracts themselves substantially duplicates Section 509(h). [5] (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.

4 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]

5 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. [HN8]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 [HN9]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, [HN10]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, [HN11]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

Analysis
As of: Mar 18, 2011

BRONX LEGAL SERVICES and QUEENS LEGAL SERVICES CORP., Plaintiffs-Appellants, -v.- LEGAL SERVICES CORPORATION, LEGAL SERVICES FOR NEW YORK CITY and EDOUARD R. QUATREVAUX, Inspector General of the Legal Services Corporation, Defendants-Appellees.

02-9097

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

64 Fed. Appx. 310; 2003 U.S. App. LEXIS 10299

May 22, 2003, Decided

NOTICE: [**1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Bronx Legal Servs. v. Legal Servs. Corp., 2003 U.S. LEXIS 8585 (U.S., Dec. 1, 2003)

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York (George B. Daniels, District Judge).
Bronx Legal Servs. v. Legal Servs. Corp., 2002 U.S. Dist. LEXIS 14674 (S.D.N.Y., Aug. 7, 2002)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff legal services corporations appealed an order of the United States District Court for the Southern District of New York, which granted summary judgment to defendants, city legal services organizations and an associated individual, in plaintiffs' claims for declaratory judgment and injunctive relief.

OVERVIEW: The legal service corporations argued that the district court erred because Pub. L. No. 104-134, § 509(h) did not require disclosure of client names when such disclosure might reveal client secrets, § 509(h) was unconstitutional if it did require such disclosure, and defendants' request for information was not "reasonable and necessary" as required by the legal service corporations' contracts. The court found that summary judgment was appropriate because (1) providing client names did not conflict with N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19 and (2) under the legal service corporations' contracts with the city legal services organizations, they were obligated to provide the names. The disclosure of client names did not violate any disciplinary rule, and the contracts unambiguously required that the legal services corporations provide time records, retainer agreements, and client names. The contract condition that they were obligated to respond to only "reasonable and necessary" information requests was meritless because the condition requiring disclosure expressly overrode the first condition.

OUTCOME: The court affirmed the judgment.

CORE TERMS: retainer agreements, disclosure, legal services, summary judgment, time records, secrets, matter of law, entitled to judgment, obligated, genuine, plainly

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure* > *Appeals* > *Standards of Review* > *De Novo Review
[HN1]An appeals court reviews a grant of summary judgment de novo.

Civil Procedure* > *Summary Judgment* > *Standards* > *Genuine Disputes
Civil Procedure* > *Summary Judgment* > *Standards* > *Materiality
[HN2]Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Legal Ethics* > *Client Relations* > *Attorney Fees* > *Fee Agreements
Legal Ethics* > *Client Relations* > *Confidentiality of Information
Public Health & Welfare Law* > *Social Services* > *Legal Aid
[HN3]N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(2) bars attorneys from revealing client confidences or secrets except when, among other reasons, disclosure is required by law or court order. Pub. L. No. 104-134, § 509(h) (§ 509(h)), requires that recipients of Legal Services Corporation funds provide time records, retainer agreements, and client names except for reports or records subject to the attorney-client privilege. 45 C.F.R. § 1611.8(a), which was in place when Congress passed § 509(h), requires that retainer agreements clearly identify the matter in which representation is sought and the nature of the legal services to be provided. Thus, when Congress passed § 509(h), requiring that grantees provide both retainer agreements and client names, it required by law the disclosure of any client secrets that might be revealed if a client name were connected to information on the nature of the representation.

COUNSEL: APPEARING FOR APPELLANTS: ROBERT M. KELLY, White & Case, LLP New York, NY.

APPEARING FOR APPELLEE Legal Services Corporation: STEPHEN A. WIEDER, Kronish, Lieb, Weiner & Hellman, LLP, (Alan Levine, on the brief), New York, NY.

SUBMITTING FOR APPELLEE Legal Services For New York City: Carl Riehl, Debevoise & Plimpton, (John S. Kiernan, on the brief), New York, NY.

APPEARING FOR APPELLEE Leonard Koczur: WENDY H. SCHWARTZ, Special Assistant United States Attorney, (James B. Comey, United States Attorney for the Southern District of New York, Jeffrey S. Oestericher, Assistant United States Attorney, on the brief), New York, NY.

JUDGES: PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. Roger J. Miner, Hon. Joseph M. McLaughlin, Circuit Judges.

OPINION

[*311] **SUMMARY ORDER**

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the [**2] district court be and it hereby is **AFFIRMED**.

Plaintiffs Bronx Legal Services and Queens Legal Services Corp. ("BLS/QLS") appeal from the district court's judgment entered August 19, 2002 granting summary judgment to defendants and dismissing plaintiffs' claims for declaratory judgment and injunctive relief. BLS/QLS argue that the district court erred because (1) Public Law No. 104-134, § 509(h), 110 Stat 1321 (1996) (" § 509(h)") does not require disclosure of client names when such disclosure might reveal client secrets, (2) § 509(h) is unconstitutional if it does require such disclosure, and (3) Legal Services For New York City's ("LSNY") and the Legal Services Corporation's ("LSC") request for information was not "reasonable and necessary" as required by BLS/QLS's contracts with LSNY and thus BLS/QLS was not required to respond. We disagree.

[HN1]We review a grant of summary judgment *de novo*. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 285-86 (2d Cir. 2002). [HN2]Summary judgment is appropriate only if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this [**3] case, we find that summary judgment was appropriate because (1) providing client names would not present a conflict with New York State Codes, Rules and Regulations § 1200.19 and (2) under BLS/QLS's contracts with LSNY, BLS/QLS are obligated to provide the names.

As an initial matter, we address whether § 1200.19 applies because it is possible that our interpretation of the contract between BLS/QLS and LSNY would be influenced by a finding that the requested disclosure of client names would violate a disciplinary rule. In this case, however, there would be no violation.

Section 1200.19 [HN3]bars attorneys from revealing client confidences or secrets except when, among other reasons, disclosure is "required by law or court order." 22 N.Y.C.R.R. § 1200.19(c)(2). In this case, BLS/QLS is

required by law to provide the names. Section 509(h) requires that recipients of LSC funds provide "time records, retainer agreements, . . . and client names . . . except for reports or records subject to the attorney-client privilege." The pertinent regulation, which was in place when Congress passed § 509(h), requires that retainer agreements "clearly identify . . . [*312] the matter in which representation [**4] is sought [and] the nature of the legal services to be provided." 45 C.F.R. § 1611.8(a). Thus, when Congress passed § 509(h), requiring that grantees provide both "retainer agreements . . . and client names," it "required by law" the disclosure of any client secrets that might be revealed if a client name were connected to information on the nature of the representation. Our conclusion is consistent with that reached by the D.C. Circuit in *United States v. Legal Services for New York City*, 346 U.S. App. D.C. 83, 249 F.3d 1077, 1083 (D.C. Cir. 2001).

The contract between BLS/QLS and LSNY unambiguously requires that BLS/QLS provide LSNY "time records, retainer agreements, . . . and client names." Contract For Provision of Legal Assistance § 3.2(c). The contract thus plainly requires that BLS/QLS provide their clients' names as well as the information contained in its attorney time records and retainer agreements, which generally include the nature of the legal issue for which representation is sought.

Finally, BLS/QLS argue that under Condition 10 of the contract, they are obligated to respond to only "reasonable and necessary" information [**5] requests. This claim is meritless because Condition 9, which requires that BLS/QLS provide "time records, retainer agreements . . . and client names," expressly overrides Condition 10.

Because there are no genuine issues of fact concerning BLS/QLS's duties under the contract and because the contracts plainly demonstrate that defendants are entitled to judgment as a matter of law on BLS/QLS's claims, summary judgment is appropriate. We therefore need not consider either plaintiffs' constitutional claims, which in any event, we would find to be without merit, or the Inspector General's claim to sovereign immunity.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

GREATER NEW YORK HOSPITAL ASSOCIATION, MOUNT SINAI SCHOOL OF MEDICINE OF THE CITY UNIVERSITY OF NEW YORK, THE MOUNT SINAI HOSPITAL, NEW YORK UNIVERSITY SCHOOL OF MEDICINE, BETH ISRAEL MEDICAL CENTER, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK ON BEHALF OF ITS FACULTY OF MEDICINE, CORNELL UNIVERSITY AND SLOAN KETTERING CANCER CENTER, Plaintiffs, -against- THE UNITED STATES OF AMERICA, Defendant.

98 Civ. 2741 (RLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1999 U.S. Dist. LEXIS 17391

November 9, 1999, Decided
November 9, 1999, Filed

DISPOSITION: [*1] Plaintiffs' claims under APA dismissed for lack of subject matter jurisdiction and claims for declaratory relief dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant moved to dismiss plaintiffs' Administrative Procedure Act claims regarding hospital reimbursement practices pursuant to Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. Defendant argued that plaintiffs' Declaratory Judgment Act claims, 28 U.S.C.S. § 2201, were not ripe.

OVERVIEW: Plaintiff hospitals challenged defendant government's audits of plaintiffs' reimbursement practices for medical care. Defendants challenged whether sufficient facts existed for the court to determine that it had subject matter jurisdiction. Plaintiffs argued that defendant's decision to conduct audits was final because it subjected them to the risk of "total destruction" based on their potential liability. The court held that the agencies involved were not at the end of their decision-making processes about the audits. Therefore the audits were not a final agency decision. Plaintiffs were not charged, but merely informed that they would be audited. The audits did not involve definitive statutes, orders or regulations or a consistent pattern of agency action eligible for pre-enforcement review. Plaintiffs failed to demonstrate injury by a final agency action for which they have no adequate remedy in court; therefore the court declined to exercise subject matter jurisdiction.

OUTCOME: Plaintiffs' claims under Administrative Procedure Act dismissed for lack of subject matter jurisdiction because defendant's actions were not a final agency action; dismissed claims for declaratory relief as not ripe for review.

CORE TERMS: audit, patient, reimbursement, attending physician, agency decision, doctor, agency action, judicial review, teaching hospitals', attending, announced, hardship, carrier, subject matter jurisdiction, residents, statutory authority, announcement, nationwide, teaching, subpoena, declaratory relief, promulgated, notice, ripe, coding, physician services, ultra vires, pre-enforcement, identifiable, declaratory

LexisNexis(R) Headnotes

Administrative Law > Informal Agency Actions

Civil Procedure > Counsel > General Overview
[HN1]The Office of Inspector General has the power, upon determining that a hospital fails its Physicians At Teaching Hospitals audit, to refer the hospital's case to the United States Attorney's Office for potential criminal or civil sanctions; if the United States Attorney's Office declines to accept the case for prosecution, the matter may be pursued by the Department of Health and Human Services for administrative recoupment proceedings.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
[HN2]In reviewing a factual challenge to subject matter jurisdiction, the court may rely on the plaintiff's complaint, as well as look to extrinsic evidence, such as affidavits, to support its determinations. However, no presumption of truthfulness attaches to the complaint's jurisdictional allegations, and the burden is on the plaintiff to satisfy the court as fact-finder of the jurisdictional facts.

Administrative Law > Agency Adjudication > General Overview
Administrative Law > Judicial Review > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN3]The Administrative Procedure Act provides for judicial review of a final agency action for which there is no other adequate remedy in court.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN4]Two conditions must be satisfied for an agency action to be final: First, the action must mark the consummation of the agency's decision-making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations are determined or from which legal consequences will follow.

Administrative Law > Agency Adjudication > Decisions > General Overview
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN5]An agency's announcement may be treated as a final agency decision when legal consequences, such as sanctions, flow from the announcement. Also, when officials have no discretionary power to alter the announcement's directives and provisions for sanction, it may be considered a final decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN6]When announced regulations have the force of law before their sanctions are invoked, these regulations may be a final agency decision reviewable under the Administrative Procedure Act.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN7]When an agency refuses to change its policy despite administrative proceedings adjudicating the fact that its policies violate persons' rights, the court will treat its announced policy as a final agency decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Public Health & Welfare Law > Social Security > Medicare > Providers > Reimbursement > General Overview
[HN8]Physicians At Teaching Hospitals (PATH) audit standards are not exactly "tentative or interlocutory" in nature; however, the agencies involved are not at the end of their decision-making processes about the audits. Therefore, the announced PATH audits cannot be treated as a final agency decision.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN9]An agency's decisions about the promulgation and enforcement of its regulations are not "final" unless the process of administrative decision-making reaches a stage where judicial review will not be disruptive of the agency process and legal consequences will flow from the actions taken.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN10]Judicial intervention into the agency process at the pre-enforcement stage denies the agency an opportunity correct its own mistakes and apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. Therefore, where the agency's own administrative processes show the potential to correct the agency action plaintiff

complains of, plaintiff's complaints are not amenable to judicial review.

Administrative Law > Agency Adjudication > Decisions > General Overview
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN11]A mere general attack on the authority of an agency to conduct an investigation does not obviate the Administrative Procedure Act's final agency decision requirement.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Separation of Powers > Constitutional Controls > General Overview
[HN12]A claim that an agency action is in plain contravention of a statutory mandate may present one of the extraordinary exceptions to the finality requirement. In order to properly invoke the court's jurisdiction under this exception, plaintiff must show that the agency is totally without jurisdiction to undertake the action and is acting in excess of its constitutional and statutory authority.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN13]In addition to demonstrating that they challenge a final agency action, plaintiffs must also show that they have no adequate remedy in a court. 5 U.S.C.S. § 704.

Administrative Law > Judicial Review > General Overview
[HN14]Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury necessitating review of Administrative Procedure Act claims.

Civil Procedure > Declaratory Judgment Actions > Federal Judgments > Appellate Review
[HN15]The Declaratory Judgment Act authorizes the federal courts to declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought. 28 U.S.C.S. § 2201(a).

Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion
[HN16]Relief under the Declaratory Judgment Act is discretionary even when an actual controversy exists in the constitutional sense because the court recognizes that the accelerated judicial intervention authorized by the act creates the risk of burdening courts and litigants with disputes that were otherwise destined to disappear by themselves.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN17]To determine whether a dispute is ripe for review the court considers the fitness of the matter for judicial decision and the hardship to the parties of withholding court consideration.

Administrative Law > Judicial Review > Reviewability > Ripeness
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN18]Courts determine whether a dispute is fit for judicial review by weighing whether (1) the disputed agency decision is "final"; and (2) whether the issue is purely legal or the underlying legal issues are facilitated if they are raised in the context of a specific attempt at enforcement.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect
Civil Procedure > Declaratory Judgment Actions > General Overview
Governments > Courts > Judicial Precedents
[HN19]Precedent establishing the conditions for final agency action under the Administrative Procedure Act are also binding under the Declaratory Judgment Act.

Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN20]Plaintiffs must show that their challenges to the Physicians At Teaching Hospitals audits concern issues that are more legal than factual in order to receive relief under the Declaratory Judgment Act.

Civil Procedure > Declaratory Judgment Actions > General Overview
[HN21]Suits based on potential future events are ill-suited for declaratory relief.

Civil Procedure > Declaratory Judgment Actions > General Overview
Healthcare Law > Business Administration & Organization > Judicial Review > General Overview
[HN22]The court recognizes that it may not decide a Declaratory Judgment Act claim which is based upon contingent future events that may not occur as anticipated, or indeed, may not occur at all.

Civil Procedure > Declaratory Judgment Actions > General Overview
[HN23]The last prong of the Declaratory Judgment Act ripeness analysis requires that the party requesting relief show that the denial of declaratory relief harms him more than it harms the challenged government agency.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN24]To prove hardship plaintiffs must show the complained of agency action caused them "direct and immediate" harm.

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JUDGES: ROBERT L. CARTER, U.S.D.J.

OPINION BY: ROBERT L. CARTER

OPINION

OPINION

ROBERT L. CARTER, District Judge

This action concerns a group of hospitals' request for declaratory and injunctive relief for their claims challenging the PATH [1] audits, a nationwide review of teaching hospitals' Medicare Part B reimbursement practices conducted by the Office of the Inspector General ("OIG"), and the Department of Health and Human Services ("HHS"). Plaintiffs are Greater New York Hospital Association ("GNYHA"), Mount Sinai School of Medicine, Beth Israel Medical Center, The Trustees of Columbia University on behalf of its Faculty of Medicine, Cornell University, and Memorial Sloan Kettering Cancer Center. Defendant is the United States of America, acting through OIG and HHS (collectively "defendants"). Presently before the court [*2] are defendants' motions to dismiss plaintiffs' Administrative Procedure Act ("APA") claims, pursuant to Rule 12(b)(1) and Rule 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Defendants also argue plaintiffs' Declaratory Judgment Act ("DJA") claims, 28 U.S.C. § 2201, should be dismissed because they are not ripe for review. Plaintiffs bring a cross-motion for summary judgment on their claims.

1 The PATH acronym stands for "Physicians At Teaching Hospitals."

II. FACTS

The Medicare Act, Title XVIII of the Social Security Act of 1935, creates a federally subsidized medical program that reimburses doctors for medical services provided to qualified elderly and disabled persons. Medicare Part A covers Medicare patients' inpatient care, *see* 42 U.S.C. §§ 1395c-1395i-2, and Medicare Part B covers Medicare patients' professional medical care, such as diagnostic and ambulatory services, *see* [*3] 42 U.S.C. § 1395j-1395w. Hospitals are bound by different reimbursement rules for the respective Medicare Parts; the dispute here concerns Part B's requirements, which authorize reimbursement for "attending physician services rendered to patients in a teaching setting." 20 C.F.R. § 405.521(a) (subsequently recodified as 42 C.F.R. § 405.521)).

HHS has delegated some administrative responsibility for the Medicare program to the United States Health Care Financing Administration ("HCFA"), *see* 42 U.S.C. §§ 1395(h) & (u), and HCFA in turn has contracted with private entities called "carriers" to conduct some Medicare Part B administrative duties, including: paying teaching hospitals for reimbursable services; performing reviews and audits; and educating teaching hospitals about reimbursable services under Medicare Part B. *See* 42 U.S.C. § 1395u(a)(1). HHS, HCFA, and the carriers have all issued statements about Medicare Part B reimbursement standards over the past thirty years.

In 1967, the Secretary of HHS promulgated a set of Medicare Part B reimbursement requirements which provided that an "attending physician['s]" [*4] services to a patient were reimbursable under Medicare Part B when "the attending 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(b) (1968) (subsequently recodified as 42 C.F.R. § 405.521). This regulation provided that "personal and identifiable direction" included "supervision in person by the attending physician" for services such as "major surgical procedures or other complex and dangerous procedures or situations." *Id*. The regulation also allowed an attending physician who involved interns and residents in a Medicare patient's treatment to be reimbursed for his fee as long as "his services to the patient [were] of the same character, in terms of the responsibilities to the patient that are assumed and fulfilled as the services to other paying patients." *Id*. These services included reviewing the patient's history and conducting a physical exam; personally examining the patient within a reasonable time after admission; confirming or revising the patient's diagnosis; determining the course of treatment to be followed; assuring that any supervision needed by the interns [*5] and residents was furnished; and making frequent reviews of the patient's progress. *Id*.

The 1967 regulations were supplemented by two Intermediary Letters ("I.L.'s"), issued to Medicare Part B carriers, clarifying which doctors' activities established an "attending physician" relationship with a covered patient. *See* I.L. 372 (1969); I.L. 70-2 (1970). I.L. 372 provided that "for a Teaching Physician to be eligible for Part B reimbursement . . . he must . . . render sufficient personal and identifiable medical services to the Medicare beneficiary to exercise full personal control over the management of the portion of the case for which a charge can be recognized" and "be present and ready to perform any service . . . when a major surgical procedure or complex or dangerous medical procedure is performed." *Id*. It further provided that the attending physician's care for the patient "must be demonstrated, in part, by notes and orders in the patient's records that are either written or countersigned by the supervising physician." *Id*. I.L. 70-2 indicated that attending doctors could in part demonstrate their responsibility for a patient's care by countersigning notes in the [*6] Medicare patient's record; it established that an attending physician's countersignature in the patient's record allowed one to presume that the patient had been examined by the attending doctor.

In 1980, Congress reissued the Medicare Part B reimbursement requirements for attending doctors, *see* 42 U.S.C. § 1395u(b)(7) (1980); the new requirements provided that a "physician [must render] sufficient personal and identifiable physicians' services to the patient to exercise full, personal control over the management of the portion for which payment is sought [and] the services [must be] of the same character as the services the physician furnishes to non-beneficiary patients."

In 1989, HCFA proposed additional revisions to the reimbursement regulations for "attending doctors" under Medicare Part B, acknowledging that the existing regulations were somewhat unclear and were being interpreted differently by different teaching hospitals. HCFA provided more detailed documentation standards for teaching hospital doctors seeking reimbursement under the "attending doctor" designation in an effort to "describe the methods that would be used to determine the [*7] customary charges" under Medicare Part B. 54 Fed. Reg. 5946 (Feb. 7, 1989). HCFA also recognized that the 1967 standards for identifying attending physicians, as described in regulation 405.520-21, were still in effect, and recognized I.L. 372 as setting forth the criteria for the "attending physician" relationship for the agency's new proposed rules. [2] (Pls.' Mem. at 13); 54 Fed. Reg. 5952 (Feb. 7, 1989).

> 2 Pls.' Mem. refers to Plaintiffs' Memorandum of Law in Opposition to the Government's Motion to Dismiss Plaintiff's Complaint and in Support of Plaintiffs' Cross Motion for Summary Judgment. Gov. Mem. refers to Government's Memorandum of Law in Further Support of Its Motion to Dismiss the Complaint and in Opposition to Plaintiffs' Motion for Summary Judgment.

In 1991, HCFA announced that it planned to finalize the rules it proposed in 1989. *See* 56 Fed. Reg. 25,793 & 25,799 (June 5, 1991). Additionally, HCFA recodified regulation 405.521, and announced that it was [*8] retaining the requirements and operating instructions for determining when a doctor who is supervising residents is considered a patient's "attending physician." *See* 56 Fed. Reg. at 25,799. HCFA referred persons seeking a detailed definition of "attending physician" for the purposes of Medicare Part B reimbursement to the original 1967 regulations and to I.L. 372, assuring doctors that the 1967 regulations were still in effect. *See* 56 Fed. Reg. 59,502 & 59,507 (Nov. 25, 1991).

On December 30, 1992, HCFA's Director of Payment Policy, Charles Booth, issued a memorandum to HCFA's regional offices ("Booth Memorandum") which provided that teaching doctors who sought reimbursement under Medicare Part B as "attending physicians" must be present on all occasions when physician services were delivered by their residents to a Medicare patient. On the same day, Thomas Ault, Deputy Director of HHS's Bureau of Policy Development, wrote a conflicting letter to a hospital explaining that "all payment for the physician's time spent in supervising residents in the care of a patient with whom an attending physician relationship is established is payable through fees [*9] . . . [under] Part B . . . ." Plaintiffs refer the court to documents showing that HCFA and HHS officials at various

points stated that the Booth Memorandum was not binding and the 1967 regulations for attending physicians were still in effect, and that even if the Booth Memorandum requirements were to become binding these requirements would not be enforced retroactively. (Pls.' Mem. at 26); (Obus Decl. Ex. E).

In 1995, HHS proposed new Medicare reimbursement rules. *See* 60 Fed. Reg. 38,400 (July 26, 1995) (describing proposed Medicare rules). After a period for comment on the proposed rules, on December 8, 1995, HHS promulgated the final and current version of the rules. *See* 42 C.F.R. § 415.172 et. seq. The new rules were not put into effect until July 1, 1996, in order to provide "adequate time to educate all affected parties." 60 Fed. Reg. 63,124 at 63,142-43 (Dec. 5, 1995).

Sometime after July 1995, when HHS entered a settlement with a teaching hospital for submitting fraudulent Medicare Part B claims, OIG announced that it would begin a nationwide audit of teaching hospitals collecting reimbursement under Medicare Part B to determine whether [*10] they were complying with I.L. 372, specifically, its provisions requiring an "attending physician" to be present during all billed patient procedures. (Pls.' Mem. at 16) (Obus Decl. Ex. A & B).

[HN1]OIG has the power, upon determining that a hospital has failed its PATH audit, to refer the hospital's case to the United States Attorney's Office for potential criminal or civil sanctions; if the United States Attorney's Office declines to accept the case for prosecution, the matter may be pursued by HHS for administrative recoupement proceedings. (Reeb Decl. PP 6-7). Plaintiffs submitted proof showing that many hospitals had not interpreted I.L. 372 as requiring the attending doctor's presence during every billed procedure, and therefore the PATH audits were likely to uncover many errors. (Obus Decl. Exh. B at 9).

After receiving complaints about the propriety of the PATH audits, the general counsel for HHS, Harriet Rabb, wrote a letter ("Rabb Letter") (Waltman Decl. Exh. B. App. A.) in which she recognized that the Medicare Part B reimbursement requirements were highly ambiguous during the period under review in the PATH audits and, therefore, the PATH audits should only continue at those [*11] hospitals where OIG had evidence that prior to December 30, 1992, (1) the local Medicare carrier for the hospital had provided the hospital with "written guidance stating that . . . reimbursement for teaching physician services would be limited to one of two situations: where the teaching physicians either personally furnished services to Medicare beneficiaries or were physically present when services were furnished by interns or residents" and the carrier's guidance (2) provided a "clear explanation of the rules regarding reimbursement for the services of teaching physicians." (Rabb Letter at 5). [3] PATH audits were terminated in several areas of the country where HHS and OIG determined that the local carrier had not informed hospitals that attending physicians were required to be present during the services rendered to Medicare patients in order to be reimbursed for their services. (Pls.' Mem. at 28-29).

> 3 Billing practices called "coding" are also being reviewed in the PATH audit. The PATH audit coding investigation examines physicians characterization of their evaluation and management services (E & M) to determine whether hospitals charged Medicare for a higher level of service than a doctor actually rendered to a Medicare patient. The facts supporting the parties' contentions about the fairness of the coding audits do not affect the legal analysis provided above, and therefore are not described in detail. Specifically, plaintiffs' contentions about the fairness of the PATH audit coding investigations raise the same issue as their claims about the "attending doctor" billing investigations: they are being charged with notice of changes in the Medicare reimbursement standards when no such notice was forthcoming from HHS, HCFA, or Medicare carriers. (Pls.' Mem. at 18-20).

[*12] OIG concluded that Empire Blue Cross, Blue Shield ("Empire"), the Medicare carrier for the hospitals in the greater New York area, had informed its hospitals of I.L. 372's requirement that "attending physicians" be present during patient services billed to Medicare Part B in a publication called "Fast Facts," (Pls.' Mem. at 30), and therefore these hospitals would be subject to PATH audits. *Id*. GYNHA appeared before OIG and HHS to persuade the agencies that the "Fast Facts" publication was not Empire's official Medicare information publication (Pls.' Mem. at 31-33); however, OIG and HHS refused to cancel the planned audits for hospitals in the greater New York area. OIG began investigating two of GNYHA's member hospitals, and the plaintiffs commenced suit to prevent the PATH audits from being conducted at any GYNHA member hospital. (Pls.' Mem. at 1).

At the time this action was submitted to the court, six PATH audits had been completed nationwide. (Reeb Decl. at P 6). In four cases, the PATH audits were resolved through settlement, and in two others no enforcement action was taken. (Reeb Decl. PP 6-8). Additionally, in 1998 the General Accounting Office (GAO) issued a report [*13] concluding the PATH audit standards on the "attending physician" requirement were reasonable. [4] (Gov. Mem. at 10).

4 The GAO report also indicated that the PATH audit standards used to review hospitals' coding of evaluation and management services were reasonable. (Gov. Mem. at 18).

II. ANALYSIS

The court begins with defendants' Rule 12(b)(1) motion to dismiss plaintiffs' APA claims on the ground that the court lacks subject matter jurisdiction to hear the claims, because failure to prove subject matter jurisdiction moots all other issues in an action. *See Dillard v. Runyon*, 928 F. Supp. 1316, 1322 (S.D.N.Y. 1996) (Mukasey, J.). Defendants bring a factual challenge to plaintiffs' subject matter jurisdiction, that is, they challenge whether sufficient facts exist for the court to determine that it has jurisdiction to hear the plaintiffs' claims. *See Guadagno v. Wallack Ader Levithan Assoc.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996) (Rakoff, J.) (distinguishing between facial [*14] and factual challenges under 12(b)(1)). [HN2]In reviewing a factual challenge to subject matter jurisdiction, the court may rely on the plaintiff's complaint, as well as look to extrinsic evidence, such as affidavits, to support its determinations. *Id*. However, "no presumption of truthfulness attaches to the complaint's jurisdictional allegations," and "the burden is on the plaintiff to satisfy the Court as fact-finder of the jurisdictional facts." *Id*.

II. APA Claims

With these standards in mind, the court reviews plaintiffs' APA claims. [5] [HN3]The APA "provides for judicial review of a final agency action for which there is no other adequate remedy in court." *See Franklin v. Massachusetts*, 505 U.S. 788, 796, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)(internal quotations omitted). "Two [HN4]conditions must be satisfied for an agency action to be final: First, the action must mark the consummation of the agency's decision-making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will follow." *Top Choice Distrib. v. United Postal Serv.*, 138 F.3d 463, 465 (2d. Cir. 1998). [*15]

5 Defendants' initial memorandum supporting their motion to dismiss characterized plaintiffs' claims as arising under both the APA and the DJA; they later characterized these claims as predominately arising under the DJA. (Gov. Mem. at 23 (describing earlier memorandum arguments). Plaintiffs' memorandum characterizes their claims as predominately DJA claims, but also raise APA issues. The court treats plaintiffs' claims as arising under both statutes.

1. Final Agency Decision

a. Announcement of Impending PATH Audits

Plaintiffs contend that the announcement that the PATH audits will occur is a final agency decision under the APA. (Pls.' Mem. at 60, 75). [HN5]An agency's announcement may be treated as a final agency decision when legal consequences, such as sanctions, flow from the announcement. *See Franklin*, 505 U.S. at 799. Also, when officials have no discretionary power to alter the announcement's directives and provisions for sanction, it may be considered a final decision. *Id* [*16] . Courts have further recognized that [HN6]when announced regulations "have the force of law before their sanctions are invoked," these regulations may be a final agency decision reviewable under the APA. *See Abbott Labs.*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681. Lastly, [HN7]when an agency refuses to change its policy despite administrative proceedings adjudicating the fact that its policies violate persons' rights, the court will treat its announced policy as a final agency decision. *See Jones v. Califano*, 576 F.2d 12, 18 (2d Cir. 1978).

Under these standards, the announced PATH audits do not constitute a final agency decision by OIG or HHS. The regulations do not establish the legal rights of parties, as the member hospitals still have the opportunity to challenge the PATH audits. *See Top Choice*, 138 F.3d at 465. Indeed, the audits do not definitively establish plaintiffs' liability or subject them to sanction, as HHS has the discretion to settle the audit claims for lesser amounts or dismiss the audit claims. (Reeb Decl. PP 6-8). Additionally, the agencies have not refused to change their position on the audits, as they have already agreed to circumscribe the group [*17] of hospitals subject to the PATH audit standards, based on whether the hospitals had adequate notice of the relevant Medicare reimbursement standards. (Reeb Decl. PP 6-8) & (Pls.' Mem. at 26-27). The court recognizes that the [HN8]PATH audit standards are not exactly "tentative or interlocutory" in nature; however, the evidence submitted also makes it clear that the agencies involved are not at the end of their decision-making processes about the audits. *Top Choice*, 138 F.3d at 465. Therefore the announced PATH audits cannot be treated as a final agency decision.

Plaintiffs argue that OIG's decision to conduct the PATH audits is final because it subjects them to the risk of "total destruction" based on their potential liability for False Claims Act ("FCA") claims. (Pls.' Mem. at 3). However, the Second Circuit recently rejected the claim that threat of liability is a sufficient basis for challenging

government action under the APA. In *Top Choice Distributors*, the court held that the post office's decision to file an administrative complaint against a company was not a "definitive agency decision," and would not become a final agency decision until after the time to [*18] appeal the ALJ's decision on the administrative claim had run, or the judicial officer in charge of the case resolved the appeal. *See* *Top Choice Distributors*, 138 F.3d at 467; *see also* *Federal Trade Commission v. Standard Oil*, 449 U.S. 232, 241, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980) (noting that an agency's complaint establishing that it had "reason to believe" a company was violating a statute was "not a definitive statement of position").

Here, plaintiffs have not even been charged in a complaint, but merely have been informed that they will be audited. Too much conjecture is required for the court to conclude that they will suffer injury from the audits: the court would have to assume OIG will determine the hospitals violated the PATH audit standards, and that they will refer these claims for FCA prosecutions or administrative recoupement proceedings.

Contrary to plaintiffs' assertion, the court's conclusion that the decision to conduct the PATH audits is not "final" under the APA does not insulate the PATH audit process from judicial review. (Pls.' Mem. at 61 & 63). Rather, the court simply defers this inquiry until a time when the "decisionmaking [*19] agency has arrived at a definite position on the issue that inflicts an actual concrete injury." *Top Choice Distributors*, 138 F.3d at 465. As defendants have not yet been found liable under the PATH Audits, the court cannot conduct the inquiry plaintiffs propose here.

b. Promulgation of PATH Audit Standards as a Final Agency Decision

Plaintiffs in their next two challenges allege that the PATH audit standards were improperly promulgated because they are being applied to a period prior to their promulgation, (Pls.' Mem. at 64, 73), and because these Medicare audit standards were actually promulgated by OIG and HCFA rather than HHS, as required by statute. (Pls.' Mem. at 51, 81). These claims are controlled by *Seafarers International Union of North America v. United States Coast Guard*, 736 F.2d 19, 22 (2d. Cir. 1984), a case in which the Second Circuit reviewed a group of plaintiffs' APA claim seeking to force the Coast Guard to "enforce applicable statutes and policies and to promulgate regulations in accordance with applicable statutes and federal policies" regulating the staffing of ships.

Under *Seafarers* [HN9]an agency's decisions about [*20] the promulgation and enforcement of its regulations are not "final" unless "the process of administrative decision-making has reached a stage where judicial review will not be disruptive of the agency process and . . . legal consequences will flow from the action[s] taken." *Seafarers*, 736 F.2d at 26. Courts recognize that "judicial [HN10]intervention into the agency process [at the pre-enforcement stage] denies the agency an opportunity correct its own mistakes and apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Standard Oil*, 449 U.S. at 241 (citations omitted). Therefore, where the agency's own administrative processes show the potential to correct the agency action plaintiff complains of, plaintiff's complaints are not amenable to judicial review. *See* *Seafarers*, 736 F.2d at 27-28.

Here it is clear that judicial review of the process for promulgating and enforcing the PATH standards would interfere with HHS's and the OIG's administrative procedures. The scope of the PATH initiative has changed as HHS [*21] officials have reviewed its progress, (Rabb Letter at 5)(establishing that hospital notice about Medicare standards must be established prior to the PATH audit inquiry and requiring dismissal of some PATH audits on this basis); and it continues to be reviewed. (see Gov. Mem. at 10)(discussing 1998 GAO report on the PATH audits). The jurisdictional facts plaintiffs have provided do not show that the PATH audit involves "definitive statutes, orders or regulations" or a "consistent pattern" of agency action eligible for pre-enforcement review. *Sinclair Oil Corp. v. C.R. Smith*, 293 F. Supp. 1111, 1112 (S.D.N.Y. 1968) (MacMahon, J.) (discussing review of definitive statutes); *National Wildlife Fed. v. Benn*, 491 F. Supp. 1234, 1241 (S.D.N.Y. 1980) (Tenney, J.) (discussing review of a pattern of agency action). There may well be further amendments to the PATH audits once plaintiffs avail themselves of their right to bring administrative challenges to the PATH audits; this has not occurred thus far because no plaintiff hospital has been found to have violated the PATH standards. (Pls.' Mem. at 1)(noting that only two hospitals have even been subject to PATH [*22] reviews). Therefore, the court will not review the PATH audit standards in order to give HHS and OIG an opportunity to correct the problems in the the PATH audit process, as these problems are fleshed out by administrative and settlement proceedings involving the audited hospitals. *See* *Seafarers*, 736 F.2d at 27-28.

c. The Inspector General's Participation in Audits as a Final Agency Decision

Plaintiffs' last claim attempts to circumvent the APA's finality requirement; they argue that they can challenge the PATH audits prior to their becoming a final agency decision because the audits are ultra vires acts of the OIG. [HN11]A mere general attack on the

authority of an agency to conduct an investigation does not obviate the APA's final agency decision requirement. *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994)(citations omitted). "A [HN12]claim, that an agency action is in plain contravention of a statutory mandate, however, may present one of the extraordinary exceptions to the finality requirement." *Veldhoen*, 35 F.3d at 225 (citing *Leedom v. Kyne*, 358 U.S. 184, 3 L. Ed. 2d 210, 79 S. Ct. 180 (1958)); [*23] *see also Sinclair Corp.*, 293 F. Supp. at 1114 (recognizing exception). In order to properly invoke the court's jurisdiction under this exception, plaintiff must show that the agency "is totally without jurisdiction" to undertake the action and is "acting in excess of [its] constitutional and statutory authority." *Sinclair Corp.*, 293 F. Supp. at 1114.

Plaintiffs have presented the court with statutory authority showing that the HHS has primary responsibility for Medicare program audits, *see* 42 U.S.C. §§ 1395u(a)(1)(A) and (C), and caselaw suggesting that OIG is limited to conducting spot checks for fraud perpetrated on administrative agencies, *see Burlington No. Railroad Co. v. Office of the Inspector General*, 983 F.2d 631, 638-41 (5th Cir. 1993) (holding that OIG does not have statutory authority to issue subpoenas for compliance with a nationwide audit); *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 328 (5th Cir. 1997) (explaining that OIG has subpoena power to conduct spot check audits). [6] Additionally, they point the court to documents showing that OIG and HHS have stated that [*24] the PATH audits are a nationwide investigatory initiative. (Pls.' Mem. at 16). However, there is also statutory authority suggesting that OIG may "provide policy direction for and . . . conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of the agency to which it is assigned. 5 U.S.C. App. 3 § 4(a)(1). This authority suggests that OIG's action "is not so at odds with the statute [creating its jurisdiction] as to present one of the extraordinary exceptions to the finality doctrine." *Veldhoen*, 35 F.3d at 225.

> 6 Neither *Burlington* nor *Winters Ranch* establishes that the OIG's decision to conduct an ultra vires audit is a decision reviewable as a final agency decision under the APA. *See Ass'n of Am. Med. Colleges v. United States*, 34 F. Supp. 2d 1187, 1191 (C.D. Cal. 1998)(discussing cases). Rather in both of these cases the courts' "jurisdiction was premised on the counterclaim filed by the Inspector General seeking enforcement of the subpoenas." *Id.*

[*25] Additionally, the court finds that the OIG's actions in conducting the PATH audits are distinguishable from the OIG's conduct in *Burlington*, the case plaintiffs' principally rely on to support their claim. Plaintiffs contend that OIG has characterized the PATH audits as a nationwide initiative, and this comment shows that the agency has exceeded its statutory authority to investigate specific kinds of fraud. (Pls.' Mem. at 28-29). However, despite this statement, the PATH audits have been conducted in a manner consonant with OIG's statutory authority. *Id.* (discussing OIG's decision to conduct the PATH audits only when hospitals had notice of relevant reimbursement standards); (Gov. Mem. at 10)(discussing GAO report reviewing how OIG and HHS should select hospitals for PATH audits). In *Burlington* the court determined that OIG only represented that it was investigating specific instances of railroad company fraud when the railroad companies threatened the agency with litigation based on the charge that OIG had exceeded the limits of its statutory authority to do limited fraud investigations. *See Burlington* 983 F.2d at 638. In this case, however, OIG and [*26] HHS have always conducted the PATH audits in a manner that shows they are trying to ferret out a specific set of fraudulent Medicare reimbursement practices. (Pls.' Mem. at 16)(characterizing the audit as an attempt to assess compliance with I.L. 372). Given these facts, it does not appear that the PATH audits involve one of the extraordinary circumstances of ultra vires agency action; rather, "this dispute is over the [OIG's] interpretation of its statute and its [PATH] regulations, an activity to which courts generally grant deference to agencies." *Veldhoen*, 35 F.3d at 226.

2. Alternative Legal Remedy

[HN13]In addition to demonstrating that they challenge a final agency action, plaintiffs must also show that they "have no adequate remedy in a court." 5 U.S.C. § 704. Courts that have previously addressed hospitals' PATH audit challenges have concluded that the hospitals have a number of adequate legal remedies available to them other than APA claims. *See Ass'n of Am. Med. Colleges*, 34 F. Supp. 2d at 1193; *Ohio Hospital Ass'n v. Shalala*, 978 F. Supp. 735, 742 & n.9 (N.D. Ohio 1997). These remedies can [*27] be accessed by "(1) refusing to settle to avoid [FCA] prosecution; (2) presenting their defenses to a False Claims lawsuit; and (3) winning that lawsuit based on lack of scienter . . . ; hospitals could either avoid recoupment or be in a position to obtain judicial review of a recoupment decision, and the policy underlying it." *Ohio Hospital Assoc.*, 978 F. Supp. at 741; *see also, Ass'n of Am. Medical Colleges*, 34 F. Supp. 2d at 1193 (discussing same). Furthermore, plaintiffs could refuse to comply with OIG subpoenas for their Medicare billing records, challenge OIG's use of its subpoena power in court, and in this way get judicial review of the PATH audits. *See, e.g., Winters Ranch*, 123 F.3d at 328 (describing plaintiffs' suit against OIG based on its

ultra vires exercise of its subpoena power); *Burlington*, 983 F.2d at 636-37 (same).

The court recognizes that plaintiffs may incur substantial costs defending against FCA claims; however, "mere [HN14]litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" necessitating review of their APA claims. *Standard Oil*, 449 U.S. at 243. [*28] For courts have recognized that "the expense and annoyance of litigation is part of the social burden of living under government;" they are not injuries requiring immediate court action. *Id*.

The analysis above demonstrates that plaintiffs have failed to demonstrate that they have been injured by a final agency action for which they have no adequate remedy in court; therefore the court declines to exercise subject matter jurisdiction over their APA claims.

III. Declaratory Judgment Act

Defendants argue that the court should decline to hear plaintiffs' claims under the DJA, 28 U.S.C. § 2201, because none of plaintiffs' challenges to the PATH audits are ripe for review. (Gov. Mem. at 3) (relying on [HN15] *Ass'n. of Am. Med. Colleges v. United States*, 34 F. Supp. 2d at 1194).

The Declaratory Judgment Act authorizes the federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought." 28 U.S.C. § 2201(a). [HN16]Relief under the act "is discretionary even when an actual controversy exists in the constitutional sense" because the court [*29] recognizes that the "accelerated judicial intervention" authorized by the act "creates the risk of burdening courts and litigants with disputes that were otherwise destined to disappear by themselves, a problem particularly acute when the burdened party is an agency of a coordinate branch of government charged by Congress with administering a statutory program." [HN17] *In re Combustion Equipment Ass'n. Inc. v. United States Environmental Protection Agency*, 838 F.2d 35, 37 (2d. Cir. 1988). To determine whether a dispute is ripe for review the court considers "the fitness of the matter for judicial decision and the hardship to the parties of withholding court consideration." *National Wildlife Fed.*, 491 F. Supp. at 1240 (citing *Abbott Labs.*, 387 U.S. at 149).

A. Fitness For Resolution

[HN18]Courts determine whether a dispute is fit for judicial review by weighing whether (1) the disputed agency decision is "final"; and (2) whether the issue is purely legal or the underlying legal issues would be facilitated if they were raised in the context of a specific attempt at enforcement. *See In re Combustion*, 838 F.2d at 37.

1. [*30] **Final Decision**

The first determination in the DJA analysis is whether the decisions raised in plaintiffs' challenges to the PATH audits concern final agency actions. [HN19]Precedent establishing the conditions for final agency action under the APA are also binding under the DJA. *See Abbott Labs.*, 387 U.S. at 149-50. Therefore, plaintiffs' failure to establish that the process for promulgating the PATH standards, the announcement of the PATH audits, and the OIG's exercise of authority to conduct the audits were final agency decisions also establishes that these claims are not "final" for the purposes of the DJA analysis.

2. More Legal than Factual

[HN20]Plaintiffs must also must show that their challenges to the PATH audits concern issues that are more legal than factual in order to receive relief under the DJA. [HN21]Suits based on potential future events are ill-suited for declaratory relief. *See In re Combustion*, 838 F.2d at 38-39. Plaintiffs' claims here about the harms the announced PATH audits will cause are based on a series of speculations: (1) that other GNYHA hospitals may be audited; (2) that these GNYHA hospitals will fail the PATH audits; (3) [*31] that the Secretary will initiate recoupment proceedings based on these PATH Audits; (4) that some of the audited hospitals will be referred to the U.S. Attorney's Office for FCA prosecutions; and (5) that the GNYHA hospitals may settle these claims rather that face liability from FCA claims.

Plaintiffs other claims: that the OIG exceeded its authority in conducting the audits, and that the audit standards were promulgated improperly, also require more extensive factual development. The court cannot determine whether OIG has acted improperly or used the PATH standards improperly without facts showing how the the OIG's implementation of the standards at the GNYHA hospitals inflicted injury. The fact record here is too underdeveloped for judicial review. [HN22]The court recognizes that it may not decide a DJA "claim which is based upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." *Thomas v. City of New York*, 143 F.3d 31, 33 (2d Cir. 1998).

B. Hardship to the Parties

[HN23]The last prong of the DJA ripeness analysis requires that the party requesting relief show that the denial of declaratory relief harms him more than it harms [*32] the challenged government agency. *See National Wildlife*, 491 F. Supp. at 1240. Plaintiffs contend that the

threat of FCA liability they face from the PATH audits is a hardship that makes their claims amenable to declaratory relief. *See* *Nutritional Alliance v. Shalala*, 144 F.3d 220, 226 (2d Cir. 1998). However, [HN24]to prove hardship plaintiffs must show the complained of agency action caused them "direct and immediate" harm. *Abbott Labs.*, 387 U.S. at 152. Plaintiffs have failed to show that they have already been injured by the PATH audits; they have not demonstrated that they have been forced to incur costs in order to comply with the audit standards or been required them to change their behavior with "serious penalties attached to non-compliance." *Id.* at 153; *cf.* *Nutritional Alliance*, 144 F.3d at 226 n.12 (requiring a showing of "significant present injuries produced by contemplation of a future event"). Rather, plaintiffs have complied with the physician presence requirement outlined by the PATH audit standards since the new Medicare Part B standards were articulated in 1995.

Plaintiffs contend that [*33] they have proven hardship by showing that their "primary conduct" -- their administration of hospitals relying on Medicare funding -- is affected by the PATH audits and the threat of FCA liability; this effect would support the appropriateness of adjudication now. (*see* Pls.' Mem. at 62-63); *cf.* *In re Combustion*, 838 F.2d at 39 (discussing threat to primary conduct as a basis for declaratory relief). However, the "possible harm from delaying litigation does not automatically render a dispute ripe[;]" indeed, this potential harm may be "outweighed by other factors," such as the hardship to the government. *Id.*

Here the hardship imposed on OIG and HHS by pre-enforcement review of the PATH audits is clear: it will prevent OIG from pursuing its statutory mandate to investigate fraud perpetrated on executive agencies, and prevent HHS from policing the spending of Medicare funds. *Id.* Furthermore, it would waste HHS and OIG resources as it would force the agencies to justify each PATH audit for each hospital before proceeding with their review. Indeed, the balance of equities suggests the government's hardship cancels out any benefit plaintiff might receive from [*34] pre-enforcement adjudication of the propriety of the PATH audits.

Based on these findings, the court dismisses plaintiffs' claims under the APA for lack of subject matter jurisdiction, and it dismisses their claims for declaratory relief as their claims are not ripe for review.

IT IS SO ORDERED.

Dated: New York, New York

November 9, 1999

ROBERT L. CARTER

U.S.D.J.

Judicial Review of Inspector General Actions

MOYE, O'BRIEN, O'ROURKE, HOGAN, & PICKERT, Plaintiff-Appellee, versus NATIONAL RAILROAD PASSENGER CORPORATION, Defendant-Appellant.

No. 03-14264

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

376 F.3d 1270; 2004 U.S. App. LEXIS 14426; 17 Fla. L. Weekly Fed. C 764

July 14, 2004, Decided
July 14, 2004, Filed

SUBSEQUENT HISTORY: Rehearing, en banc, denied by Moye, O'Brien, O'Rourke, Hogan & Pickert v. AMTRAK, 2004 U.S. App. LEXIS 27931 (11th Cir. Fla., Sept. 14, 2004)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida. D. C. Docket No. 02-00126-CV-ORL-31-KRS.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee law firm sued appellant National Railroad Passenger Corporation (Amtrak), pursuant to 5 U.S.C.S. § 552(a)(4)(B), in the United States District Court for the Middle District of Florida to compel production of requested documents under the Freedom of Information Act (FOIA), 5 U.S.C.S. § 552. The district court entered an order/injunction directing Amtrak to disclose most of the requested documents to the law firm. Amtrak appealed.

OVERVIEW: The law firm requested Amtrak to produce documents associated with routine financial audits that Amtrak's Office of Inspector General (Amtrak's OIG) performed with regard to a contract. The FOIA request included final audit reports and associated drafts, notes, internal memoranda, and other work papers. Amtrak asserted that all of the requested documents were exempted from disclosure pursuant to the FOIA's Exemption 5, 5 U.S.C.S. § 552(b)(5), as they pertained to attorney work product, attorney-client privilege, and deliberative process privilege. On appeal, the court found that the district court took too narrow a view of the deliberative process privilege when it restricted Exemption 5's scope to extend only to documents that a decision-maker actually reviewed. Instead, the district court should have considered whether the documents reflected advisory opinions, recommendations, and deliberations comprising part of a process by which Amtrak's OIG auditing policies were formulated. Finally, Amtrak satisfied its burden of establishing that the material sought by the firm was both predecisional and deliberative and, thus, protected from disclosure by the FOIA's Exemption 5.

OUTCOME: The judgment was reversed, and the case was remanded for further proceedings.

CORE TERMS: deliberative process, audit, disclosure, exemption, auditor, decision-maker, deliberative, recommendations, audit reports, predecisional, deliberation, requested documents, disclose, staff, electrification, evidentiary, advisory opinions, decision-making, formulated, reflecting, auditing, subordinate, injunction, federal funds, inspector generals, final decision, lower level, public scrutiny, collaborative, consultative

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials

[HN1]The Inspector General Act of 1978, 5 U.S.C.S. app. 3, §§ 1-12, created inspector generals throughout the federal government in order to combat fraud, waste, abuse, and mismanagement in federal programs and operations.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN2]A circuit court reviews a district court's conclusions of law regarding the deliberative process privilege de novo and its findings of fact for clear error.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > General Overview
Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > General Overview
Administrative Law > Governmental Information > Freedom of Information > Enforcement > Burdens of Proof
[HN3]The Freedom of Information Act (FOIA), 5 U.S.C.S. § 552, requires government agencies to disclose to the public any requested documents. An agency may avoid disclosure only if it proves that the documents fall within one of nine statutory exemptions. Because FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed. The government bears the burden of proving that a requested document is exempted. 5 U.S.C.S. § 552(a)(4)(B).

Administrative Law > Governmental Information > Freedom of Information > Compliance > General Overview
Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Interagency Memoranda > General Overview
Transportation Law > Rail Transportation > U.S. National Railroad Passenger Corporation (Amtrak)
[HN4]Although Amtrak is not a federal agency, it must comply with the requirements of the Freedom of Information Act, 5 U.S.C.S. § 552. 49 U.S.C.S. § 24301(e).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Interagency Memoranda > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
Evidence > Privileges > Government Privileges > Freedom of Information Act
[HN5]Exemption 5 of the Freedom of Information Act, 5 U.S.C.S. § 552, protects from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. This provision shields those documents, and only those documents, normally privileged in the civil discovery context. Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Freedom of Information Act
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN6]Exemption 5 of the Freedom of Information Act, 5 U.S.C.S. § 552, includes a deliberative process privilege. The purpose of this privilege is to allow agencies to freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Interagency Memoranda > Deliberative Process Privilege
Evidence > Privileges > Government Privileges > Freedom of Information Act
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN7]The deliberative process privilege protects against premature disclosure of proposed policies before they have been finally formulated or adopted and protects against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action. Thus, Exemption 5 of the Freedom of Information Act, 5 U.S.C.S. § 552, covers documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawers & Makers
Evidence > Privileges > Government Privileges > General Overview
[HN8]To fall within the deliberative process privilege, a document must be both predecisional and deliberative. A predecisional document is one prepared in order to assist an agency decision-maker in arriving at his decision and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. However, the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment. Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense.

Administrative Law > Governmental Information > Freedom of Information > General Overview
[HN9]A document is deliberative if the disclosure of the materials in the document would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and, thereby, undermine the agency's ability to perform its functions.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN10]The underlying purpose of the deliberative process privilege is to ensure that agencies are not forced to operate in a fish bowl. Therefore, courts must focus on the effect of the material's release, and conclude that predecisional materials are privileged to the extent that they reveal the mental processes of decision-makers.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Freedom of Information Act
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN11]The United States Supreme Court has adopted, for purposes of Exemption 5 of the Freedom of Information Act, 5 U.S.C.S. § 552, a distinction between factual and opinion data. Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other. The Supreme Court issued this mandate despite its acknowledgment that the task of drawing a line between what is fact and what is opinion can at times be frustrating and perplexing. The Supreme Court implicitly reaffirmed this fact/opinion distinction by noting that the focus of the deliberative process privilege was on documents reflecting advisory opinions, recommendations, and deliberations.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > General Overview
[HN12]The United States Supreme Court has explained that the purpose of the privilege for predecisional deliberations is to ensure that a decision-maker will receive the unimpeded advice of his associates. Accordingly, the Supreme Court has held that factual information generally must be disclosed and materials embodying officials' opinions are ordinarily exempt from disclosure.

Governments > Federal Government > Employees & Officials
[HN13]Congress established Amtrak's Office of the Inspector General (OIG) to ensure, inter alia, that federal funds are used for its intended purpose and to deter fraud, waste, and abuse. Accordingly, Amtrak's OIG is charged with the responsibility to provide policy direction for, and to conduct, supervise, and coordinate audits and investigations, to recommend policies for promoting efficiency and economy, and to prevent and detect fraud and waste. 5 U.S.C.S. app. 3, §§ 3, 4.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN14]A government agency need not cite to a specific policy decision in connection with which audit work papers and internal memoranda were prepared in order for those documents to be protected from disclosure by the deliberative process privilege.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > General Overview

[HN15]The need to protect predecisional documents does not mean that the existence of the privilege for predecisional deliberations turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Interagency Memoranda > Deliberative Process Privilege
Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
[HN16]For the deliberative process privilege to apply, the decision-making process must bear a reasonable nexus to the documents sought.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Government Privileges > Official Information Privilege > Deliberative Process Privilege
Evidence > Privileges > Government Privileges > Waiver
[HN17]The selection and sifting of factual materials may itself be the product of a government agency's deliberative process and, therefore, entitled to the privilege.

COUNSEL: For NATIONAL RAILROAD PASSENGER CORPORATION, Appellant: Clair, Jeffrey, WASHINGTON, DC.

For MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT, Appellee: Martin, Gregory S., Moye, O'Brien, O'Rourke, et al., Moye, James E., Moye, O'Brien, O'Rourke, Hogan & Pickert, Kovalcik, Anthony R., MAITLAND, FL.

JUDGES: Before TJOFLAT and HILL, Circuit Judges, and MILLS *, District Judge.

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

OPINION BY: RICHARD MILLS

OPINION

[*1272] RICHARD MILLS, District Judge:

We deal here with the scope of the Freedom of Information Act's Exception 5, commonly known as the "deliberative process privilege."

Specifically, we must determine whether the district court erred in concluding that the Freedom of Information Act requests made to the National Railroad Passenger Corporation by the law firm of Moye, [*1273] O'Brien, O'Rourke, Hogan, & Pickert were not protected from disclosure pursuant to the "deliberative process privilege."

After a review of the record, we conclude that the material sought is protected from disclosure by the "deliberative process privilege" and that the district court erred in requiring the National Railroad Passenger Corporation to disclose this material.

Accordingly, we must reverse and remand.

I. BACKGROUND

In December 1995, the National [**2] Railroad Passenger Corporation ("Amtrak") entered into a $ 321,000,000.00 contract with Balfour Beatty Construction, Inc., and Massachusetts Electric Construction Company ("BBCMEC") to design and build a high-speed rail electrification system between New Haven, Connecticut, and Boston, Massachusetts. This project was referred to as the "Northeast Corridor Electrification Project," was financed with federal funds, and was intended to construct a rail system which would enable Amtrak to operate high speed train service between Washington, D.C., and Boston. The contract set forth certain work standards and a series of payment terms.

In 1988, Congress established an Office of Inspector General ("OIG") within Amtrak. Congress established the OIG within Amtrak under [HN1]the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12, which created inspector generals throughout the federal government in order to combat fraud, waste, abuse, and mismanagement in federal programs and operations.

Pursuant to the terms of its statutory mandate, Amtrak's OIG conducted a series of financial and performance audits of BBC-MEC's activities since the inception of the Northeast Corridor Electrification [**3] Project. Some of these audits prompted further investigation of whether BBC-MEC committed civil and/or criminal fraud in seeking contract payments. Amtrak's OIG also conducted a series of more routine financial audits

evaluating whether BBC-MEC's various claims for additional payments were proper.

On May 1, 2001, the law firm of Moye, O'Brien, O'Rourke, Hogan & Pickert ("the firm") sent Amtrak a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request which contained 21 separately numbered paragraphs and which asked Amtrak to produce documents associated with twelve routine financial audits which Amtrak's OIG had performed with regard to the BBC-MEC's Northeast Corridor Electrification Project contract. The firm's FOIA request sought a broad array of documents, including final audit reports and associated drafts, notes, internal memoranda, and other work papers. [1]

> 1 More specifically, paragraphs 1-13 sought various "audits" of the Northeast Corridor Electrification Project; paragraph 14 sought "any and all draft audit reports" during the time BBC-MEC had been involved in the project; paragraph 15 sought "any and all notes" regarding those audits; paragraph 16 sought "any and all internal memos" regarding those audits; paragraphs 17-20 sought audit documents relating to a prior contractor on the project; and paragraph 21 sought documents relating to the issues of anchor bolts on the project.

[**4] On July 20, 2001, Amtrak issued a blanket denial of the firm's FOIA request, asserting that all of the requested documents were exempted from disclosure pursuant to all three components of FOIA's Exemption 5 (i.e., attorney work product, attorney-client privilege, and deliberative process privilege). 5 U.S.C. § 552(b)(5). On August 20, 2001, the firm filed an administrative appeal of Amtrak's decision.

[*1274] However, Amtrak did not rule upon the merits of the firm's appeal. Instead, Amtrak, through a letter from its general counsel, informed the firm that Amtrak would be unable to address the merits of the administrative appeal because the documents in question were in the possession of Amtrak's OIG.

On February 2, 2002, the firm filed suit in federal district court. Specifically, the firm sued Amtrak, pursuant to 5 U.S.C. § 552(a)(4)(B)(i.e., FOIA), to compel production of the requested documents. Amtrak answered the firm's Complaint by reasserting, inter alia, that the documents requested were exempted from disclosure by the deliberative process privilege codified in FOIA at 5 U.S.C. § 552(b)(5). On June 7, 2002, the [**5] parties consented to having the case heard by United States Magistrate Judge Karla R. Spaulding ("the district court"). The district court then held a series of scheduling conferences, ordered that responses to the firm's FOIA requests be staged, and required Amtrak to respond to the firm's requests in groups: i.e., requests 1-16, request 21, and requests 17-20, in turn. [2]

> 2 The district court has held three bench trials on the firm's FOIA requests: one for FOIA requests 1-16 which has resulted in the instant appeal number 03-14264; FOIA request 21 which has resulted in appeal number 03-15535; and FOIA requests 17-20 which has resulted in appeal number 03-14823.

On November 8, 2002, the firm moved for partial summary judgment on requests 1-16 and on request 21. On January 15, 2003, Amtrak filed a cross-motion for summary judgment as to these requests. On May 13, 2003, the district court largely denied both parties' motions, essentially concluding that the evidentiary record had not been sufficiently developed [**6] in order to determine whether Amtrak had a valid basis for asserting the deliberative process privilege as to the requested documents. [3]

> 3 The district court did allow the firm's motion with respect to two categories of information which had been redacted from previously disclosed documents: the identity of certain individuals named in certain financial audit statements and third party business and financial information contained in two final audit reports. Amtrak has represented in its brief that it has now disclosed this material, and therefore, these documents are no longer at issue.

On July 28, 2003, the district court conducted a bench trial on the firm's FOIA requests 1-16. On August 18, 2003, the district court rejected Amtrak's assertion of the deliberative process privilege, allowed the firm's FOIA requests 1-16, and entered an order/injunction directing Amtrak to disclose most of the requested documents to the firm within twenty days. On September 5, 2003, the district court stayed its order/injunction [**7] requiring Amtrak to disclose the FOIA material requested by the firm in paragraphs 1-16 pending a resolution of Amtrak's appeal to this Court.

II. ISSUE

Whether the district court erred in finding that the firm's FOIA requests 1-16 to Amtrak were not protected by the deliberative process privilege and, thus, were not exempt from disclosure pursuant to 5 U.S.C. § 522(b)(5)

III. STANDARD OF REVIEW

[HN2]This Court reviews a district court's conclusions of law regarding the deliberative process privilege

de novo and its findings of fact for clear error. Office of the Capital Collateral Counsel, N. Region of Florida *ex rel.* Mordenti v. Department of Justice, 331 F.3d 799, 802 (11th Cir. 2003); MiTek Holdings, Inc. v. Arce Eng'g Co., Inc., 89 F.3d 1548, 1554 (11th Cir. 1996).

[*1275] **IV. ANALYSIS**

A. ARGUMENTS

1. Amtrak

Amtrak argues that the district court erred in finding that the firm's FOIA requests 1-16 were not protected from disclosure pursuant to FOIA's Exemption 5 (i.e., the deliberative process privilege), 5 U.S.C. § 552(b)(5), for four reasons. First, Amtrak [**8] asserts that, contrary to the district court's conclusions, the protections afforded by the deliberative process privilege are not confined only to the documents reviewed by the final decision-maker. On the contrary, Amtrak contends that the deliberative process privilege extends, not only to the draft audit reports submitted for the final decision-maker's consideration, but to the internal memoranda, notes, and other work papers prepared by lower level auditors and their staff because these staff level work papers play a significant role in the deliberative process and are a vital part of the consultative process. Amtrak asserts that these documents essentially record the deliberative process and, therefore, are protected by the privilege.

Second, Amtrak claims that the public policy considerations underlying the privilege mandate that these documents be considered privileged. Amtrak argues that decision-making in large, hierarchical organizations frequently requires consultation and deliberation among staff and lower level officials in order to gather and analyze data, narrow the range of possible policy choices, compile and verify a factual record, and shape recommendations [**9] for a final decision. Amtrak asserts that subordinates' participation in this process requires the same protection of full and frank communications which is afforded to higher level officials; otherwise, Amtrak claims, the potential for disclosure would chill subordinates' communications and internal discussions.

Third, Amtrak argues that the district court improperly placed the burden upon it to establish that disclosure of the documents would chill communications from a particular subordinate auditor to senior auditors and, ultimately, to the decision-maker. Amtrak asserts that Congress has already determined that disclosure of deliberative materials carries a risk of chilling internal discussions, and thus, the district court erred in requiring it to make a further showing of a chilling effect.

Fourth, Amtrak argues that its detailed evidentiary submissions to the district court at the bench trial clearly established that the audit work papers sought by the firm embodied precisely the type of advice, recommendations, and discretionary policy choices protected by the deliberative process privilege. In particular, Amtrak contends that the audit work papers record the auditors' [**10] decisions as to the methodology and scope of the planned audit, the mental impressions of interviews, documents, and other data, preliminary analyses and conclusions, supervisory review, and on-going evaluation of the audit work in progress. As such, Amtrak claims that the audit work papers document a collaborative, consultative process leading to a final audit decision and, therefore, fall squarely within the protection of the deliberative process privilege.

In short, Amtrak argues that the district court's narrow, restrictive interpretation of the deliberative process privilege is at odds with both precedent and sound public policy considerations. Amtrak contends that, contrary to the district court's finding, it carried its burden of establishing that the documents sought by the firm were both predecisional and deliberative. As such, Amtrak asks the Court to reverse the district court's order/injunction requiring them to disclose the documents sought by the firm in its FOIA requests 1-16.

[*1276] 2. The Firm

The firm asks the Court to affirm the district court's holding because the district court correctly found that Amtrak had failed to carry its evidentiary burden of proof at trial [**11] and because the district court did not commit any errors as a matter of law. Specifically, the firm asserts that the district court correctly found that Amtrak had failed to carry its evidentiary burden of proving that the audit work papers were predecisional and deliberative. The firm contends that the only deliberative process asserted by Amtrak was Gary Glowacki's (i.e., the decision-maker) decision regarding whether or not to issue a final audit report. However, the district court found that Amtrak failed to offer any evidence regarding the deliberative process employed by Glowacki in determining whether or not to issue a final audit report on the BBC-MEC contract, and the firm asserts that this finding is not clearly erroneous.

Furthermore, the firm claims that the district court applied the proper legal standards in evaluating Amtrak's claim of the deliberative process privilege. In fact, the firm notes that the district court quoted verbatim the standard set forth by this Court in prior published opinions for determining whether the privilege applies. [4]

4 The firm also argues that Amtrak has waived its argument that the district court applied the

wrong legal standard by failing to raise the issue to the district court during the bench trial.

[**12] Moreover, the firm contends that Amtrak has mischaracterized the district court's holding in that, contrary to Amtrak's assertion, the district court did not limit the applicability of the deliberative process privilege to the deliberations of the decision-maker. On the contrary, the firm argues that the district court expressly recognized that the privilege could also reach a decision-maker's communications with subordinates, but the district court went on to hold that the privilege did not extend to these documents under the circumstances.

In addition, the firm argues that the district court's decision is consistent with public policy considerations relating to FOIA. Specifically, the firm contends that Congress enacted FOIA in order to permit access to information and that FOIA mandates disclosure of documents unless a specified exemption applies. The firm asserts that Amtrak's interpretation of Exemption 5 would swallow the rule and would shield almost every document within the Government's control from public scrutiny.

Finally, the firm argues that Glowacki's decision regarding whether or not to issue a final audit report is not a "decision" to which Exemption 5 applies. [**13] In short, the firm contends that the decision to issue or not to issue a final audit report does not qualify as a deliberative process affecting any agency law or policy, and thus, Amtrak cannot avail itself of the deliberative process privilege. Accordingly, the firm asks the Court to affirm the district court's order/injunction requiring Amtrak to disclose the material which it sought pursuant to its FOIA requests 1-16.

B. DISCUSSION

[HN3]FOIA requires government agencies to disclose to the public any requested documents. [5]United States v. Weber Aircraft Corp., 465 U.S. 792, 793-94, 79 L. Ed. 2d 814, 104 S. Ct. 1488 (1984); 5 U.S.C. § 552(a), (b). An agency may avoid disclosure only if it proves that the documents fall within one of nine statutory [*1277] exemptions. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975); Office of the Capital Collateral Counsel, 331 F.3d at 802. Because FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed. Cochran v. United States, 770 F.2d 949, 954 (11th Cir. 1985)(citing Dep't of the Air Force v. Rose, 425 U.S. 352, 366, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)). [**14] The government bears the burden of proving that a requested document is exempted. EPA v. Mink, 410 U.S. 73, 80, 35 L. Ed. 2d 119, 93 S. Ct. 827 (1973); Chilivis v. SEC, 673 F.2d 1205, 1210-11 (11th Cir. 1982); 5 U.S.C. § 552(a)(4)(B).

5 [HN4]Although Amtrak is not a federal agency, it must comply with FOIA's requirements. 49 U.S.C. § 24301(e).

[HN5]"Exemption 5 protects from disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'" Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8, 149 L. Ed. 2d 87, 121 S. Ct. 1060 (2001)(quoting 5 U.S.C. § 552(b)(5)). This provision shields those documents, and only those documents, normally privileged in the civil discovery context. Sears, Roebuck & Co., 421 U.S. at 149. "Stated simply, '[a]gency documents which would not be obtainable by a private [**15] litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5.'" Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999)(quoting Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 557 (1st Cir.1992)); Enviro Tech Int'l, Inc. v. United States EPA, 371 F.3d 370, 2004 WL 1274331, * (7th Cir. 2004)("Conversely, if a private litigant could not obtain certain records from the agency in discovery, Exemption 5 relieves the agency of the obligation to produce that document to a member of the public.").

[HN6]Exemption 5 also includes a "deliberative process privilege." Nadler v. United States Dep't. of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992), abrogated on other grounds by United States Dep't of Justice v. Landano, 508 U.S. 165, 124 L. Ed. 2d 84, 113 S. Ct. 2014 (1993). The purpose of this privilege is to allow agencies to freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny. Klamath Water Users, 532 U.S. at 8-9. [**16]

In addition, [HN7]the privilege "protect[s] against premature disclosure of proposed policies before they have been finally formulated or adopted and protect[s] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." Id. Thus, Exemption 5 covers documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. Sears, Roebuck & Co., 421 U.S. at 150.

[HN8]To fall within the deliberative process privilege, a document must be both "predecisional" and "de-

liberative." Klamath Water Users, 532 U.S. at 8. A "predecisional" document is one prepared in order to assist an agency decision-maker in arriving at his decision and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 945 (11th Cir. 1992); [**17] State of Missouri *ex rel*. Shorr v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998). However, "the privilege does not protect a document which is merely peripheral to [*1278] actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment. Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense." Grand Central P'ship, 166 F.3d at 482 (quoting Ethyl Corp. v. USEPA, 25 F.3d 1241, 1248 (4th Cir. 1994) (internal quotation marks omitted)).

[HN9]A document is "deliberative" if the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and, thereby, undermine the agency's ability to perform its functions. Shorr, 147 F.3d at 710 (citing Assembly of State of California v. United States Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992); Dudman Communications Corp. v. Department of Air Force, 259 U.S. App. D.C. 364, 815 F.2d 1565, 1568 (D.C. Cir. 1987)("[T]he key [**18] question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."). [HN10]The underlying purpose of the deliberative process privilege is to ensure that agencies are not forced to operate in a fish bowl. Dow Jones & Co., Inc. v. Department of Justice, 286 U.S. App. D.C. 349, 917 F.2d 571, 573 (D.C. Cir. 1990)(quotation omitted). Therefore, courts must focus on the effect of the material's release, Schell v. United States Dep't of Health & Human Servs., 843 F.2d 933, 940 (6th Cir. 1988), and conclude that "[p]redecisional materials are privileged 'to the extent that they reveal the mental processes of decision-makers.'" Assembly of State of California, 968 F.2d at 921 (quoting National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988).

Furthermore, [HN11]the Supreme Court has adopted, for Exemption 5 purposes, a distinction between "factual" and "opinion" data. "Exemption 5 . . . requires different treatment [**19] for material reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." Mink, 410 U.S. at 89. The Supreme Court issued this mandate despite its acknowledgment that the task of drawing a line between what is fact and what is opinion can at times be frustrating and perplexing. Florida House of Representatives, 961 F.2d at 947. While it was delineating the contours of the privilege in Sears, Roebuck & Co., the Supreme Court implicitly reaffirmed this fact/opinion distinction by noting that the focus of the deliberative process privilege was "on documents reflecting advisory opinions, recommendations and deliberations. . . ." Id. at 150.

Later, in Federal Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 61 L. Ed. 2d 587, 99 S. Ct. 2800 (1979), [HN12]the Supreme Court explained that the purpose of the privilege for predecisional deliberations is to ensure that a decision-maker will receive the unimpeded advice of his associates. Id. at 359-60. Accordingly, the Supreme Court has held that factual information generally must be disclosed and materials embodying [**20] officials' opinions are ordinarily exempt from disclosure. Petroleum Info. Corp. v. United States Dep't of Interior, 298 U.S. App. D.C. 125, 976 F.2d 1429, 1434 (D.C. Cir. 1992)(citing Mink, 410 U.S. at 87-91)).

In the instant case, we find that the district court erred in concluding that the documents sought by the firm were not protected from disclosure pursuant to the deliberative process privilege. 5 U.S.C. § 552(b)(5). In reaching this conclusion, we agree with Amtrak's assessment that there is no real factual dispute involved in this appeal; rather, the key issue is a legal [*1279] one: whether the district court correctly concluded that the audit work papers and internal memoranda sought by the firm are not protected by the deliberative process privilege because they were not considered by the final decision-maker. Because we believe that the district court took too narrow a view of Exemption 5, we must reverse and remand. [6]

6 Our holding applies equally to the documents identified by the district court as "miscellaneous work papers." Although it is true that these documents were issued after a final audit report, the documents all pertain to decisions as to whether to conduct further audit work in light of the completed audit findings and, therefore, are protected by the deliberative process privilege for the reasons discussed infra.

[**21] Based upon the factual findings made by the district court, we believe that the audit work papers and the internal memoranda at issue are both predecisional and deliberative because Amtrak's evidentiary submissions establish that the entire body of collaborative work performed by Amtrak's OIG auditors document

and contain the comments and notes authored by all levels of auditors working on the BBC-MEC assignment. [HN13]Congress established Amtrak's OIG to ensure, inter alia, that federal funds are used for its intended purpose and to deter fraud, waste, and abuse. Inspector Gen. of USDA v. Glenn, 122 F.3d 1007, 1009 (11th Cir. 1997). Accordingly, Amtrak's OIG is charged with the responsibility to "provide policy direction for, and to conduct, supervise, and coordinate audits and investigations," to recommend policies for promoting efficiency and economy, and to prevent and detect fraud and waste. 5 U.S.C. App. 3 §§ 3, 4.

Furthermore, although the district court acknowledged that Amtrak's OIG issuance of a final audit reported involved certain predecisional judgments and internal consultations which are protected by the deliberative process privilege, [**22] the district court too narrowly construed the scope of the privilege. The linchpin of the district court's reasoning (and our basis for reversal) is found in paragraph fifteen of the district court's conclusions of law. Therein, the district court rejected Amtrak's assertion of privilege as to the audit work papers because "[t]here is no evidence that Glowacki reviewed any of the auditors' working papers after receiving the draft audit report from the Senior Director responsible for the audit. Therefore, I find that the information in the audit working papers was not directly involved in Glowacki's decision-making process." R/E 177.

However, the district court's ruling fails to account for the significant role during the auditing process which the lower level staff play in Amtrak's OIG's deliberative process. Again, as Amtrak's evidence revealed and as the district court's own factual findings establish, the audit work papers document the entire body of collaborative work performed by the auditors and contain: (1) the initial work plan for the audit describing its purpose and objectives as well as the methodologies and sampling techniques which will be used to gather and analyze [**23] the audit data; (2) the staff auditors' notes and/or memoranda summarizing site visits, interviews, meetings, and/or telephone conversations which record the auditors' impressions of the information obtained and his view of the reliability of the information; (3) the auditors' preliminary calculations, findings, and conclusions as well as a description of any additional work the auditor believes is necessary in order to complete an evaluation; and (4) suggestions and critiques from the auditors' peers and superiors, including recommendations for further action.

[*1280] Contrary, to the district court's finding and the firm's assertion, [HN14]Amtrak need not cite to a specific policy decision in connection with which the audit work papers and internal memoranda were prepared in order for these documents to be protected from disclosure by the deliberative process privilege. As the Supreme Court has explained:

> Our emphasis on [HN15]the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing [**24] process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, Roebuck & Co., 421 U.S. at 151-52 n. 18; Vaughn v. Rosen, 173 U.S. App. D.C. 187, 523 F.2d 1136, 1146 (D.C. Cir. 1975)("We are not saying that a 'final decision' is necessary for there to be a 'deliberative process' which is protected by Exemption 5. Rather, we cite the absence of any assured final decision as indicative of the amorphous nature of the mass of information the Government seeks to protect, i.e., the failure of the affidavits relied on to come to grips with and define what it is out of this mass of documents that the Government considers the 'deliberative process' and thus entitled to protection."). Thus, the district court erred in focusing exclusively upon whether the final decision-maker viewed the requested material rather than viewing the entire auditing process as a whole. Id. at 150 (holding that the deliberative process privilege protects "documents reflecting advisory opinions, recommendations, [**25] and deliberations *comprising part of a process* by which governmental policies are formulated.")(emphasis added). Had the district court done so, it would have determined that the audit work papers and internal memoranda were protected by the deliberative process privilege. See Hamilton Sec. Group, Inc. v. HUD, 106 F. Supp. 2d 23, 29-32 (D.D.C. 2000)(holding that the Inspector General's draft audit materials are deliberative materials protected from disclosure by Exemption 5 of FOIA); see also Mead Data Cent., Inc. v. United States Dep't of Air Force, 188 U.S. App. D.C. 51, 575 F.2d 932, 934-35 (D.C. Cir. 1978)(concluding that "cost comparisons, feasibility opinions, and the data relevant to how the personnel involved arrived at those comparisons and opinions are policy deliberative.").

Likewise, the district court's finding that Amtrak failed to carry its burden of proof with regard to establishing the applicability of the privilege is incorrect be-

cause the district court focused solely upon the audit work papers and internal memoranda as it related directly to the decision-maker, Glowacki, rather than viewing these [**26] documents as they related to the entire auditing process. When viewed accordingly, it is clear that Amtrak established that the material was both predecisional and deliberative in character.

For example, Amtrak submitted a detailed declaration from a senior Amtrak OIG auditor, Roy Wiegand, who detailed the nature of the audit process and the role which the audit work papers play in documenting the mental impressions, advice, opinions, and recommendations of the auditors and supervisors at lower levels of the decisional process. Wiegand's testimony was undisputed at the bench trial. [7] [*1281] Thus, it is clear that this material was consultative and deliberative in nature. City of Virginia Beach, Virginia v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (deliberative documents broadly include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.")(internal quotation omitted).

7 Contrary to the firm's assertion otherwise, the district court did not find Wiegand's testimony incredible. In fact, the district court cited Wiegand's uncontradicted declaration as a basis for its findings on the content and purpose of the audit work papers.

[**27] In addition, while it is certainly true that FOIA's purpose is to encourage disclosure, it is equally true that Amtrak's OIG serves a valid public purpose and that this purpose would be hampered if lower level auditors declined to engage in open and frank discussions with supervisors and decision-makers for fear that their comments would be subjected to public scrutiny. Florida House of Representatives, 961 F.2d at 949 ("It defies reason as well as Supreme Court precedent, to then go back and weigh the policies underlying the distinction to decide whether disclosure would in fact discourage frank discussion in some specific case."). Congress established Amtrak's OIG to ensure that federal funds were being appropriately spent, and the enabling statute charged Amtrak's OIG with the responsibility of establishing appropriate audit policies, recommending policies for promoting efficiency and deterring abuse, and referring suspected civil and criminal violations to the Attorney General. 5 U.S.C. App. 3 §§ 3, 4. Amtrak's OIG cannot fulfil these duties and further these policies if the lower level staff auditors' communications with supervisors and decision-makers [**28] are chilled by the fear of having their comments made public.

Nor are we overly concerned that our ruling will necessarily result in Exemption 5 swallowing FOIA's disclosure requirements. On the contrary, in order [HN16]for the deliberative process privilege to apply, the decision-making process must bear a reasonable nexus to the documents sought. Here, we find that such a reasonable nexus exists, and therefore, the audit work papers and internal memoranda sought by the firm are protected from disclosure by Exemption 5. [8]

8 We are not persuaded by the firm's other arguments (1) that Amtrak has waived its argument that the district court applied the wrong standard, (2) that Glowacki's decision regarding whether or not to issue a final audit is not a decision to which Exemption 5 even applies, and (3) that the audit work papers contain certain factual information which is not protected by the deliberative process privilege. Our review of the record persuades us that Amtrak has not waived any arguments for purposes of this appeal. In addition, as discussed supra, Exemption 5 is applicable to the documents sought by the firm. Finally, contrary to the district court's conclusion, [HN17]the selection and sifting of factual materials (as is the case here) may itself be the product of a government agency's deliberative process and, therefore, entitled to the privilege. Lead Indus. Ass'n, Inc. v. OSHA, 610 F.2d 70, 85 (2d Cir. 1979); Montrose Chem. Corp. of California v. Train, 160 U.S. App. D.C. 270, 491 F.2d 63, 68 (D.C. Cir. 1974).

[**29] **V. CONCLUSION**

In sum, we find that the district court took too narrow a view of the deliberative process privilege when it restricted Exemption 5's scope to extend only to those documents which were actually reviewed by the decision-maker Glowacki. In determining whether the deliberative process privilege applied, the district court should have considered whether the documents reflected advisory opinions, recommendations, and deliberations comprising part of a process by which Amtrak's OIG auditing policies were formulated. We hold that, [*1282] applying this standard, Amtrak has satisfied its burden of establishing that the material sought by the firm is both predecisional and deliberative and, thus, protected from disclosure by FOIA's Exemption 5.

Accordingly, we reverse the district court's holding that Amtrak's audit work papers and internal memoranda are not protected from disclosure pursuant to FOIA's Exemption 5 and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

ASSOCIATION OF AMERICAN MEDICAL COLLEGE, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.

No. 98-56190

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

217 F.3d 770; 2000 U.S. App. LEXIS 15855; 2000 Cal. Daily Op. Service 5656; 2000 Daily Journal DAR 7583; 70 Soc. Sec. Rep. Service 181

December 8, 1999, Argued and Submitted, Pasadena, California
July 11, 2000, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV 98-01734 CM. Carlos R. Moreno, District Judge, Presiding.

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Action DISMISSED WITHOUT PREJUDICE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs appealed from the United States District Court for the Central District of California, which dismissed with prejudice, for lack of subject matter jurisdiction, plaintiffs' action for declaratory and injunctive relief regarding defendant's program of audits for reimbursements made to teaching hospitals.

OVERVIEW: The government initiated a nationwide program of audits for reimbursements made to teaching hospitals under Part B of the Medicare Act. Plaintiffs, medical associations and teaching hospitals, brought an action for declaratory and injunctive relief, alleging that the audits were based on unlawful or retroactively applied standards for Medicare billing, and that, on threat of suit under the Federal False Claims Act, the audits were being used to coerce settlements. The district court dismissed the action with prejudice for lack of subject matter jurisdiction. On appeal, the court affirmed on grounds that there was no case or controversy under U.S. Const. art. III and the case was not ripe, but ordered the case dismissed without prejudice. Although plaintiffs were subject to concrete agency action in the form of the audits, the actions were not final. Also, plaintiffs' case fell outside of the Abbot Laboratories rule because the impact of the regulation was not sufficiently direct and immediate.

OUTCOME: Dismissal was affirmed as to ripeness, but case was dismissed without prejudice.

CORE TERMS: audit, teaching, resident, billing, teaching hospitals, carrier, Medicare Act, agency action, physical presence, patient, documentation, laboratory, settlement, reimbursement, countersignature, ripe, ripeness, coding, service performed, subject matter jurisdiction, intern, unripe, services provided, attending physician, citations omitted, judicial review, judicial resolution, declaratory, guidelines, services rendered

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]Dismissal for lack of subject matter jurisdiction is reviewed de novo.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN2]The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN3]For motions to dismiss under Fed. R. Civ. P. 12(b)(1), unlike a motion under Fed. R. Civ. P. 12(b)(6), the moving party may submit affidavits or any other evidence properly before the court. It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction
[HN4]Federal courts are courts of limited jurisdiction. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > General Overview
Public Health & Welfare Law > Social Security > Medicare > Appeals Process & Judicial Review
[HN5] 42 U.S.C.S. § 405(h) (as incorporated into the Medicare Act through 42 U.S.C.S. § 1395ii), is a complete bar to federal question jurisdiction for claims arising under the Medicare Act unless application of 42 U.S.C.S. § 405(h) would not simply channel review through the agency, but would mean no review at all.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
[HN6]See 42 U.S.C.S. § 405(h).

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion
[HN7]It is well settled that injunctive and declaratory judgment remedies are discretionary, and courts traditionally are reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. The basic purpose of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. Thus, in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN8]Under the first prong in evaluating ripeness, the fitness of the issue for judicial decision, agency action is fit for review if the issues presented are purely legal and the regulation at issue is a final agency action. Courts traditionally take a pragmatic and flexible view of finality. The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. The court looks to the following elements: whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN9]The general rule is that administrative orders are not final and reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. The court will not entertain a petition where pending administrative

proceedings or further agency action might render the case moot and judicial review completely unnecessary. Informal or "tentative" regulations are not final.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN10]Even final agency rules may not be fit for review unless the rule has been concretely applied to the plaintiff.

Administrative Law > Agency Investigations > General Overview
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN11]An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action.

Civil Procedure > Justiciability > Ripeness > General Overview
[HN12]A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

Administrative Law > Judicial Review > Reviewability > Ripeness
Trademark Law > Special Marks > Trade Names > General Overview
Trademark Law > Subject Matter > Names > Generic Names > General Overview
[HN13]A pre-enforcement challenge to a regulation may be ripe where the impact of the regulation is sufficiently direct and immediate.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN14]Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some unusual circumstance.

Administrative Law > Judicial Review > Reviewability > Ripeness
[HN15]Courts typically read the Abbott Laboratories rule to apply where regulations require changes in present conduct on threat of future sanctions.

COUNSEL: Leonard C. Homer, Baltimore, Maryland, and Harry R. Silver, Washington, D.C., for the plaintiffs-appellants.

Peter Robbins, United States Attorney, Civil Division, for the defendant-appellee.

JUDGES: Before: Betty B. Fletcher, Alex Kozinski, & David R. Thompson, Circuit Judges. Opinion by Judge B. Fletcher.

OPINION BY: Betty B. Fletcher

OPINION

[*773] B. FLETCHER, Circuit Judge:

This is an action for declaratory and injunctive relief brought by the American Association of Medical Colleges, the American Medical Association, a host of other medical associations, and numerous teaching hospitals against the Office of the Inspector General for the Department of Health and Human Services and the Department of Justice. Plaintiffs allege that the government has initiated a nationwide program of audits for reimbursements made to teaching hospitals under Part B of the Medicare Act, that the audits are based on unlawful or retroactively applied standards for [**2] Medicare billing, and that, on threat of suit under the False Claims Act, the audits are being used to coerce settlements. The district court dismissed the action for lack of subject matter jurisdiction on defendant's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, ruling that the action is premature because there has been no final agency action, plaintiffs have adequate alternative remedies, and the issues are not ripe for adjudication. Although we affirm on grounds that there is no case or controversy under Article III of the Constitution, we order the case dismissed without prejudice.

Facts and Procedural History

This case arises out of efforts by the Secretary of Health and Human Services (the "Secretary") to review Medicare Part B billings by teaching hospitals and to recover potential overpayments for services rendered by such hospitals to Medicare beneficiaries. The review is called [*774] the Physicians at Teaching Hospitals ("PATH") program, and is conducted in the form of audits by the HHS's Office of the Inspector General ("OIG"). [1] After a PATH audit of the billings submitted by the University of Pennsylvania Health System produced a settlement [**3] of over $ 30 million for the government for Medicare claims submitted between 1989 and 1994, the review was extended to teaching hospitals nationwide. The key findings in the University

of Pennsylvania PATH audit were (1) a lack of documentation showing the physical presence of the teaching physician during a service performed by a resident and subsequently billed for payment under Medicare Part B, and (2) "upcoding" - i.e., billing for a more complex level of care than that which was provided. According to the government, services performed by a resident may be billed to Medicare Part B by a teaching physician only if that physician was present during the performance of the service.

> 1 Audits initiated by OIG offer hospitals the choice of either submitting to audit directly by OIG ("PATH I"), or paying for their own OIG approved auditor ("PATH II"). The Department of Justice ("DOJ") has also cooperated with OIG by initiating its own investigations under the False Claims Act.

Plaintiffs, comprising nearly all [**4] the major medical associations in the country along with several major teaching hospitals currently subject to PATH audits, filed a complaint in October 1997, alleging (1) that the PATH audits apply billing requirements beyond those set forth in the Medicare Act and HHS regulations, and (2) that the audits are being used along with the threat of ruinous penalties under the False Claims Act to coerce settlements. Fourteen plaintiff hospitals and affiliated practice groups were subject to PATH audits as of February 1998. At least one audit has concluded with a finding of no Medicare fraud or abuse and at least one plaintiff (the University of California) has been named in a qui tam suit by an individual who alleges Medicare fraud in the hospitals' Part B billings. [2] A brief review of the billing requirements historically imposed on teaching hospitals will illustrate why plaintiffs are so deeply concerned by the PATH audits.

> 2 Unless the government has decided to intervene, the qui tam suit will presumably be short lived. *See* *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) (state is not a "person" under False Claims Act where private individual brings suit).

[**5] Title XVIII of the Social Security Act of 1935 establishes a federally subsidized health insurance program for elderly and disabled persons. 42 U.S.C. § 1395 (the "Medicare Act"). While Part A of the Medicare Act covers institutional health costs, such as hospital expenses (e.g., room, board, nursing, residents' salaries, and other inpatient care costs), *see* 42 U.S.C. §§ 1395c-1395i-2, Part B covers medical services provided directly to individuals on a fee-for-service basis such as physician services, medical supplies, and diagnostic/laboratory tests. *See* 42 U.S.C. §§ 1395j-1395w. Coverage and payment for services rendered to beneficiaries is administered by the Secretary through the Health Care Financing Administration ("HCFA"). For Medicare Part B claims, the HCFA contracts with approximately 34 private insurance companies nationwide ("Carriers") to process claims and to perform payment safeguard functions. *See* 42 U.S.C. § 1395u.

In order to obtain payment for Part B services rendered at teaching hospitals, the regulations traditionally required (1) that the teaching physician [**6] establish an "attending physician" relationship with the patient, and (2) that the services rendered be "of the same character, in terms of the responsibilities to the patient that are assumed and fulfilled," as the services provided to paying patients. 20 C.F.R. § 405.521 (1968). Although payment of residents' salaries is covered under Medicare Part A, services performed by residents *under the direction of teaching* [*775] *physicians* qualified for Part B reimbursement where (1) the teaching physician furnished "personal and identifiable direction to interns or residents who are participating in the care of his patient," or (2) in the case of "major surgical procedures and other complex and dangerous procedures or situations," the attending physician provided direction "in person." 20 C.F.R. § 405.521(b) (1968).

With respect to documentation of the teaching physician's role in services provided, HCFA simply required that "performance of the activities . . . must be demonstrated, in part, by notes and orders in the patient's records that are either written by or countersigned by the supervising physician." Bureau of Health Insurance Intermediary Letter No. 372, at 3 (April 1969). In [**7] other words, countersignature by the teaching physician would adequately document his or her personal supervision of services provided to the patient. *See id.*; Bureau of Health Insurance Intermediary Letter No. 70-2 (January 1970) (answer to question # 22).

In 1980, Congress amended the Medicare Act, incorporating the medical direction standard set forth in 20 C.F.R. § 405.521 (1968), but omitting any reference to the "attending physician" concept or the personal presence requirement for major surgery and dangerous or complex procedures. As amended, the Act provided that no payment may be made for teaching physician services unless the 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 payment is sought [and] the services are of the same character as the services the physician furnishes to patients not entitled to benefits under this subchapter . . . .

42 U.S.C. § 1395u(b)(7)(A)(i)(I)-(II) (1980).

The Secretary and HCFA have repeatedly acknowledged that, at least prior to 1996, the standards for personal presence [**8] and documentation by teaching physicians were less than clear. *See* 60 Fed. Reg. 63,138 (Dec. 8, 1995) (Secretary concedes that I.L. 372 is "vague, perhaps necessarily, on the matter of the presence of the physician during . . . occasions of inpatient service"); Letter from Harriet Rabb, HHS General Counsel to Jordan J. Cohen, M.D., President of the Assn. of American Medical Colleges, and P. John Seward, M.D., Executive Vice President of the American Medical Association 4 (July 11, 1997) (the "Rabb Letter") (stating that "the standards for paying teaching physicians under Part B of Medicare have not been consistently and clearly articulated by HCFA over a period of decades"); *The Physicians at Teaching Hospitals (PATH) Audits: Hearings before the Subcomm. on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations*, 105th Cong. 35 (1997) ("*PATH Hearings*") (testimony of HCFA representative Wynn) ("HCFA has not articulated within IL 372 or some of its other policy issuances a clear and unambiguous policy that the physician needed to be present. There are some explicit statements that the physician should be present in supervising the interning [**9] resident; in other cases, it's vague."); *PATH Hearings*, at 5 (statement of Michael F. Mangano, Principal Deputy Inspector General, HHS) (acknowledging that HHS's policy documents "often used the terms 'personal and identifiable services' and 'personal and identifiable direction' interchangeably," and that while some policy documents were clear about physician presence, others "were not as distinctly stated").

Presumably in an effort to address ambiguity in the statutory and regulatory requirements for Part B reimbursements, Carriers often issued policies and guidance to teaching hospitals articulating their view of the personal presence and documentation requirements. These policies varied widely by Carrier in terms of the degree of physician involvement required. As the Complaint alleges, the rules [*776] "ranged from merely repeating or paraphrasing the text of the regulation or I.L.372 to improperly adding additional requirements for physical presence and documentation thereof not found in, or inconsistent with, § 1395u(b)(7), § 405.521, and/or I.L.372." Compl. Par. 31; *see also* 54 Fed. Reg. 5948 (1989) (admitting that existing regulations were somewhat unclear [**10] and were interpreted differently by different teaching hospitals); *cf. PATH Hearing*, at 5 (statement of Mangano) (estimating that 75% of teaching hospitals received clear guidance from Carriers requiring physical presence of physician for all services billed under Medicare Part B).

On December 8, 1995, after years of struggling with the issue, the Secretary published final regulations revising the requirements for Part B Medicare claims by teaching physicians. *See* 42 C.F.R. §§ 415.150-190 (effective July 1, 1996). According to the new regulations, payment for services performed by residents and directed by teaching physicians is limited to services for which the teaching physician is *physically present*. *See id*. at § 415.172. Both the "attending physician" and the "of the same character" requirements are eliminated. Moreover, the new regulations require more than a mere countersignature of the resident's notes by the teaching physician as documentation of personal presence. "The medical records must document [that] the teaching physician was present at the time the service is furnished." *Id.*

In 1995, HCFA and the American Medical Association also adopted new [**11] documentation guidelines for coding and billing of so-called evaluation and management ("E & M") services. The guidelines were based on regulations originally promulgated in 1991. *See* 56 Fed. Reg. 59,502, 59,792-801 (Nov. 25, 1991) (effective Jan. 1, 1992). E & M services include basic diagnostic services provided by physicians during office or bedside visits such as taking a patient's medical history, the history of the medical problem, physical examination, diagnosis and counseling. Prior to the new guidelines, coding and billing of E & M services occurred in terms of a few simple phrases designating the time and comprehensiveness of the service. The new guidelines reflect a dramatic change, requiring precise designation of codes from an extensive set of descriptions of E & M services in the AMA manual of current procedural technology ("CPT-4 Manual").

As soon as the PATH initiative began, plaintiffs complained that OIG and DOJ were retroactively applying the new 1996 physical presence and documentation requirements as well as the 1995 guidance on E & M coding in audits covering the period 1990-96. The AAMC and AMA raised their concerns with the agency and on July 11, 1997, Harriet [**12] Rabb, General Counsel to the Secretary, issued a responsive letter. As with all agency communication on the PATH audits, the letter begins by insisting that, however ambiguous the agency's regulations have been, physical presence of the teaching physician is essential to reimbursement under Medicare Part B for services performed by residents:

> As you know, supervision of interns and residents by teaching physicians is reimbursed under Medicare Part A through graduate medical education (GME) payments. By this mechanism, teaching physicians are paid for taking responsibility for the hospital's oversight of its doctors in training. *It would be absurd to assert that physicians could re-*

> *ceive the significant remuneration that characterizes Part B reimbursement for supplying the same level of services that qualifies and was paid for as Part A services*. The *physical presence of a physician* with the treating intern or resident *at the time of treatment* is one clear indication of a more patient-specific level of responsibility for the physician entitling her or him to Part B, rather than Part A, reimbursement. That view is consistent both with common sense and the [statutory [**13] and regulatory history].

[*777] Rabb Letter at 1-2 (emphasis added); *see also PATH Hearings*, at 4 (statement of Mangano) ("In light of [the] direct and indirect payments for training, the teaching physicians may not submit claims for payment to Medicare Part B for the same general supervision of residents and interns already paid for under Part A. Teaching physicians seeking reimbursement under Part B must do more. Physicians claiming Part B reimbursement for services performed by the intern or resident alone are making a duplicate claim . . . ."); June Gibbs Brown, Inspector General, HHS, Status Report: OIG/DOJ Joint Project Review of Medicare Part B Billings by Physician Group Practices at Teaching Hospitals 4 (1996) (same). [3]

> 3 Plaintiffs' view is diametrically opposed. According to the President of the AAMC, for the last 30 years teaching physicians have understood the regulations to require the physical presence of the physician for major surgeries and all other complex procedures. But for simple procedures, Medicare Part B billing was acceptable so long as the teaching physician established an "attending physician" relationship with the patient and provided *medical direction* to the residents involved in providing care to the patient. Also, a countersignature on the patient's medical records was adequate documentation of the physician's role:
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> > In the cases of major surgery and other complex procedures, in order to bill for the services, the teaching physician must have been physically present, elbow-to-elbow with the resident and prepared to perform the procedure if necessary. That standard was clear, everyone understood it and everyone should be held accountable to it.
> >
> > The majority of cases, however, do not involve major surgery or other complex procedures . . . .
> >
> > The teaching physician's presence is obviously required to provide medical direction, and HCFA stipulated that countersignature, countersigning the note in the medical record written by the involved resident provided presumptive evidence of that presence for billing purposes.
> >
> > The [Inspector General] has interpreted HCFA's medical direction standard to require the teaching physician to be elbow-to-elbow with the resident in these nonsurgical instances [and] the Inspector General is insisting that contrary to the standard practice in this country for 30 years or more since Medicare was enacted that countersignature does not constitute adequate documentation of the teaching physician's presence when IL 372 clearly stipulated that that was an adequate documentation. We've attempted on a number of occasions to persuade the Inspector General that the relevant language in the governing Medicare laws and regulations do not support the present PATH audit parameters, but thus far, the IG has insisted on an interpretation of those governing standards that simply does not conform to the reality of the time.
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> *PATH Hearings*, at 15-16 (testimony of Jordan J. Cohen, M.D.).

[**14] The Letter nevertheless goes on to make several assurances regarding future PATH audits. First, Rabb states that due to regulatory confusion as to the proper standard for teaching physician presence, only teaching hospitals that previously received clear written guidance from their Carrier that physical presence was necessary will be subject to PATH audits. [4] Second, any hospital approached for a PATH audit "will 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 . . . ." Rabb Letter at 6. Third, unless it is auditing a

hospital's compliance with the physical presence requirement, OIG will not audit a hospital's E & M coding. *Id.* Finally, because hospitals were still training on the new coding [*778] rules, only "egregious cases of abuse or fraud" in E & M coding will be pursued for the period prior to August 1995. *Id.*

4 The letter states:

> The OIG will undertake PATH audits only where carriers, before December 30, 1992, issued clear explanations of the rules regarding reimbursement for the services of teaching physicians. Thus, claims for services of teaching physicians will be considered for a PATH I or II audit only where a carrier provided written guidance stating that Part B reimbursement for teaching physician services would be limited to . . . when the teaching physicians either *personally furnished services* to Medicare beneficiaries *or were physically present* when the services were furnished by interns or residents.

Rabb Letter at 5 (emphasis added).

[**15] Plaintiffs filed their complaint just a few months after the Rabb Letter. They allege that OIG has impermissibly elevated Carrier policies to legal requirements for purposes of assessing Medicare Part B payments. They also challenge the E & M auditing and the government's determination that a physician's countersignature (on medical reports drafted by residents) is insufficient to establish the physician's presence. Plaintiffs charge that these actions violate the Medicare Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment. Compl. Par. Par. 72-76. On the due process front, plaintiffs claim that the PATH is unconstitutional to the degree that (1) Carrier guidance rather than national standards set forth in the Medicare Act and relevant agency regulations now determines whether a hospital will be audited, *id.* Par. 73, (2) audited hospitals are not permitted to submit evidence outside the records reviewed by the auditors, *id.* Par. 77, and (3) the audits are predicated on inappropriately small statistical samples of hospital billing records. *Id.* at Par. (e). Plaintiffs also claim that the government's coercive use of potential False Claims [**16] Act liability to "obtain participation in an OIG/DOJ team audit process and thereby [favorable settlements] . . . is a violation of the doctrine of unconstitutional conditions and an abridgement of [plaintiffs'] due process rights . . . ." *Id.* at Par. 79. Plaintiffs seek declaratory and injunctive relief.

When plaintiffs moved for summary judgment, the government opposed the motion and filed a separate motion to dismiss for lack of subject matter jurisdiction. Finding the action premature, the district court granted the motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure and entered judgment for the government. The court reasoned that the government's actions are not reviewable under the Administrative Procedure Act because the actions are not final and plaintiffs may challenge the legality of the actions in any False Claims Act suit brought by the government if and when a PATH audit reveals misconduct and the government decides to sue. Following *Texas v. United States*, the court further held that plaintiffs' action fails on ripeness grounds because the complaint seeks to enjoin and declare invalid "contingent future events that may not occur [**17] as anticipated, or indeed may not occur at all." 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (internal quotation marks omitted). We have jurisdiction to review the court's order pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

Standard of Review

[HN1]Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998). [HN2]The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. *See Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989). [HN3]For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), the moving party may submit affidavits or any other evidence properly before the court . . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary [**18] to resolve factual disputes.

St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (citations omitted); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994) ([HN4]"Federal courts are courts of limited jurisdiction . . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of [*779] establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted).

Discussion

I. 42 U.S.C. § 405(h)

After we heard oral argument in this case, the Supreme Court decided *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 146 L. Ed. 2d 1, 120 S. Ct. 1084 (2000). [HN5]In *Illinois Council*, the Court held that 42 U.S.C. § 405(h) (as incorporated into the Medicare Act through 42 U.S.C. § 1395ii), is a complete bar to federal question jurisdiction for claims arising under the Medicare Act unless "application of § 405(h) would not simply channel review through the agency, but would mean no review at all." 120 S. Ct. at 1096-97. [HN6]Section [**19] 405(h) provides:

> The findings and decisions of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. *No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter*.

42 U.S.C. § 405(h) (emphasis added). Because the Act provides an administrative mechanism for reviewing the nursing home sanction provisions at issue in *Illinois Council*, the Court held that plaintiffs could not escape the § 405(h) bar. [5]

> 5 The Court so held notwithstanding plaintiffs' insistence that they could not avail themselves of the administrative review process because to do so they would have to risk termination of their provider agreements. 120 S. Ct. at 1098.

[**20] Following *Illinois Council*, we are obliged to inquire whether there is an administrative channel for review of adverse determinations following a PATH audit. If such a channel exists, § 405(h) precludes this suit. The short answer is that there are administrative channels of review for some, but not all, of the courses of action open to OIG and the Secretary once violations of the Act are identified. [6] But because we do not know which course the agency will pursue, we cannot decide whether § 405(h) applies at this juncture.

> 6 Under the Inspector General Act of 1978, "each Inspector General shall report to and be under the general supervision of the head of the [agency] involved . . . ." 5 U.S.C. App. 3 § 3(a). The Inspector General is authorized to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [the agency]." *Id.* § 4(a)(1). If an audit discloses potential criminal liability, OIG must report "expeditiously to the Attorney General." *Id.* at § 4(d). DOJ may then bring criminal charges or a civil action under the False Claims Act. Otherwise, the Secretary retains discretion to pursue administrative sanctions. If the Secretary proceeds under 42 U.S.C. §§ 1320a-7, 1320a-7a(a), 1395ff, or 31 U.S.C. §§ 3801-3812, the § 405(h) bar arguably applies.

[**21] *II. Ripeness*

[HN7]It is well settled that "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). The basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. Thus, in evaluating ripeness, courts assess "both the fitness of [*780] the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

A. Fitness for Judicial Review

[HN8]Under the first prong, "agency action [**22] is fit for review if the issues presented are purely legal and the regulation at issue is a final agency tion." *Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992) (citations omitted). Courts traditionally take a pragmatic and flexible view of finality. *See Abbott Laboratories*, 387 U.S. at 149-50. "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992). We have accordingly looked to the following elements: whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms. *See Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990), *see so Anchorage*, 980 F.2d at 1323; *Ukiah Valley Medical Ctr. v. Fed. Trade Comm'n*, 911 F.2d 261, 264 (9th Cir.

1990) [**23] ([HN9]"The general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'") (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)); *Sierra Club v. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary.") (citation omitted). Informal or "tentative" regulations are not final. *See Abbott Laboratories*, 387 U.S. at 151.

[HN10]The Supreme Court has recently held that even final agency rules may not be fit for review unless the rule has been concretely applied to the plaintiff. *See Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) ("a regulation is not ordinarily considered . . . 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, [**24] and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him"; holding unripe a general challenge to Bureau of Land Management's "land withdrawal review program").

The core issues in plaintiffs' challenge to the PATH audits are indeed purely legal: (1) whether OIG can apply Carrier policies on physical presence when the Medicare Act and applicable regulations were ambiguous on the physical presence requirement; (2) whether OIG can require more than the teaching physician's countersignature to establish the physician's presence and supervisory role; and (3) whether the 1995 E & M coding standards are retroactively enforceable.

Although judicial resolution of these important questions might aid the parties, the challenged agency actions are not final. Even if we were to assume that OIG has taken a definitive position on the nature and scope of the PATH audits - i.e., that physical presence is required for all services and that countersignature is inadequate documentation of presence [7] - the [*781] audits themselves do not "impose an obligation, deny a right, or fix some legal relationship [**25] as a *consummation* of the administrative process." *Chicago & S. Air Lines*, 333 U.S. at 113 (emphasis added). [HN11]An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action. *See Jobs, Training & Services, Inc. v. East Tex. Council*, 50 F.3d 1318, 1324-25 (5th Cir. 1995) ("'An agency's initiation of an investigation does not constitute final agency action.' . . . Judicial intervention at [the investigative] stage will deter rather than foster effective administration of the statute.") (quoting *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994)); *Winter v. California Medical Review Inc.*, 900 F.2d 1322, 1325-26 (9th Cir. 1990) (since the agency's conclusions could change with additional information "appellant's claim that the investigation itself represented final agency action lacks merit . . . . This court must give the agency an opportunity to formulate a final position."); *O'Brien, Inc. v. Sec. & Exch. Comm'n*, 704 F.2d 1065, 1067 n.6 (9th Cir. 1983) ("District court review of the propriety of SEC actions in its investigation [**26] would . . . have been inappropriate because 'final agency action,' a prerequisite to judicial review, had not yet occurred.") (citing *Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980)), *rev'd on other grounds*, 467 U.S. 735 (1984); *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1235 (5th Cir. 1979) (SEC and DOJ investigation is not final agency action).

> 7 The assumption is not unwarranted given the agency's repeated claim that Part B cannot cover any services residents perform in the absence of their instructors. Nevertheless, it is worth noting that of the numerous declarations submitted by deans at teaching hospitals currently subject to PATH audits, none aver that Carrier physical presence requirements, as opposed to Medicare Act or DHHS regulatory mandates, are or will be used to assess Medicare Part B billings. Thus, we have no way of knowing what standards OIG is actually using in plaintiffs' PATH audits.
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> Moreover, the Rabb Letter and subsequent communication from the OIG suggest that the agency has been willing to shift the parameters of the PATH audit in response to plaintiffs' concerns. Indeed, the transition from nationwide audits to audits focused on hospitals who received clear Carrier guidance reflects just such a shift. *See also* Declaration of George Reeb, Assistant Inspector General for HCFA Par. Par. 3, 5 (Feb. 12, 1998) (indicating that PATH audits will focus on a twelve-month period between 1994 and 1996, and that PATH audit results will not be finalized or forwarded to the Attorney General until after the audited entity has had an opportunity to review the findings, provide additional information or documents and submit a response).

[**27] More importantly, on the facts before this court it is an open question whether the PATH audits will actually result in findings of abuse or fraud. For obvious reasons, plaintiffs have not admitted in their pleadings that they stand in violation of the Medicare Act as interpreted by OIG. We might infer this fact, but its absence from the *record* demonstrates a lack of finality.

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 to review under 42 U.S.C. § 405(h) and *Illinois Council*. *See supra* § I. And only one of those remedies (settlement under threat of False Claims Act liability) presents the dire Hobson's choice plaintiffs complain of.

As a review of recent Supreme Court precedent confirms, the district court properly concluded that these uncertainties render plaintiffs' action unfit for judicial resolution at this time. In *Texas v. United* [**28] *States*, the Supreme Court considered a ripeness challenge to an action brought by the State of Texas seeking a declaratory judgment that preclearance provisions of the Voting Rights Act do not apply to state laws permitting sanctions for local school districts that fail to meet state-mandated performance criteria. 523 U.S. at 297-98. The Court deemed the case unfit for judicial resolution because the feared sanctions that [*782] would implicate Voting Rights Act preclearance were contingent on a host of factors: (1) a school district falling below the state standards; (2) imposition of lesser sanctions required by the applicable state law; and (3) a determination that the lesser sanctions failed and that greater sanctions are necessary. *Id.* at 300-01. As the Court stated:

> [HN12]A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all . . . . Under these circumstances, where we have no idea whether or when such [a sanction] will be ordered, the issue is not fit for adjudication.

Id. at 300 (internal quotation marks and citations omitted).

In [**29] *Ohio Forestry Ass'n, Inc. v. Sierra Club*, the Sierra Club "challenged the lawfulness of a federal land and resource management plan adopted by the United States Forest Service for Ohio's Wayne National Forest on the ground that the plan permits too much logging and too much clearcutting." 523 U.S. 726, 728, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998). Although the plan made logging possible, and even likely, the Court dismissed the case as unripe because the plan itself did "not authorize the cutting of any trees." *Id.* at 729. The Forest Service was required to take at least five additional steps beyond the plan before permitting any logging. *Id.* at 729-30. Accordingly, the Court held that immediate judicial review would unnecessarily interfere with the administrative process and would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would take place without the benefit of the focus that a particular logging proposal could provide [**30] . . . . And, of course, depending upon the agency's future actions to revise the Plan or modify the expected methods of implementation, review may now turn out to have been unnecessary . . . . *All of this is to say that further factual development would "significantly advance our ability to deal with the legal issues presented" and would "aid us in their resolution.*"

Id. at 736-37 (emphasis added) (citing *Standard Oil Co.*, 449 U.S. at 242, and quoting *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 82, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978)). *See also Dalton v. Specter*, 511 U.S. 462, 469-70, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994) (Secretary of Defense's and commission's recommendations for base closures not final agency action where President's approval is a prerequisite to actual base closures) (following *Franklin*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767); *Nat'l Wildlife Federation*, 497 U.S. at 890-91 (BLM's general land management program is not final agency action for purposes of ripeness; plaintiffs must await concrete, particular application [**31] of program).

Although plaintiffs are currently subject to concrete agency action in the form of PATH audits (and plaintiffs' case is therefore less abstract than the claims asserted in *Texas v. United States* and *Ohio Forestry*), the actions are not final and their outcomes turn on contingencies which the court is ill-equipped to predict. Plaintiffs' case would indeed be moot if the auditors are not relying on Carrier rules and retroactive application of the 1995 E & M guidelines. Plaintiffs' case would also be moot if the OIG/DOJ teams decide to abandon reliance on these standards, if the audits turn up no Medicare billing violations, or if coercion is absent from settlement negotiations after violations are found.

B. The Balance of Hardships

Perhaps recognizing the weakness of their claims under the first prong of the [*783] ripeness analysis, plaintiffs stress an exception that has been recognized under the hardship prong. [HN13]In *Abbott Laboratories*, the Supreme Court held that a pre-enforcement

challenge to a regulation may be ripe where the impact of the regulation is "sufficiently direct and immediate." 387 U.S. at 152. At issue was a regulation requiring drug [**32] manufacturers to designate the generic name of a drug on labels and advertisements where the drug's trade name was printed. Although plaintiffs believed that the regulation exceeded the statutory provision from which it derived, failure to comply immediately opened the possibility of product seizure as well as severe criminal and civil penalties. As the Court described the plaintiffs' dilemma, "'either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.'" *Id.* (quoting district court findings). The Court therefore concluded:

> [HN14]Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some unusual circumstance, neither of which appears here.

Id. at 153.

Strictly speaking, plaintiffs' case falls outside the *Abbott* [**33] *Laboratories* rule since the PATH initiative is not a final rule and it relates to liability for past billing practices rather than requiring a costly change in present conduct. [HN15]Courts typically read the *Abbott Laboratories* rule to apply where regulations require changes in present conduct on threat of future sanctions. *See, e.g., Ohio Forestry*, 523 U.S. at 734 (plaintiff is outside *Abbott Laboratories* rule where agency plan does not "force [plaintiff] to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through threat of future sanctions") (citing *Abbott Laboratories*, 387 U.S. at 152-53; *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417-19, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942)). However, plaintiffs are faced with a similar dilemma. If they enter settlement agreements predicated on audit standards that exceed the requirements of the Medicare Act and applicable regulations, they will simultaneously waive their right to challenge the audit standards in court. *See, e.g.*, *Aulenback, Inc. v. Fed. Highway Admin.*, 322 U.S. App. D.C. 250, 103 F.3d 156, 161-62 (D.C. Cir. 1997) [**34] (settlement with agency moots legal challenge to rules applied to induce settlement). On the other hand, if they refuse to settle, they face potentially ruinous liability under the False Claims Act. [8]

> 8 As in *Abbott Laboratories*, plaintiffs here "deal in a sensitive industry, in which public confidence . . . is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and ly." 387 U.S. at 153. Indeed, plaintiffs argue that their goodwill and status as teaching hospitals could be irreparably harmed by allegations, let alone findings, of False Claims Act liability for Medicare fraud. And the audits themselves are costly and onerous, taking precious time and resources away from hospital administration and patient care.

But this argument assumes that plaintiffs face an immediate Hobson's choice. Since none of the PATH audits pending against plaintiffs are complete, however, we have no evidence [**35] that the government has threatened litigation to obtain settlements. The rule in *Abbott Laboratories* has been carefully circumscribed to regulations that pose an immediate dilemma. Because the Commissioner of Food and Drugs expected immediate compliance with the new regulations, the companies in *Abbott Laboratories* faced an immediate [*784] choice between adjusting their businesses or disregarding the new rules. *See also Nat'l Wildlife Federation*, 497 U.S. at 891 (although pre-enforcement review is normally precluded, "the major exception . . . is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately") (citing *Abbott Laboratories*). Here, however likely plaintiffs think a settlement/FCA litigation choice may be, the choice is not before them yet, and because the PATH initiative reaches only past conduct, nothing but participation in the audits is demanded of them at present.

The boundaries of the *Abbott Laboratories* exception are confirmed by another decision the Supreme Court issued on the same day. In *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967), [**36] the Court upheld the dismissal of a pre-enforcement challenge by a cosmetics industry group to regulations promulgated by the Food and Drug Commissioner. The regulations permitted the Commissioner to suspend certification services to any company that refused to allow agency employees to inspect the facilities and processes used in preparing color additives for cosmetic products. Applying the reasoning of *Abbott*

Laboratories, the Court found the action unripe because the impact of the regulation was not "felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* at 164. As the Court reasoned:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order . . . . We believe that judicial appraisal of these factors is likely to stand on a much surer [**37] footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here . . . .
>
> Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection.

Id. at 163-65 (emphasis in original).

At this juncture, we can only speculate whether the PATH audits will result in findings of Medicare violations and threats of prosecution under the False Claims Act. Absent a coercive threat of prosecution, plaintiffs' claim is unripe. [9]

> 9 Plaintiffs' unconstitutional conditions argument mirrors the *Abbott Laboratories* claim and fails for the same reasons. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994) ing *Ex parte Young*, 209 U.S. 123, 148, 52 L. Ed. 714, 28 S. Ct. 441 (1908)).
>
> We also reject plaintiffs argument that "federal question jurisdiction exists whenever substantial constitutional violations are alleged." Appellants' Opening Brief at 34. In support of this proposition, plaintiffs cite a late *Lochner* era takings case and an obscure footnote in a Ninth Circuit Equal Access to Justice Act attorney fees case. *See South Covington & C. St. Ry. Co. v. City of Newport*, 259 U.S. 97, 66 L. Ed. 842, 42 S. Ct. 418 (1922); *Foster v. Tourtellotte*, 704 F.2d 1109 (9th Cir. 1983).
>
> In *South Covington*, the Supreme Court found federal subject matter jurisdiction in an action to enjoin enforcement of a municipal resolution which directed immediate removal of a high-tension wire used to run electrical current in support of plaintiff's perpetual franchises for operating street cars in Newport, Kentucky. Finding "a substantial claim under the Constitution" that the city's action would amount to a taking, the Court held that jurisdiction would not be defeated merely because the city's answer disclaimed an intention to enforce the resolution "except through an order of court." 259 U.S. at 100 (noting that the "denial went to the merits of the claim" and could not, therefore, defeat jurisdiction). In *Foster*, we merely noted the well recognized rule that, for purposes of establishing federal question jurisdiction, "[a] claim of constitutional violation need not be proven." 704 F.2d at 1111 n.2. Rather, federal courts will exercise jurisdiction unless the constitutional claim "'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682-83, 90 L. Ed. 939, 66 S. Ct. 773 (1946)).
>
> But even if federal question jurisdiction may be established by pleading a substantial constitutional claim, the claim must still be ripe for review before courts will exercise jurisdiction. In *South Covington*, the claim was presumably ripe because the city's resolution created the prospect of imminent, forcible removal and destruction of the company's property. Although the Court held that the city's denial of an intention to act in the absence of a court order could not defeat jurisdiction, the holding was predicated on the rule that jurisdiction "must be determined on the allegations of the bill." *South Covington*, 259 U.S. at 99. This rule predates modern Rule 12(b)(1) practice, which allows the court to look beyond the bare allegations of the complaint in order to determine the existence of jurisdiction. Whether statutory or constitutional in origin, an unripe claim is not justiciable.

[**38]

[*785] *Conclusion*

Having held that plaintiffs' case is unripe, we AFFIRM its dismissal for want of jurisdiction. However, we REVERSE the district court's dismissal with prejudice

and the entry of judgment for the United States. In the time since judgment was entered the PATH audits may have progressed at any number of hospitals to a point where plaintiffs' claims are ripe. Accordingly, the action is DISMISSED WITHOUT PREJUDICE.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LEXSEE

Analysis
As of: Mar 18, 2011

TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION ON BEHALF OF ITS TEMPLE UNIVERSITY CLINICAL FACULTY PRACTICE PLANS TEMPLE UNIVERSITY SCHOOL OF MEDICINE, v. * JANET REHNQUIST, INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES; * TOMMY G. THOMPSON, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES, Temple University--of The Commonwealth System of Higher Education, on behalf of its Temple University Clinical Facility Practice Plans ("Temple"), Appellant

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

No. 01-3862

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

46 Fed. Appx. 124; 2002 U.S. App. LEXIS 19052

June 25, 2002, Argued
August 20, 2002, Filed

NOTICE: [**1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (Dist. Court No. 00-cv-01063). District Court Judge: Honorable William H. Yohn, Jr.
Temple Univ. v. Brown, 2001 U.S. Dist. LEXIS 1937 (E.D. Pa. Feb. 23, 2001).

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: After appellee Inspector General (OIG) of the Department of Health and Human Services decided to conduct a Physicians at Teaching Hospitals (PATH) audit of Medicare claims filed by appellant university's school of medicine, the university sought judicial review. The United States District Court for the Eastern District of Pennsylvania dismissed the suit under Fed. R. Civ. P.12(b)(1) for lack of jurisdiction. The university appealed.

OVERVIEW: The district court held that the decision to audit the university was not the definitive position of the OIG in this matter, because a PATH audit was only the beginning of a process that might or might not end in a decision to pursue an action under the False Claims Act. The appellate court agreed. The initiation of the audit was not even a determination of a "reason to believe" that the university was in violation of the Medicare Act, let alone any definitive determination of its liability. The university failed to show that the initiation of the audit would cause an immediate and direct impact on its day-to-day operations; the mere burden responding to investigatory requests was insufficient. Even assuming, as the university claimed, that the OIG's PATH audit guidelines constituted binding rules, the university did not prove that the OIG violated those guidelines. And the OIG's determination to conduct an audit was not ripe for review: the hardship prong of the Abbot Labs rule was not met, as the audit would not force the university to change its present conduct on threat of future adverse consequences, and litigation cost saving was insufficient to meet the hardship prong.

OUTCOME: The judgment was affirmed.

CORE TERMS: audit, agency action, definitive, judicial review, initiation, guideline, ripe, oil, hardship, question of law, ripeness, prong, agency decision, finality, carrier, pure, day-to-day, issuance, initiate, Medicare Act, final order, decision to impose, declaratory judgment, physical presence, subject matter jurisdiction, noncompliance, reviewable, comparable, responding, accounting

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]An federal circuit court exercises plenary review of a district court's dismissal of a complaint on the ground that the Administrative Procedure Act, 5 U.S.C.S. § 704, bars review.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Energy & Utilities Law > Administrative Proceedings > General Overview
[HN2]The test for determining whether an agency's action is "final agency action" reviewable under the Administrative Procedure Act, 5 U.S.C.S. § 704, is (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.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN3]The Administrative Procedure Act, 5 U.S.C.S. § 704, provides for judicial review of a final agency action for which there is no other adequate remedy in court. To determine whether an agency's action is final, the core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. The cases dealing with judicial review of administrative actions have interpreted the "finality" element in a pragmatic way.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN4]The mere initiation of a Physicians at Teaching Hospitals (PATH) audit cannot be characterized as definitive or conclusive agency action. The initiation of the PATH audit is merely the beginning of the investigative process, which may or may not end in the agency's decision to pursue an action under the False Claims Act.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
[HN5]The burden of responding to an agency's investigatory requests is not the kind of burden that turns an otherwise unreviewable action into a final action under the Administrative Procedure Act, 5 U.S.C.S. § 704.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Declaratory Judgment Actions > State Judgments > Discretion
[HN6]Traditionally, courts have been reluctant to apply injunctive and declaratory judgment remedies which are discretionary to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. The ripeness doctrine prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. This is so because awaiting the termination of agency proceedings may obviate all need for judicial review.

Civil Procedure > Justiciability > Ripeness > Tests
Trademark Law > Special Marks > Trade Names > General Overview
Trademark Law > Subject Matter > Names > Generic Names > General Overview
[HN7]A court must assess two prongs in the ripeness inquiry: both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. First, the fitness prong requires an examination of whether the agency action is final and whether the issue is purely legal. Second, a pre-enforcement challenge to a regulation may be ripe where the impact of the regulation is sufficiently direct and immediate. Where the legal issue presented is fit for judicial resolution, and

where a regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act, 5 U.S.C.S. § 704, and the Declaratory Judgment Act must be permitted, absent a statutory bar or some unusual circumstance. Courts typically read this rule to apply where regulations require changes in present conduct on threat of future sanctions.

Administrative Law > Judicial Review > Reviewability > Ripeness
Public Health & Welfare Law > Social Security > Medicare > Appeals Process & Judicial Review
[HN8]The rule in Abbott Labs regarding ripeness has been carefully circumscribed to regulations that pose an immediate dilemma.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN9]Litigation cost saving is insufficient to meet the hardship prong of the Abbot Labs ripeness rule where a case is otherwise unripe for review.

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For Appellees: ROBERT D. McCALLUM, JR., Assistant Attorney General, PATRICK L. MEEHAN, United States Attorney, DOUGLAS N. LETTER, CHRISTINE N. KOHL (Argued), Attorneys, Appellate Staff, Department of Justice, Washington, D.C.

JUDGES: Before: ALITO, AMBRO, and GARTH, Circuit Judges.

OPINION

[*125] OPINION OF THE COURT

PER CURIAM:

This is an appeal from the District Court's final order of dismissal. Because we write for the parties only, we do not set out the background of this case. [1]

1 [HN1]This Court exercises plenary review of a district court's dismissal of a complaint on the ground that the APA bars review. See American Disabled for Attendant Programs Today v. United States Dep't of Hous. & Urban Dev., 170 F.3d 381, 382 & n.2 (3d Cir. 1999).

[**2] We find dispositive two doctrines -- finality and ripeness -- that the courts "frequently mingle" in deciding whether judicial review is appropriate. See Wright, Miller & Cooper, 16 Federal Practice & Procedure: Jurisdiction 2d § 3942 at 770-71 (1996); see also e.g., Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1080 (3d Cir. 1989). Because we believe that the decision to initiate an audit does not constitute final agency action and that this appeal is unripe for review, we Affirmed the District Court's dismissal under Rule 12(b)(1) for lack of jurisdiction.

I.

The first issue is whether the OIG's decision to conduct an audit of Temple's Medicare claims is "final agency action" reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

A.

The District Court found persuasive two cases involving challenges to the PATH initiative. See Association of Am. Med. Colleges v. United States, 217 F.3d 770 (9th Cir. 2000) [hereinafter AAMC]; Greater N.Y. Hosp. Ass'n v. United States, 1999 U.S. Dist. LEXIS 17391, No. 98 Civ 2741, 1999 WL 1021561 (S.D.N.Y. Nov. 9, 1999). In Greater New York Hospital, a group of hospitals [**3] sued for declaratory and injunctive relief, seeking to prevent planned PATH audits at hospitals in the greater New York area. Although the hospital association disputed that the hospitals' Medicare carrier's publication represented official standards, the OIG concluded that the carrier had informed its hospitals of the "physical presence" requirement for billing attending physicians' services under Medicare Part B. Consequently, the OIG determined that those hospitals would be subject to PATH audits. The court concluded that, because the audits do not establish definitively the liability of the hospitals and because the agencies have not completed their decision making process regarding the audits, "the announced PATH audits do not constitute a final agency decision by OIG or HHS," 1999 U.S. Dist. LEXIS 17391 at [WL] *5. Rejecting the notion that the audit was final because it subjected the hospitals to potential liability under the False Claims Act, the court concluded that "too much conjecture is required for the court to conclude that [plaintiffs] will suffer injury from the audits," 1999 U.S. Dist. LEXIS 17391 at [WL] *6, and that review of the agency's decision to conduct the PATH audit could be obtained if and when the plaintiffs [**4] incurred liability

stemming from the PATH audits. 1999 U.S. Dist. LEXIS 17391.

In AAMC, the court dealt with slightly different facts than the Greater New York [*126] Hospital case. The AAMC plaintiffs did not object to a *specific* PATH audit because it violated agency guidelines, but rather challenged -- as violative of the APA and Medicare Act -- numerous standards employed during the PATH audit process generally. See AAMC, 217 F.3d at 773. The district court dismissed the action for lack of subject matter jurisdiction on defendant's motion under Rule 12(b)(1), ruling that the action was premature because there had been no final agency action, plaintiffs had adequate alternative remedies, and the issues were not ripe for adjudication. The Second Circuit Affirmed on the ground that there was no case or controversy under Article III of the Constitution and ordered the case dismissed without prejudice.

The District Court here found these two cases comparable to the instant appeal. First, in both Greater New York and here, OIG concluded that the Medicare carrier had informed the hospitals of the physical presence requirement. Second, although Temple challenges a narrower [**5] application of the PATH audit than the AAMC plaintiffs, the challenge seeks the very same relief, namely a determination of its rights with respect to a government investigation. Therefore, the District Court concluded that the reasoning of the two cases properly informed the decision in this case.

Apart from analogizing the present case to the two cases mentioned, the District Court also analyzed the case under the factors outlined in this Court's decision in CEC Energy Co., Inc. v. Public Service Commission of the Virgin Islands, 891 F.2d 1107, 1110 (3d Cir. 1989), namely, [HN2]"(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."

First, the District Court concluded that the decision to audit the hospital did not constitute the definitive position [**6] of the agency in this matter, because a PATH audit is only the beginning of a process that may or may not end in the agency's decision to pursue an action under the FCA. Second, although initiating a PATH audit necessarily requires the hospital's immediate compliance, it does not carry the same status of law as the lodging of an FCA complaint. Third, the initiation of the PATH audit would not have an immediate impact on the hospital's daily operations, because the very nature of the audit is a review of past conduct not a change in present or future conduct. Fourth, the dispute does not concern a pure question of law. Fifth, plaintiff's pre-enforcement challenge would not serve to speed enforcement of the statute, but rather would frustrate the agency's enforcement efforts and create an unnecessary burden for the courts. For all of these reasons, the District Court dismissed the case for lack of subject matter jurisdiction, holding that the initiation of a PATH audit was not "final agency action" under the APA.

[HN3]The APA provides for judicial review of a final agency action for which there is no other adequate remedy in court. To determine whether an agency's action is final, "the core [**7] question is whether the agency has *completed its decisionmaking process*, and whether the result of that process is one that will *directly affect the parties*." Franklin v. Massachusetts, 505 U.S. 788, 797, 120 L. Ed. 2d [*127] 636, 112 S. Ct. 2767 (1992) (emphasis added). The Supreme Court has observed that "the cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds*, Califano v. Sanders, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977) (publication of certain regulations by the Commissioner of Food and Drugs was held to be final agency action subject to judicial review in an action for declaratory judgment brought prior to any government action for enforcement).

The Supreme Court in FTC v. Standard Oil Co., 449 U.S. 232, 244, 66 L. Ed. 2d 416, 101 S. Ct. 488 n.11 (1980), held, however, that the issuance of a complaint was materially different from the regulation at issue in Abbott Labs. In Standard Oil, the FTC issued a complaint against several major oil companies, alleging that it had "reason to believe" that the companies were violating § 5 of the Federal [**8] Trade Commission Act, which prohibits unfair methods of competition or unfair and deceptive acts or practices in commerce. While the case was pending before an ALJ, Standard Oil challenged the action in federal court. The Court of Appeals reversed the District Court's dismissal, holding that the issuance of the complaint was "final agency action" under § 10(c) of the APA. The Supreme Court reversed, holding that the issuance of the complaint served only to initiate the proceedings and had no legal force comparable to that of the regulation at issue in Abbott Labs. Moreover, the Commission's issuance of the complaint was not a definitive ruling or regulation and it had no legal force or practical effect on the company's daily operations other than the disruptions that accompany any major litigation. The Court concluded that these prag-

matic considerations counseled against the conclusion that the issuance of the complaint was "final agency action." Standard Oil, 449 U.S. at 243.

1.

We agree with the District Court that [HN4]the mere initiation of the PATH audit cannot be characterized as "definitive" or conclusive agency action. Although the plaintiff attempts to characterize [**9] the *decision* to begin an audit as definitive, the initiation of the PATH audit is merely the *beginning* of the investigative process, which may or may not end in the agency's decision to pursue an action under the FCA. See e.g., Aerosource, Inc. v. Slater, 142 F.3d 572, 579-80 (3d Cir. 1998) (holding that safety advisory reports published by the FAA were not final orders "because their conclusions were tentative and indicative of an on-going investigation"); CEC, 891 F.2d at 1110 (holding that a public service commission's order announcing that it had jurisdiction to investigate a utility contract was not final agency action, because an investigation is merely "a prerequisite to definitive agency action"); West Penn Power Co. v. Train, 522 F.2d 302, 311 (3d Cir. 1975), *cert. denied*, 426 U.S. 947, 49 L. Ed. 2d 1183, 96 S. Ct. 3165 (1976) (pre-Standard Oil) (holding that a Notice of Violation of the Clean Air Act was not final agency action, reviewable under the APA, because its only effect was "to make the recipient aware that . . . regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes [**10] any formal enforcement measures"); Mobil Exploration & Producing U.S., Inc. v. Department of the Interior, 180 F.3d 1192, 1198-99 (10th Cir. 1999) (agency request that firm retain records for purposes of audit was not final agency action); Veldhoen v. United States Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994) (agency's initiation of investigation is not final agency action).

[*128] For this reason, the initiation of the PATH audit is *less* definitive than the complaint issued by the FTC in Standard Oil, which was held *not* to be final agency action. As explained above, the administrative complaint in Standard Oil "represented a threshold determination that further inquiry was warranted and that a complaint should initiate proceedings." 449 U.S. at 241. Here, as the defendants correctly state, the initiation of the PATH audit does not even amount to a determination of "reason to believe" that Temple is in violation of the Medicare Act, let alone any definitive determination of Temple's liability. Standard Oil rejected the same kind of argument that the plaintiff advances here, namely, that the *decision* to initiate an audit [**11] amounts to definitive agency action: "The extent to which the respondent may challenge the complaint and its charges proves that the averment of reason to believe is not 'definitive' in a comparable manner to the regulations in Abbott Laboratories." 449 U.S. at 241. Similarly here, if the PATH audit reveals Medicare violations and the government pursues enforcement action, then Temple will have an opportunity for judicial review at that time. The mere initiation of the audit does not mean the agency has definitively taken a position against Temple; it is merely the beginning of an investigation.

2.

We also find that the defendants are correct that the plaintiffs have failed to show that the initiation of the PATH audit will cause the sort of immediate and direct impact on its day-to-day operations that is relevant in the present context. Although Temple will undoubtedly experience a burden in responding to OIG's document requests, Standard Oil unequivocally rejected the argument that such a burden is sufficient to render an investigatory proceeding final and reviewable under the APA. Standard Oil, 449 U.S. at 242. In short, [HN5]the burden of responding [**12] to an agency's investigatory requests is not the kind of burden that turns an otherwise unreviewable action into a final action under the APA.

3.

Finally, the plaintiff argues that the Rabb Letter and OIG's PATH audit guidelines "promulgated" a binding rule or regulation that were violated when the Inspector General decided to commence a PATH audit at Temple, and that such action is therefore arbitrary and capricious and should be set aside under the APA. The defendants respond that neither the PATH audit guideline nor the Rabb Letter is, or purports to be, a "rule" or binding norm. Even so, they argue, OIG complied with the guidelines, giving Temple numerous opportunities to proffer evidence of conflicting guidance from its carrier. Pursuant to its guidelines, OIG reviewed the evidence submitted by Temple and found no basis for excusing Temple from the audit. Finally, the defendants argue that even if OIG had violated its own "regulations," the limited exception to the finality requirement invoked by Temple applies only to agency action in violation of statutory authority.

Even assuming that the Rabb Letter and OIG's PATH audit guidelines constitute binding rules, the plaintiffs [**13] have not proven that the OIG violated those guidelines. Under the OIG guidelines (which were repeated in the Rabb Letter), "a hospital selected for a PATH audit will have an opportunity to show that it received guidance from the [carrier] which, in the hospital's view, contradicts the physical presence standard articulated above. *The decision whether clear guidance was given by the carrier will be made by OIG*." [*129] We agree with the District Court that Temple was given multiple opportunities to show that it had received con-

flicting guidance from Xact, and notwithstanding these multiple opportunities, it failed to convince OIG. Temple's evidence of allegedly conflicting guidance consisted of the following: (1) Xact's 1983 directive stating that "[a] physician's countersignature of a note entered [on a patient's medical chart] by a resident or nurse is not evidence that a Part B covered service was provided unless the note indicates that the physician was present" (App. at 188); (2) a 1995 report on an audit of 14 patients' records in 1994 (App. at 197-212); and (3) a 1996 Medicare hearing officer decision based on that same audit (App. at 229-32). OIG reexamined Xact's guidance, [**14] reviewed the allegedly conflicting documents submitted by Temple, and reAffirmed its conclusion that Xact's policy was to require a physician to have been physically present at the time service was rendered in order to claim Medicare B reimbursement. Although Temple may disagree with OIG's conclusion, Temple cannot credibly argue that OIG violated its own rules.

For the foregoing reasons, we hold that there has been no "final agency action" and, thus, that this case is unreviewable at this time under the APA.

II.

The second albeit related issue is whether the OIG's determination to conduct an audit is ripe for review. The District Court concluded that the plaintiff's complaint was neither fit for judicial review nor would the parties suffer the requisite hardship if judicial consideration were withheld. First, the District Court held that because the agency's decision was not yet final, judicial intervention would inappropriately interfere with further agency action. Second, the District Court concluded that the plaintiff failed to show how the challenged action would force it to modify or alter its behavior in order to avoid future adverse legal consequences. Although the plaintiff [**15] argues that without judicial intervention it will be forced to endure a costly and disruptive PATH audit, the District Court held that such costs are not the type of direct and immediate change required to establish ripeness.

A.

[HN6]Traditionally, courts have been reluctant to apply "injunctive and declaratory judgment remedies [which] are discretionary . . . to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Abbott Labs., 387 U.S. at 148. The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also [] protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id. at 148-49. This is so because awaiting the termination of agency proceedings may obviate all need for judicial review. See Standard Oil, 449 U.S. at 244 n.11.

[HN7]We must assess two prongs in the ripeness inquiry: "*both* the fitness of the issues for judicial decision and [**16] the hardship to the parties of withholding court consideration." 387 U.S. at 149. First, the fitness prong requires an examination of whether the agency action is final and whether the issue is "purely legal." Abbott Labs, 387 U.S. at 149. Here, the agency action is decidedly not final for all of the reasons set forth above.

Second, the Supreme Court outlined the hardship prong in Abbott Labs when it held that a pre-enforcement challenge to a [*130] regulation may be ripe where the impact of the regulation is "sufficiently direct and immediate." Id. at 152. In that case, at issue was a regulation requiring drug manufacturers to designate the generic name of a drug on labels and advertisements where the drug trade name was printed. Failure to comply with the regulation resulted in product seizure as well as severe criminal and civil penalties. The Court described the plaintiffs' dilemma: "'either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.'" Abbott Labs., 387 U.S. at 152. The Court concluded: [**17]

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an *immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance*, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some unusual circumstance, neither of which appears here.

Id. at 153 (emphasis added). Courts typically read this rule to apply where regulations require changes in *present conduct* on threat of future sanctions. See e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998) (plaintiff is outside Abbott Labs rule where agency plan does not "force [plaintiff] to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through threat of future sanction").

B.

Plaintiffs urge us to find the case at bar similar to A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976). In that case, the Court held that the hardship prong had been satisfied. In the early [**18] 1970s, the FTC adopted a resolution requiring Line of Business Reports ("LB Reports") that would facilitate the public reporting of corporate financial information. The LB Reports required detailed sales and cost data broken down into line of business categories as defined by the Commission. Pursuant to the resolution, the Commission ordered 345 of the nation's largest companies to complete and file LB Reports within 150 days of receipt or face penalties. This Court held that the companies were placed in an immediate and real dilemma: if they chose to comply with the orders, they would have to commit substantial resources -- both in terms of money and manpower -- to develop accounting techniques necessary for compliance and, as a result, would suffer loss of profits; alternatively, if they refused to comply, they would risk civil fines for noncompliance. Because the consequences of noncompliance were found to be serious and the effects of compliance on primary day-to-day operations were found to be immediate, we held that the hardship prong was satisfied. At the very least, we found that the orders necessitated changes in internal record keeping and accounting, which the Supreme Court [**19] has held may entail a sufficiently direct impact to conclude that the case is ripe.

Defendants, on the other hand, suggest that this case is similar to AAMC, where the Ninth Circuit held that the hardship prong was not met in a similar challenge to PATH audits. There, the Ninth Circuit held that the plaintiffs' case fell outside the Abbott Labs rule "since the PATH initiative is not a final rule and it relates to liability for *past* billing practices rather than requiring a costly change in present conduct." AAMC, 217 F.3d at 783 (emphasis added). The court recognized that the AAMC plaintiffs might be faced with a [*131] similar Abbott Labs dilemma: if they entered into settlement agreements predicated on audit standards that exceed the requirements of the Medicare Act and regulations, they would simultaneously waive their right to challenge the audit standards in court; on the other hand, if they refused to settle, they faced potentially ruinous liability under the False Claims Act. But, noting that [HN8]the rule in Abbott Labs has been "carefully circumscribed to regulations that pose an *immediate dilemma*," the Ninth Circuit concluded that no matter [**20] how likely the plaintiffs thought a settlement/False Claims Act litigation choice might be, the choice was not yet before them. Because the PATH audit reached only *past* conduct, nothing but participation in the audits was demanded of them at the time of that appeal. 217 F.3d at 783-84.

Here, Temple faces no immediate and real dilemma like that faced by the plaintiffs in Abbott Labs or A.O. Smith. The mere initiation of a PATH audit will not force Temple to change its *present* conduct on threat of future adverse consequences, and Temple is certainly not in the position of the A.O. Smith plaintiffs, who were forced to *develop* new accounting techniques in order to comply with the resolution. All that Temple must do is cooperate with the PATH audit, which does entail responding to production requests. But Standard Oil clearly states that this burden "is different in kind and legal effect from the burdens" involved in Abbott Labs. 449 U.S. at 242; see also Ohio Forestry, 523 U.S. at 735 ([HN9]litigation cost saving is insufficient to meet hardship prong where case is otherwise unripe). For all of these reasons, the District [**21] Court was correct to conclude that Temple has not met the burden of proving that its case is ripe for review before this Court.

We have considered all of the plaintiff's arguments and see no basis for reversal. [2] The judgment of the District Court is therefore AFFIRMED.

> 2 In light of our holding that there is no final agency action as required for review under the APA, Temple's argument that its APA challenge may be determined in the context of a separate subpoena enforcement proceeding is also unavailing.

We cannot conclude, however, without noting the warnings made by Temple regarding the consequences that a PATH audit may have for the patients served by Temple Hospital. Temple Hospital is essential to the health of many in the community it serves. We request that counsel for the appellees bring the statements of Temple's counsel to the personal attention of the Inspector General and Secretary so that the PATH audit can be conducted in a way that does not prevent the delivery of vital health services. Our [**22] decision does not foreclose the opportunity for plaintiff to seek judicial review if a health emergency were to develop.

___

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

___

Circuit Judge

CONCUR BY: AMBRO

CONCUR

AMBRO, Circuit Judge, concurring

The District Court gave three reasons why it lacks subject matter jurisdiction over Temple's action: (1) the OIG's action was not final; (2) Temple has an adequate alternative legal remedy (i.e., in response to a False Claims Act action, it may defend on the ground that it is a state agency and has received conflicting guidance); and (3) the challenged action is one committed to agency discretion under 5 U.S.C. § 701(a)(2). [3] I agree with the District Court on (2) and (3) and agree with the majority that "Temple cannot credibly argue that OIG violated its own rules." [4] The [*132] majority, however, bases its affirmance on there being no final order and the issue not being ripe for review. But while I would affirm the District Court's judgment, I believe that the OIG's decision to impose a Path I audit was a final one under our CEC Energy Co. v. Public Serv. Comm'n of the V.I. decision, [**23] 891 F.2d 1107, 1110 (3d Cir. 1989), and that the issue is ripe for review.

3 The District Court also concluded that the OIG's action was not ripe for review.

4 Temple seems to believe that its claim of conflicting guidance issues it a free pass from a PATH I audit. That is not the case, for at most such a claim is a "time out" while the OIG evaluates that claim. Temple received its time out, the OIG made its decision, and the audit should proceed.

The five factors we consider to determine if an agency action is final are: (1) is the decision the agency's definitive position on the question; (2) does the decision have the status of law, requiring immediate compliance; (3) does it have an immediate effect on the day-to-day operations; (4) is it a pure question of law, requiring no further factual development; and (5) and will immediate judicial review speed enforcement of the act? Id. I believe that these factors, taken together, weigh in favor of finding final agency action here.

The [**24] first factor that guides our inquiry is whether the Path I audit represented the definitive position of the agency. The OIG's decision to impose the Path I audit was not merely the initiation of an investigation that could culminate in an enforcement action, as the majority implies. On the contrary, it represents the OIG's final and definitive position on the issue of whether to begin an audit.

Next, we examine whether the decision has the status of law requiring immediate compliance. Neither Temple nor the OIG has asserted that Temple has any option except to comply with the Path I audit, should this suit fail. Temple cannot risk its Medicare funding by not complying.

Third, we examine whether the decision has an immediate effect on Temple's day-to-day operations. The majority finds the burden the Path I audit imposes on Temple to be insignificant. However, Temple asserts that it would "sustain irreparable injury" were the audit to go forward, describing the required locating and copying of "tens of thousands of documents and the need for an already overtaxed staff to respond to the OIG's requests." Given that Temple is a relatively small institution, the audit must have some effect [**25] on its daily operations.

Fourth, we determine whether a pure question of law exists. Here the question is whether the OIG violated its own rules, as articulated in the Rabb Letter, by going forward with the audit. As adverted to above, I would answer no. But whether an agency complied with its own guidelines is still a pure question of law, which weighs in favor of finding final agency action. In short, I believe that the majority and I agree that this is an easily resolved pure question of law: the OIG did not violate its guidelines by initiating the Path I audit.

Finally, we consider whether immediate judicial review would resolve the issue. Here, judicial review not only could resolve the issue, but in effect has resolved it. The majority considered the question of law presented and concluded, quite rightly, that the OIG did not violate its guidelines by imposing a Path I audit on Temple.

In this case I conclude that "the agency has completed its decision making process, and . . . the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992). After an examination of the above factors, I believe the [**26] decision to impose a Path I audit to be final agency action.

[*133] I likewise would refrain from basing our affirmance of the District Court on ripeness grounds. While finality and ripeness analyses often overlap, ripeness, in addition to considering finality of the agency's decision, also takes into account whether the issue is a legal one, whether it is better reviewed after more development, and the hardship to the parties if review is postponed, all in the context of avoiding premature interference with agency action. Mountain States Tel. & Tel. Co. v. F.C.C., 291 U.S. App. D.C. 193, 939 F.2d 1021, 1028 (D.C. Cir. 1991); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3942, at 769-71 (2d ed. 1996). I believe that these factors weigh in favor of concluding that the OIG's action is ripe for review in the context of the finality reasoning noted above.

I thus respectfully concur in the judgment.

COMMONWEALTH OF PENNSYLVANIA, Department of Public Welfare, Plaintiff, v. UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.

Civil Action No. 05 - 1345

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 67024

September 19, 2006, Decided
September 19, 2006, Filed

CORE TERMS: audit, inspector generals, judicial review, agency action, ripeness, eligibility, initiate, finality, conformity, discovery, hardship, path, foster care, Social Security Act, summary judgment, issuance, promulgated, ripe, oil, adequate remedy, citations omitted, subpoena, partial, relaxed, disallowance, medicare, indicia, declaratory judgment, subject matter jurisdiction, day-to-day

COUNSEL: [*1] For COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, Plaintiff: Jason W. Manne, Department of Public Welfare, Office of General Counsel, Pittsburgh, PA.

For UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants: Eric J. Beane, U.S. Department of Justice, Washington, DC US.

JUDGES: Donetta W. Ambrose, Chief United States District Judge.

OPINION BY: Donetta W. Ambrose

OPINION

Doc. Nos. 5, 7, 15

MEMORANDUM OPINION

Ambrose, Chief Judge.

In this case, Plaintiff, Commonwealth of Pennsylvania Department of Public Welfare ("Pennsylvania") is challenging the decision of Defendant, United States Department of Health and Human Services ("HHS"), to initiate an audit of Pennsylvania's use of Federal matching funds for foster care paid to it under Title IV-E of the Social Security Act. Pennsylvania is seeking judicial review of Program Instruction ACYF-CB-PI-02-06 ("Program Instruction") issued by the Administration for Children and Families ("ACF") [1] of HHS with regard to Title IV-E Foster Care Eligibility Reviews. The Program Instruction was issued to clarify the Secretary's position that the eligibility review procedures established [*2] by 42 U.S.C. § 672(a) and (b), as well as by the ACF implementing regulations, 45 C.F.R. Part 1356, and in particular section 1356.71, do "not, and [were] not intended to replace other types of eligibility reviews, audits or monitoring processes that may be conducted by the Federal government." *See* Program Instruction ACYF-CB-PI-02-06 (July 12, 2002) (Ex. A to Pl's Compl.).)

1 ACF is charged with the administration of the Title IV-E program under 45 C.F.R. Parts 74 and 92. Essentially, ACF advances estimated Federal matching funds to the States on a quarterly basis, and the States reconcile these amounts with actual expenditures in quarterly financial reports. 45 C.F.R. §§ 74.53, 92.41. In addition to

> the financial reporting requirements in Parts 74 and 92, States are also required to comply with the record retention rules, which mandate that documentation supporting the expenditures be retained for three years, or longer if a financial management review or audit is started within the three-year period. 45 C.F.R. § 74.53, 92.42. Beginning on September 8, 2003, Part 92 replaced Part 74 for the Title IV-E program. 68 Fed. Reg. 52,843 (Sept. 8, 2003).

[*3] Pennsylvania has filed a three-count complaint against Defendants, the United States of America and the United States Department of Health and Human Services (collectively "HHS"), in which it seeks the following injunctive and declaratory relief: (1) a declaration that Program Instruction ACFY-CB-PI-02-06 be set aside as in excess of statutory authority; (2) a declaration that 42 U.S.C. § 1320a-2a establishes a complete and exclusive scheme for federal review of state Title IV-E programs; (3) an injunction enjoining HHS from continuing the Office of Inspector General ("OIG") audits of Pennsylvania; and (4) a declaration that HHS may not use a Title IV-E audit program against Pennsylvania that is more severe than that used in other states.

Pennsylvania asserts that the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1346 (Little Tucker Act), and 1361 (mandamus statute). However, HHS disputes that subject matter jurisdiction exists here and submits three arguments in support thereof. First, HHS argues that Pennsylvania's claims fail to meet the requirements for judicial review under the Administrative [*4] Procedures Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). Second, HHS argues that Pennsylvania's claims should be dismissed for lack of ripeness. Finally, HHS submits that Pennsylvania's complaint fails to meet the requirements for jurisdiction under either the Little Tucker Act or Mandamus Act. [2] Pennsylvania disagrees with HHS, arguing that the decision to initiate the audit and the issuance of the Program Instruction constitute final agency action, and therefore it is entitled to judicial review under the APA, and that its claims are ripe for review or, at a minimum, it is entitled to discovery as to the ripeness issue. Pennsylvania further responded by filing a motion for partial summary judgment on Count A of the complaint, asking the Court to find as a matter of law that the Program Instruction issued by ACF is contrary to 42 U.S.C. § 1320a-2a and therefore exceeds statutory authority and is invalid.

> 2 Pennsylvania has failed to address this argument in its responsive brief and therefore appears to be conceding that the Court's jurisdiction here cannot be premised on either the Little Tucker Act or the Mandamus Act. The Court agrees with HHS that Pennsylvania has failed to assert facts to establish jurisdiction under either the Little Tucker Act or Mandamus Act. Therefore, these statutes provide no basis for the Court's jurisdiction in this matter.

[*5] For the reasons set forth below, the Court finds that it lacks subject matter jurisdiction over Pennsylvania's claims and will grant HHS's motion to dismiss. Consequently, the Court finds it lacks jurisdiction to decide Pennsylvania's Motion for Partial Summary Judgment as to Count A challenging the validity of the Program Instruction, and therefore, will deny Pennsylvania's Motion for Partial Summary Judgment. In light of the Court's ruling on these dispositive motions, the Court will grant HHS's Motion to Strike Improperly Served Discovery and Stay Future Discovery Pending Resolution of the Motion to Dismiss.

I. STANDARD OF REVIEW - MOTION TO DISMISS

HHS has moved to dismiss the Complaint in its entirety under Rule 12(b)(1) and, in the alternative, under Rule 12(b)(6). Under Rule 12(b)(1), the movant makes either a facial or factual challenge to the court's subject matter jurisdiction. *Patsakis v. Greek Orthodox Archdiocese of America*, 339 F.Supp.2d 689, (W.D.Pa. 2004) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). In a facial attack, the court must consider the allegations of the complaint as true, [*6] similar to a motion to dismiss under Rule 12(b)(6). *Mortensen*, 549 F.2d at 891; *Int'l Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 673 F.2d 700, 711 (3d Cir. 1982). A factual challenge goes, however, to the court's power to hear the case:

> The factual attack . . . differs greatly for here the trial court may proceed as it never could under 12(b)(6) or *Fed. R.Civ. P. 56*. Because at issue in a tual 12(b)(1) motion is the trial court's jurisdiction its very power to hear the case there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. (citing 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1350 (1969)) (footnote omitted); *see also Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) [*7] (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991); *Mortensen*, id.). Thus, in a Rule 12(b)(1) factual challenge, the court must ensure that its ruling is based on an adequate record. *Internat'l Ass'n of Machinists & Aerospace Workers*, 673 F.2d at 711-12. If a defendant presents evidence, in the form of affidavits and/or documentary evidence, challenging the jurisdictional allegations in the complaint, plaintiff must respond with affidavits or other sworn proof of his own to controvert the facts asserted by the defendant. *Id.*

In the case at bar, HHS appears to be making a facial challenge, as evidenced by its brief in support of the Motion to Dismiss, as well as by the fact that it has not produced any affidavits or evidence to disprove any of Pennsylvania's factual allegations regarding subject matter jurisdiction.

In ruling on a motion to dismiss under Rule 12(b)(6), the Court is required to accept as true all allegations made in the complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the plaintiff. [3] *See Blaw Knox Ret. Income Plan v. White Consol. Indus. Inc.*, 998 F.2d 1185, 1188 (3d Cir. 1993); [*8] *Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 871 (3d Cir. 1992). The issue is not whether the plaintiff will ultimately prevail, but rather whether "plaintiff can prove any set of facts consistent with the averments of the complaint which would show the plaintiff is entitled to relief." *See Gaines v. Krawczyk*, 354 F.Supp. 2d 573, 576 (W.D.Pa. 2004) (citing *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994)). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *See Port Auth. of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305, 311 (3d Cir. 1999) (quoting *Alexander v. Whitman*, 114 F.3d 1392, 1397 (3d Cir. 1997)); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Langford v. City of Atlantic City*, 235 F.3d 845, 847 (3d Cir. 2000). Thus, under this standard, a complaint will withstand a motion to dismiss if it gives the defendant adequate notice of the essential elements of a cause of action. *Gaines*, 354 F.Supp. 2d at 576 [*9] (citing *Nami v. Fauver*, 82 F.3d 63, 66 (3d Cir. 1996)).

> 3 Nonetheless, a court is not required to credit bald assertions or legal conclusions in a complaint when deciding a motion to dismiss. *Gaines v. Krawczyk*, 354 F.Supp. 2d 573, 576 (W.D.Pa. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)). Consistently, the courts have rejected "'legal conclusions,' 'unsupported conclusions,' 'unwarranted inferences,' 'unwarranted deductions,' 'footless conclusions of law' or 'sweeping legal conclusions cast in the form of factual allegations'"[,] in deciding a motion to dismiss pursuant to Rule 12(b)(6). *Id.* (citing *Morse*, 132 F.3d at 906 n. 8 (citing Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1357 (2d ed. 1997)); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)).

Courts generally [*10] consider only the allegations of the complaint, attached exhibits, and matters of public record in deciding motions to dismiss. *Pension Benefit Guar. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Factual allegations within documents described or identified in the complaint may also be considered if the plaintiff's claims are based upon those documents. *Id.* (citations omitted). A district court may consider these documents without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of the motion to dismiss, the Court assumes the following allegations of fact contained in the complaint are true. At all relevant times including the present, Pennsylvania participated in the foster care and adoption assistance program established under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b, which is a cooperative Federal-State grant program. Under this Title IV-E program, States provide certain child welfare services [*11] to needy children in conformity with Federal requirements in exchange for Federal funds. Consequently, Pennsylvania has been audited with respect to Federal funds it received under the Title IV-E program. For the period covering 1983 through 1989, Pennsylvania was audited at least twice by the OIG and at least once by ACF with regard to the Title IV-E program. Pennsylvania was not audited for any period between 1990 and 1995.

In 1994, Congress enacted 42 U.S.C. § 1320a-2a which directed the Secretary of HHS, in consultation with the State agencies administering the State Title IV-E (and other) programs, to "promulgate regulations for the review of such programs to determine whether such programs are in substantial conformity with -- (1) State plan requirements under . . . part[] . . . E, (2) implementing regulations promulgated by the Secretary,

and (3) the relevant approved State plans." 42 U.S.C. § 1320a-2a(a)(1)-(3). Congress further provided that these regulations shall be promulgated no later than July 1, 1995, with an effective date of April 1, 1996. Pub.L.103-432, § 203(c)(3). Notwithstanding this Congressionally [*12] mandated deadline, the Secretary of HHS did not issue the final regulations until January 25, 2000, with an effective date of March 27, 2000. *See* 65 Fed. Reg. 4020 (Jan. 25, 2000) (codified at 45 C.F.R. pts. 1355, 1356 and 1357). On July 12, 2002, ACF promulgated the Program Instruction at issue here, for the stated purpose of "provid[ing] additional clarification to States concerning periodic title IV-E foster care eligibility reviews and their relationship to other aspects of title IV-E implementation and enforcement." (Ex. A to Pl.'s Compl. (Doc. No. 1-1).)

On November 19, 2003, OIG informed Pennsylvania that it intended to initiate an audit of the State's Title IV-E program for the period 1998 through 2002. (Compl. P 10.) Pennsylvania contends that ACF specifically requested OIG to conduct this audit and controlled its timing. [4] (*Id.*) Pennsylvania further avers that this audit is specifically aimed at establishing a dollar amount for refund to the Federal government for prior fiscal periods that would have been reviewed under the review procedures of 42 U.S.C. § 1320a-2a had HHS promulgated its regulations within the July 1, 1995 deadline [*13] established by Congress. (*Id.*) In addition, Pennsylvania alleges that ACF requested the OIG audit based on the results of a small probe sample of certain reclassified Title IV-E claims examined in 1999, which were determined to have a higher than normal error rate. (Compl. P 11.) Pennsylvania contends that this sample was not representative of its Title IV-E population and subsequently withdrew its claims. (*Id.*) Nonetheless, Pennsylvania alleges ACF considered the small probe sample indicative of problems. (*Id.*) It is further alleged that although ACF believed Pennsylvania's Title IV-E claims had errors since 1999, ACF did not take any action to review Pennsylvania's claims as required by 42 U.S.C. § 674(b) and instead shifted that responsibility to OIG. (Compl. P 12.)

> 4 Pennsylvania contends that although OIG has its own independent authority to conduct the audit under the Inspector General Act, OIG would not be acting under that authority in conducting the proposed audit of Pennsylvania's Title IV-E program for the period covering 1998 through 2002, but rather, would be acting on behalf and under the authority of ACF. For the reasons set forth below, the Court need not decide this issue.

[*14] In undertaking the audit of the period covering 1998 through 2002, OIG allegedly informed Pennsylvania that it will be reviewing and auditing more than three hundred sample cases in Philadelphia and Allegheny Counties. (Compl. P 14.) OIG has further indicated it will examine such things as the propriety of the State's provider rates and its issuances of foster care licenses which, Pennsylvania contends, is beyond the scope of prior audits. (Compl. P 15.) Pennsylvania expects the audit will last at least two years and during that time, will consume hundreds, if not thousands, of hours of staff time by child welfare officials at the state and local levels, who will be diverted from their work of improving child welfare services to Pennsylvania children. Pennsylvania contends the costs of the audit have approximated $ 200,000.00 to date and expects the costs to ultimately exceed $ 1 million. (Compl. P 16.) According to Pennsylvania, OIG has refused to reimburse Pennsylvania for the costs of the audit. (*Id.*)

In the fall of 2004, ACF conducted a review of Pennsylvania's Title IV-E program under the regulations promulgated pursuant to 42 U.S.C. § 1320a-2a [*15] and found Pennsylvania to be in substantial conformity with the Federal requirements. Despite this finding, OIG is proceeding with the audit of Pennsylvania at ACF's request and direction, for the period covering 1998 through 2002. (Compl. P 13.)

On September 27, 2005, Pennsylvania instituted the present action by filing a three-count complaint against HHS, setting forth the following claims: Count A -- the Program Instruction issued by ACF is contrary to 42 U.S.C. § 1320a-2a, and therefore, exceeds statutory authority; Count B -- the OIG audits are outside the framework of 42 U.S.C. § 1320a-2a and therefore are unlawful, and the shifting of ACF's Title IV-E review responsibility to OIG violates the Inspector General Act ("IGA"), 5 U.S.C. App. 3, § 9(a)(2); and Count C -- the actions of ACF and OIG vis a vis the Title IV-E audits of Pennsylvania were arbitrary and capricious, and therefore violate federal law and the Constitution. In response, HHS filed a motion to dismiss the complaint. In addition to the motion to dismiss, there are two other motions currently pending before the Court: HHS's Motion to Strike/Stay [*16] Discovery and Pennsylvania's Motion for Partial Summary Judgment. These motions have been fully briefed and argued and are now ripe for disposition.

III. STATUTORY AND REGULATORY FRAMEWORK

An understanding of the relevant statutory and regulatory framework is necessary to resolving the pending dispositive motions.

Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b, authorizes the appropriation of Federal funds to States, which have submitted State plans approved by

the Secretary, to match certain expenditures by the States for providing "foster care and transitional independent living programs for children who would otherwise have been eligible for assistance under the State's plan approved under [the Aid to Families with Dependent Children ("AFDC") program], [5] and adoption assistance for children with special needs[.]" 42 U.S.C. § 670 (1997); 45 C.F.R. § 1356.60. In 1980, Congress established the review structure for Title IV-E with the enactment of the Adoption Assistance and Child Welfare Act, Pub. L. 96-272. This review procedure, denominated as an "eligibility" [*17] review, was promulgated at 45 C.F.R. part 1356, and in particular §§ 1356.20 through 1356.60; 47 Fed. Reg. 30925 (July 15, 1982), as amended. In 2000, the Secretary amended 45 C.F.R. part 1356 and added a new section, § 1356.71, which contains the new requirements governing Federal reviews of State compliance with the Title IV-E eligibility provisions established by 42 U.S.C. § 672(a) and (b). The eligibility review focuses on the requirements for eligibility for foster care maintenance payments to verify that children in foster care for whom Federal financial participation is being claimed (or can be claimed) are eligible and are being placed with eligible foster care providers. *Notice of Proposed Rulemaking, Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews*, 45 C.F.R. Parts 1355 and 1356, 63 Fed. Reg. 50058, 50061 (Sept. 18, 1998).

5 The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, repealed the AFDC program constituting Part A of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.* However, Title IV-E continues to refer to certain former AFDC provisions that were in effect on June 1, 1995.

[*18] Eligibility reviews conducted pursuant to 45 C.F.R. § 1356.71 utilize random sampling methodologies to select a "sample" of cases for review, to determine the number of ineligible cases and the error rate. 45 C.F.R. § 1356.71(c). Eligibility is determined based on the five factors enumerated in § 1356.71(d)(1). In addition, for each case reviewed, the State must make available a licensing file which contains the licensing history for each provider. 45 C.F.R. § 1356.71(g). Reviews are conducted once every three years by a team of state and federal reviewers. 45 C.F.R. 1356.71(a)(3) and (b). From a random sampling of 80 cases (plus a 10 percent oversample of 8 cases), ACF determines sample case ineligibility and dollar error rates in a primary review. 45 C.F.R. § 1356.71(c). In the initial primary review, a state is deemed in substantial compliance if the population error rate is less than fifteen percent; for subsequent primary reviews, substantial compliance will be found if the population error rate is less than 10 percent. *Id.* at § 1356.71(c). [*19] On secondary reviews following a determination of noncompliance, the case ineligibility or dollar error rate may not exceed ten percent. *Id.* A disallowance is assessed for ineligible cases for the period of time cases are ineligible. *Id.* at § 1356.71(j). The State is also liable for interest on the amount of funds disallowed. *Id.* at § 1356.71(j)(3). In addition, States found to be in noncompliance must develop a program improvement plan ("PIP") jointly with the Federal staff of ACF. *Id.* at § 1356.71(i). States may appeal any disallowances [6] taken by ACF to the HHS Departmental Appeals Board ("DAB") in accordance with the regulations at 45 C.F.R. Part 16. [7] *Id.* at § 1356.71(j)(4).

6 If ACF makes a determination to recover any funds paid to States for cases determined to be ineligible, it must issue a "disallowance" as set forth in 45 C.F.R. § 201.13. The State must be given written notice of the disallowance and advised of its right to request reconsideration by the DAB, whose decision constitutes HHS' final action in grant disputes. 5 U.S.C. § 301; 45 C.F.R. Part 16; 45 C.F.R. §§ 74.62, 92.43.

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7 The regulations at Part 16, Title 45 of the Code of Federal Regulations set forth the procedures and requirements for obtaining an appeal from final written decisions issued regarding certain disputes that arise under HHS programs. 45 C.F.R. § 16.1. The appeal procedures under Part 16 specifically provide for review by the DAB of disallowances under Title IV of the Social Security Act. 45 C.F.R. Part 16, App. A., § B(a)(1). This internal review process is adversarial in nature, § 16.8, is based on a detailed factual and legal record, §§ 16.8, 16.21, may involve a hearing, including examination and cross examination of witnesses, § 16.11, and the DAB is bound by all applicable laws and regulations, § 16.14.

The purpose of the Title IV-E eligibility reviews under 42 U.S.C. § 672(a) and (b), which "is to validate the accuracy of a State's claims to assure that appropriate payments are made on behalf of eligible children, to eligible homes and institutions, at allowable rates", differs in purpose and scope from the outcomes-based review for conformity [*21] reviews under 42 U.S.C. § 1320a-2a. 65 Fed. Reg. 4020, 4070 (Jan. 25, 2000). In 1994, Congress added Section 1123 of the Social Security Act, codifed at 42 U.S.C. § 1320a-1a (Pub. L. No.103-432), [8] which directs the Secretary, in consultation with the State agencies administering the State programs under Title IV-E, to promulgate regulations for the review of foster care and adoption assistance programs to determine whether such programs are in substantial con-

formity with the State plan requirements, implementing regulations and approved State plans. Pub. L. No. 103-432, Title II, Section 203(a), 108 Stat. 4398, 4454-55 (Oct. 31, 1994). This review procedure has been denominated as a "conformity" review by Congress, [9] as well as by the Secretary of HHS, [10] and is promulgated at 45 C.F.R. part 1355, in particular, sections 1355.32-.37.

8 In 1996, Congress renumbered section 1123 of the Social Security Act as section 1123A, codified at 42 U.S.C. § 1320a-2a. *See* Pub. L. No. 104-193, Title V, Section 504, 110 Stat. 2105, 2278 (Aug. 22, 1996).

[*22]

9 The title of the section in Pub. Law No. 103-432 adding section 1123 of the Social Security Act is "Sec. 203 CONFORMITY REVIEWS."

10 *See* 45 C.F.R. §§ 1355.33-.36. In addition, Attorney Beane explicated at oral argument that the state plan conformity reviews under 42 U.S.C. § 1320a-2a are not audits; while, on the other hand, the eligibility reviews under 42 U.S.C. §§ 671-672 and 45 C.F.R. § 1356.71 do give rise to physical audits on occasion. Transcript of Oral Argument on May 8, 2006 ("Tr.") at 4-5.

The conformity review contemplated under section 1320a-2a is outcome-based, that is, it focuses on assisting the States to improve services and outcomes for children and families. 68 Fed. Reg. 41590-01 (July 14, 2003); 63 Fed. Reg. 50058, 50065-66 (Sept. 18, 1998). In particular, the regulation establishes criteria related to child and family services outcomes in determining whether a State is in substantial conformity, in the areas of [*23] child safety, permanency for children, and child and family well-being. 45 C.F.R. § 1355.34(b)(1). In addition, the State's ability to meet the national standards for statewide data indicators associated with a particular outcome and to deliver the services delineated in paragraphs (c)(2) through (c)(7) of § 1355.34 are assessed. Following a review in which it is found to be operating in substantial conformity, a State must complete a full review every 5 years. 45 C.F.R. § 1355.32(b)(1)(i). A State program which is found not to be operating in substantial conformity is required to develop and implement a PIP. *Id.* at §§ 1355.32(b)(2)(i), 1355.35(a)(1). Failure to achieve substantial conformity or to successfully complete a PIP will result in a withholding of Federal funds. *Id.* at § 1355.36. The amount of Federal funds subject to withholding is based on pre-determined percentages of the pool of funds consisting of the State's allotment of Title IV-B funds for each year the withholding applies plus ten percent of the State's Federal claims for Title IV-E foster care administrative costs for each year the withholding applies, [*24] depending on the nature of the nonconformity. *Id.* at § 1355.36(b)(4)-(8). In addition, the state agency is liable for interest on the amount of funds withheld by HHS. *Id.* at § 1355.36(e)(5). A state may, however, appeal the final determination and any subsequent withholding of, or reduction in, funds, to the DAB within sixty (60) days after receiving notice of nonconformity (as described in § 1355.36(e)(1)) or notice of noncompliance by ACF (as described in § 1355.38(a)(3)) in accordance with 45 C.F.R. Part 16. *Id.* at § 1355.39(a). Moreover, a State may obtain judicial review of an adverse decision of the DAB. *Id.* at § 1355.39(b).

ACF released the Program Instruction at issue here on July 12, 2002 to provide additional clarification to States regarding periodic Title IV-E foster care eligibility reviews under Section 472(a) and (b) of the Social Security Act (42 U.S.C. § 672(a) and (b)) and 45 C.F.R. § 1356.71, and their relationship to other aspects of Title IV-E implementation and enforcement. (Ex. A to Pl.'s Compl. at 1.) In this regard, the Program Instruction states that the eligibility review procedure [*25] set forth in the regulation, section 1356.71:

> does not, and was not intended to, replace other types of eligibility reviews, audits or monitoring processes that may be conducted by the Federal government. This includes, but is not limited to, monitoring processes conducted by the Office of the Inspector General (OIG), the General Accounting Office (GAO), or those that arise out of ACF Regional Office quarterly review of title IV-E financial claims filed by State agencies. Thus, the regulations at 45 CFR 1356 do not affect the Federal government's traditional authority to conduct audits and take disallowances.

(*Id.* at 1-2.) The Program Instruction goes on to explain that the review structure set forth in Part 1356 is primarily a management tool to ensure State compliance with requirements impacting child welfare, and only secondarily a tool for fiscal responsibility, inasmuch as the regulation provides for only periodic reviews and for extrapolated disallowances after a determination of noncompliance following a State's implementation of a PIP. (*Id.* at 2.) In addition, the Program Instruction notes that historically, multiple avenues for review of State eligibility [*26] decisions have existed, and the regulation in Part 1356 "did not, and does not, purport to disrupt those other avenues of review, such as OIG audits, which are necessary to ensure the financial integrity of the [Title IV-E

foster care] program." (*Id.*) Finally, the Program Instruction clarifies that examinations of a State's Title IV-E financial report (Form ACF-IV-E-1), which are authorized under the regulations at 45 C.F.R. § 74.53, are a discrete process and are not subject to the eligibility review procedures outlined in 45 C.F.R. § 1356.71. Thus, the Program Instruction states eligibility issues that arise as a result of an examination of a State's Title IV-E financial reports will continue to be addressed in ACF or OIG audits or other reviews, rather than through the periodic reviews under 45 C.F.R. § 1356.71. (*Id.*)

The role of the Inspector General of HHS is best explained by an examination of the enabling statute, the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, § 1 *et seq.* ("IGA"). The Offices of Inspector General were created under the IGA as independent [*27] bodies for the purpose of conducting and supervising audits and investigations relating to the programs and operations of the federal establishments set forth in § 11(2), [11] as well as to oversee 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, programs and operations. 5 U.S.C. App. 3, §§ 2(1)-(2), 4(a)(1) & (3). The inspector generals are appointed by the President with the advice and consent of the Senate. *Id.* at § 3(a). Although the inspector general reports to and is under the general supervision of the head of the federal establishment involved (in this case, the Secretary of HHS) or the officer next in rank, the head or officer next in rank may not prevent or prohibit the inspector general from initiating, carrying out or completing any audit or investigation, including the issuing of subpoenas during the course thereof. *Id.* In addition, the IGA vests the inspector general with broad discretion to determine which investigations and reports relating to the administration of the programs and operations are necessary or desirable. [*28] *Id.* at § 6(a)(2). The IGA further allows the Secretary of HHS to transfer to the IG such functions, powers or duties of HHS which the Secretary determines are properly related to the functions of the OIG and would further the purposes of the IGA. *Id.* at § 9(a)(2). The Inspector General's power is not without limitation, however, as the IGA does specifically prohibit the Secretary of HHS from transferring "program operating responsibilities" to the Inspector General. *Id.* at § 9(a)(2). [12]

11 The Department of Health and Human Services is one of the federal establishments enumerated in § 11(2). The term "head of the establishment" refers to the Secretary of Health and Human Services. 5 U.S.C. App. 3, § 11(1).

12 The IGA does not define what is meant by "program operating responsibilities."

IV. ANALYSIS - MOTION TO DISMISS

HHS advances three main arguments in support of dismissing Pennsylvania's action seeking to enjoin the OIG audit. First, HHS submits that the [*29] facts alleged have not established any final agency action that would entitle Pennsylvania to judicial review of its claims under the APA. Rather, according to HHS, Pennsylvania has established only a decision to *initiate* an audit, which is not a final agency action. Second, HHS contends that because Pennsylvania has the ability to raise its arguments as to a defense to any enforcement action, judicial review under the APA is inappropriate. Third, HHS contends that the OIG's decision to audit Pennsylvania is a matter committed to agency discretion and therefore, is not subject to judicial review. Finally, HHS submits that the ripeness doctrine provides an independent basis for dismissal of Pennsylvania's Complaint.

In response, Pennsylvania counters that the Program Instruction is a final agency action since it represents a settled agency position which has legal consequences. Pennsylvania further contends that the Program Instruction is ripe for review because it meets the Third Circuit's relaxed standard of ripeness in declaratory judgment cases, [13] and because the validity of the Program Instruction involves a pure legal question and questions of statutory construction are [*30] presumptively suitable to judicial review. [14] As to dismissal of the audit challenges, Pennsylvania argues that the Third Circuit's decision in *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57 (3d Cir. 2003) ("*UMDNJ*"), regarding ripeness and finality is readily distinguishable. Pennsylvania further argues that even applying the two-part ripeness standard followed in *UMDNJ*, Pennsylvania's claims meet both the hardship and fitness elements. In addition, Pennsylvania submits that although technically it could raise its defenses to the audit before the DAB, its challenge to the propriety of the audit will "wash out" of the case because DAB would refuse to consider this issue. Finally, Pennsylvania responds to HHS's argument that the audit decision is committed to agency discretion by arguing that this exception to judicial review is applied only in rare circumstances, where there is no meaningful standard against which to judge the agency's exercise of discretion. In the present case, Pennsylvania submits that meaningful standards do exist and therefore the action was not committed to HHS's discretion.

13 In *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004), the Court of Appeals held that to establish ripeness in a declaratory judgment case, the plaintiff need only show: ""(1) adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the

judgment.'" *Id.* at 196 (quoting *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir. 1996)) (other citation omitted).

[*31]

14 *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 95, 367 U.S. App. D.C. 185 (D.C. Cir. 2005).

In further response, Plaintiff filed a motion for partial summary judgment on the issue of the validity of the Program Instruction, arguing essentially that the Program Instruction is inconsistent with 42 U.S.C. § 1320a-2a and should be invalidated as "'in excess of statutory authority' and 'otherwise not in accordance with law.'" (Pl.'s Br. in Supp. of Mot. for Summ. J. at 15 (quoting 5 U.S.C. § 706(A) and (C)).) In response, HHS argues that the Court lacks jurisdiction to rule on the validity of the Program Instruction because the mere existence of an interpretive ruling, the Program Instruction, does not create standing under the APA; rather, under 5 U.S.C. § 702, Pennsylvania must demonstrate, among other things, that it has been injured by a final agency action. HHS contends that Pennsylvania has not and cannot allege harm from the Program Instruction itself. In addition, HHS submits that even if the Court has jurisdiction to rule on [*32] the validity of the Program Instruction, a finding in Pennsylvania's favor would not redress the alleged injury because such a ruling would merely determine whether the Program Instruction is consistent with the Social Security Act, not whether the Inspector General is acting in excess of his authority under the IGA, and therefore runs afoul of the standing requirements in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

For the reasons set forth below, the Court finds HHS's arguments persuasive and will grant HHS's motion to dismiss the complaint without prejudice.

A. Judicial Review Requirements of APA and Ripeness Standard

Pennsylvania asserts that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. However, a federal court may only exercise jurisdiction over claims against the United States where the United States has so consented. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (citations omitted). In the present case, the only statute that may provide the Court with jurisdiction over Pennsylvania's claims against HHS is the Administrative Procedure Act, [*33] 5 U.S.C. §§ 701 to 706. However, in order for this Court to have jurisdiction of Pennsylvania's claims against HHS under the APA, Pennsylvania must show that it meets all of the requirements for judicial review under the APA.

Generally, the APA affords a person who has been legally wronged because of, or adversely affected by, agency action to seek judicial review of said action, provided the following two requirements are met: (1) judicial review of the agency action must be authorized by statute; and, (2) the agency action for which judicial review is sought must be a final agency action for which there is no other adequate remedy in a court. 5 U.S.C. §§ 702, 704. In addition, judicial review of agency action under the APA is unavailable where the agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). When judicial review is appropriately exercised under the APA, the scope of the court's review extends to all relevant questions of law, the interpretation of constitutional and statutory provisions, and a determination of the meaning or applicability of the [*34] terms of an agency action. 5 U.S.C. § 706. In this regard, a reviewing court may hold unlawful and set aside agency action, findings or conclusions which it determines to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional rights or powers; or in excess of statutory jurisdiction, authority or limitations, among other things. [15] *Id.* at § 706(2)(A)-(C).

15 Although there are other bases upon which a reviewing court may hold an agency action to be unlawful, those bases are not relevant to the instant motion before the Court. *See* 5 U.S.C. § 706(2)(D)-(F).

In the instant matter, HHS challenges the finality of the alleged agency actions: (1) the decision of ACF/OIG to initiate an audit; [16] and (2) the issuance and enforceability of the Program Instruction. With regard to finality, the Supreme Court has delineated a two-part test: "First, the action must mark the 'consummation' of the agency's [*35] decisionmaking process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]'" *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (citations omitted); *Star Enter. v. U.S. Envtl. Prot. Agency*, 235 F.3d 139, 145 n. 9 (3d Cir. 2001) (citing *Bennett, supra*). The Court of Appeals has considered the following five factors in assessing finality: "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." *CEC Energy Co., Inc. v. Pub. Serv. Comm'n of Virgin Islands*, 891 F.2d 1107, 1110 (3d Cir. 1989) (citing *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1080 (3d

Cir. 1989) [*36] (citing *Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232 239-40, 101 S. Ct. 488, 66 L. Ed. 2d 416 (1980) ("*Standard Oil*"))). The Third Circuit's finality assessment comports with the Supreme Court's determination of indicia of finality: "a definitive statement of the agency's position which has a direct and immediate effect on the petitioner's day-to-day operations, which has the status of law, and of which immediate compliance is expected." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 579 (3d Cir. 1998) (citing *Standard Oil*, 449 U.S. at 239). The Supreme Court noted that in its previous decisions involving review of administrative actions, it has interpreted this finality requirement in a "pragmatic" or "flexible" way. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (citations omitted). [17]

16 Essentially, Pennsylvania objects to the audit OIG seeks to conduct with respect to the period 1998 through 2002 and seeks to enjoin ACF and OIG from proceeding with the audit, on the basis that the OIG audit is aimed at establishing a dollar amount for refund to the Federal government for the fiscal period 1998 through 2002 when the review that should be conducted for this fiscal period is the conformity review established under 42 U.S.C. § 1320a-2a and the regulations thereunder, 45 C.F.R. Part 1355, which would have been in effect had HHS promulgated the regulations within the deadline established by Congress. The Court knows of no authority and Pennsylvania cites none for the proposition that the governing law for a certain period in time is the law that would have been in place had the regulations been promulgated and taken effect earlier, short of a provision in the new law making it apply retroactively. In any event, the fact that the conformity review regulations did not take effect until March 27, 2000 is of no moment here because even if the conformity review regulations had been in effect for the fiscal period 1998 through 2002, neither section 1320a-2a nor 45 C.F.R. Part 1355 precludes other types of reviews or audits of Title IV-E programs.

This applies equally to Pennsylvania's other objection to the OIG audit, that despite HHS's finding in 2004 after conducting a conformity review that Pennsylvania was in substantial conformity with the regulations and State plan, OIG is proceeding to conduct an audit of Pennsylvania at ACF's request for the fiscal period 1998 through 2002. Underlying these two objections is Pennsylvania's belief that Congress, in enacting the conformity review statute (42 U.S.C. § 1320a-2a), intended to establish a single, comprehensive scheme for Federal oversight of all State Title IV-E programs. Although the Court has determined it is precluded from deciding this issue since it lacks jurisdiction, the Court observes nonetheless that there does not appear to be any support for Pennsylvania's argument in either the plain language of the statutes, regulations, or legislative history. Generally, the Court notes that Congress did not repeal 42 U.S.C. §§ 670-679b (Title IV-E eligibility reviews) with the enactment of Section 1320a-2a. That alone suggests that the conformity review under Section 1320a-2a was not intended to replace eligibility reviews under Section 672. In addition, these reviews are entirely different in purpose and scope. *See* discussion *supra* at 11-12.

[*37]

17 In *Abbott Laboratories*, the Supreme Court held that pre-enforcement review of regulations promulgated by the Commissioner of Food and Drugs was required to prevent a hardship to the drug manufacturer plaintiffs. 387 U.S. at 152-53. The regulations at issue in that case took effect immediately and compelled the drug manufacturers to choose between costly compliance (significant changes in everyday business practices) and the risk of severe criminal and civil penalties for failure to comply. *Id.* at 153. Accordingly, the Supreme Court concluded that judicial review was proper in light of the very real dilemma in which the drug manufacturers were placed. *Id.* Unlike the regulation in *Abbott Lab.*, the Program Instruction here does not place Pennsylvania in a very real dilemma in that the Program Instruction does not impose any rules having a direct and immediate, day-to-day effect on its business affairs under the threat of serious criminal or civil sanctions for non-compliance. Indeed, the mere issuance of the Program Instruction has not caused any harm to Pennsylvania.

[*38] The resolution of the finality issue in this case is controlled by the Supreme Court's decision in *Standard Oil, supra*, and the Court of Appeals decision in *UMDNJ, supra.* In *Standard Oil*, the FTC issued a complaint against several oil companies alleging that it had reason to believe that the companies were violating federal law prohibiting unfair competition and deceptive trade practices. 449 U.S. at 232. Prior to completion of the administrative proceedings, one of the oil companies filed suit in federal court challenging the FTC's actions on the basis that the Commission lacked sufficient evidence before issuing its complaint to determine it had reason to believe that this particular oil company was violating the law. *Id.* at 236. The Supreme Court found that the term "reason to believe" was not a definitive

statement of position and the issuance of a complaint averring a "reason to believe" "ha[d] no legal force comparable to that of the regulation at issue in *Abbott Laboratories*, nor any comparable effect upon [the oil company's] daily business." *Id.* at 242. The Supreme Court contrasted [*39] the complaint's lack of legal or practical effect upon the oil company, with the effect of judicial review, *i.e.*, interference with the proper functioning of the agency and a burden for the courts. *Id.* at 242. In this regard, the Supreme Court opined that "[j]udicial intervention into agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Id.* (internal citations omitted). The Supreme Court also rejected the oil company's alternative argument that it would be irreparably harmed unless the issuance of the complaint was judicially reviewed immediately, holding that even though the burden of defending the proceeding will be substantial, "'the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Id.* at 244 (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222, 58 S. Ct. 834, 82 L. Ed. 1294 (1938)).

In *UMDNJ*, the Court of Appeals applied the holding in *Standard Oil* to a challenge [*40] of the inspector general's decision to initiate a Medicare audit. *UMDNJ* involved a challenge to Physicians at Teaching Hospitals (PATH) audits which the inspector general of HHS intended to conduct to determine whether any of the hospitals had engaged in Medicare overbilling. Upon learning of the intended audits, the hospitals initially elected to have the audits performed by an independent auditor at their own expense. However, the hospitals never went forward with the independent audits and instead filed suit to enjoin the audits. Since the hospitals refused to go forward with the audits, the inspector general issued administrative subpoenas for the relevant records. The hospitals refused to comply with the subpoenas and the inspector general brought an action in federal court to enforce the subpoenas. 347 F.3d at 62-63.

The district court dismissed the hospitals' claims for lack of jurisdiction on two related grounds. First, the district court held that the decision to initiate the PATH audits was not "final" and therefore the court lacked jurisdiction to review the agency's action under the APA. *Id.* at 68. The district court similarly concluded [*41] that the case was not sufficiently ripe at that juncture to allow judicial review. *Id.* In affirming the district court's dismissal of the hospitals' suit to enjoin the audits for lack of jurisdiction, the Court of Appeals addressed both the finality and ripeness of the proposed audits, noting that finality is an element in the test for ripeness. *Id.* (citing *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003); *Abbott Labs*, 387 U.S. at 149).

As the Court of Appeals explained:

> Determining whether a dispute over agency action is ripe involves a two-part inquiry. We must assess "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Assoc.*, 538 U.S. at [808]; *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, and whether "further factual development would 'significantly advance our ability to deal with the legal [*42] issues sented.'" *Nat'l Park Hospitality Assoc.*, 538 U.S. at [812] (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59[, 82,] 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978)); *Abbott Labs.*, 387 U.S. at 149.

347 F.3d at 68 (footnote omitted). Applying this test to the facts before it, the Court of Appeals found that two of the above three requirements were met, *i.e.*, the issue of whether the inspector general has the authority to initiate PATH audits was primarily a legal one, and further factual development did not appear to be necessary to resolve the issues. Nonetheless, the Court of Appeals concluded the case was "not sufficiently 'fit' for judicial review" because the inspector general's decision to initiate the PATH audits was not a final one for purposes of ripeness and judicial review. *Id.* In so holding, the Court of Appeals reasoned that regardless of how decisive the inspector general's determination was to initiate the PATH audits, it was only a decision to initiate an investigation, noting that none of the hospitals had been charged with fraud, nor had the agency commenced any kind of enforcement proceeding. *Id.* The [*43] Court of Appeals further noted that none of the hospitals had been required to change their billing practices or pay a penalty for past practices, but were only required to cooperate with the audits. *Id.* at 68-69.

The Court of Appeals' decision in *UMDNJ* was also informed by the decision of its sister court in *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 781 (9th Cir. 2000) ("*AAMC*"), [18] which held that "'[a]n investiga-

tion, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action.'" *UMDNJ*, 347 F.3d at 69 (quoting *AAMC*, 217 F.3d at 781). The Court of Appeals in *UMDNJ* thus found that the path of an investigation is highly uncertain and a very real possibility exists that no enforcement action will ultimately be taken, for any number of reasons, including the inspector general changing her mind on one or more issues during the audit. *Id.* Accordingly, the Court of Appeals concluded that "'[j]udicial intervention into the agency process denies the agency an opportunity to correct is own mistakes and to apply its expertise.'" *Id.* (quoting [*44] *Standard Oil*, 449 U.S. at 242). [19]

18 In *AAMC*, the alleged final action also involved PATH audits. In that case, medical associations and teaching hospitals brought an action to enjoin medicare reimbursement audits of teaching hospitals under the PATH program that the OIG for HHS was conducting. Plaintiffs alleged that the audits were based on unlawful or retroactively applied standards for Medicare billing and that the audits were being used to coerce settlements on threat of suit under the False Claims Act. 217 F.3d at 773. The Court of Appeals for the Ninth Circuit held that the Plaintiffs' case was unripe as the audits did not constitute final agency action (*id.* at 780-81), and the "outcome[] turn[ed] on contingencies which the court [wa]s ill-equipped to predict." *Id.* at 782. The court of appeals also found significant the fact that the challenged actions related to past billing practices rather than requiring a costly change in present conduct. *Id.* at 782. In finding the agency action unfit for judicial review, the court of appeals rejected plaintiffs' argument that an exception under the hardship prong, as recognized by the Supreme Court in *Abbott Labs*, required immediate judicial review under the facts of that case. The court of appeals found that since none of the PATH audits were complete, it had no evidence that the government had threatened litigation to obtain settlements, and plaintiffs were not faced with a Hobson's choice, the rule in *Abbott Labs* was not implicated because it only applied to regulations that posed an immediate dilemma. *Id.* at 783-84. The court of appeals affirmed the district court's dismissal of the case for lack of jurisdiction, but reversed the district court's dismissal insofar as the dismissal was *with prejudice*, and ordered the case be dismissed without prejudice.

[*45]

19 The Court of Appeals in *UMDNJ* also rejected the hospitals' further contention that the decision of the agency to employ a certain standard with regard to the questionable billing practices was itself a final action subject to judicial review, for the same reasons stated earlier.

In affirming the district court's dismissal of the hospitals' claims, the Court of Appeals also noted the five indicia of finality that it delineated in *GEC Energy*, and concluded with regard to whether the decision represents the agency's definitive position on the questions, that intermediate decisions made in the course of determining what position the agency will ultimately take are not determinative. *Id.* at 70. As to whether the decision to initiate the audits 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 hospitals, the hospitals argued that the burdens of complying with the audits themselves constituted the relevant effects, *i.e.*, audits are a disruptive process that would detract the hospitals [*46] from providing healthcare and would cost over one million dollars. *Id.* Relying again on *Standard Oil*, the Court of Appeals rejected the hospitals' argument, concluding "[t]hese burdens . . . are not the kind of burdens that support a finding of finality." *Id.* (citing *Standard Oil*, 449 U.S. at 242). The Court of Appeals found the expense and annoyance of administrative audits and investigations, like the expense and annoyance of litigation, is "part of the social burden of living under government." *Id.* (quoting *Standard Oil*, 449 U.S. at 244; and citing *CEC Energy*, 891 F.2d at 1110). Even more compelling in *UMDNJ* was the fact that the audits at issue were directed to past conduct and thus the only effects the hospitals would encounter would be related to their participation in the audits/investigation, and any actions that might be taken as a result; there would be no direct effect on the hospitals' "'primary conduct.'" *Id.* (citing *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810; *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967)).

Finally, turning to the hardship [*47] prong of the ripeness test, the Court of Appeals concluded the hospitals failed to show sufficient hardship that would give rise to a finding of ripeness for judicial review. *Id.* at 71. In reaching this conclusion, the Court of Appeals found the only significant hardships to the hospitals resulting from the decision to initiate the PATH audits were "those related to compliance with a request for information reasonably directed at a legitimate purpose of the inspector general." *Id.* The Court of Appeals thus concluded that "[t]his is a cost that [the hospitals]--recipients of Medicare funding--must face as a 'burden of living under government.'" *Id.* (quoting *Standard Oil*, 449 U.S. at 244).

Moreover, the Court of Appeals affirmed the district court's dismissal of the hospitals' claims for lack of juris-

diction, even though the hospitals raised "profoundly serious questions" regarding the wisdom and fairness of the PATH audits. *Id.* In the end, however, the Court of Appeals found the audits were within the broad authority of the inspector general, and any challenges to this authority must wait until an enforcement or other final action, if any, has been [*48] taken against the hospitals. *Id.*

1. The Audit (Counts B and C)

a. No Final Agency Action

It is clear from controlling precedent that decisions to conduct an audit do not constitute final agency action for purposes of judicial review under both the APA and the ripeness doctrine. The Court does not see any reason for finding otherwise in the case at bar. In both *UMDNJ* and this case, the agency action at issue is the decision of the inspector general to initiate an audit. As in *UMDNJ*, the issue of whether the inspector general has the authority to initiate the audit of Pennsylvania's Title IV-E program is primarily a legal one, and that issue does not appear to require further factual development. However, as in *UMDNJ*, the decision to initiate the audit in the present action is not "sufficiently 'fit' for judicial review" because the decision of the inspector general was only a decision to initiate an investigation, and Pennsylvania has not yet been charged with fraud or abuse, nor has any type of enforcement proceeding commenced.

Moreover, the inspector general's decision in this case to initiate the audit of Pennsylvania's Title IV-E claims has no [*49] legal force or effect on Pennsylvania's day-to-day business, comparable to that of the regulation at issue in *Abbott Labs*. *See* Note 17, *supra.* Like the PATH audits in *UMDNJ*, the proposed audit by the inspector general here is directed at past conduct and therefore the only effects on Pennsylvania would be related to its participation in the audits/investigation and any actions resulting therefrom; there would be no direct effect on Pennsylvania's "primary conduct." In this regard, Pennsylvania has not alleged that it had to change its claims procedure for reimbursement of Title IV-E claims, or had to pay a penalty for past practices. So far, all Pennsylvania has been required to do is comply with the audits, just as the hospitals were required to do in *UMDNJ*. Moreover, it is entirely possible that the inspector general will recommend that no enforcement action be taken against Pennsylvania, and that ACF will not take any such action. Therefore, considering that the audits are just in the initial stages, judicial intervention at this time would deny HHS the opportunity to correct its own mistakes, if any, and apply its expertise, and further, would lead to piecemeal [*50] review, resulting in an inefficient and perhaps unnecessary use of judicial and economic resources.

Pennsylvania tries to side-step the finality issue by arguing ACF improperly shifted program operating responsibilities to the inspector general. The hospitals in *UMDNJ* raised the very same issue, albeit in the context of a challenge to HHS's action to enforce the administrative subpoenas, without success. In determining whether the inspector general's subpoenas were lawful and therefore enforceable, the Court of Appeals focused its inquiry on determining whether the subpoenas were issued pursuant to a legitimate purpose. The hospitals had argued that such legitimate purpose was lacking because the inspector general lacked the authority to conduct PATH audits in the absence of fraud or abuse (and admittedly there was no evidence yet of Medicare fraud at the hospitals). 347 F.3d at 64. In particular, the hospitals argued that PATH audits are routine compliance audits and as such, they constitute program operating responsibilities which HHS may not transfer to the inspector general unless it is doing so based on a specific allegation of fraud or abuse. *Id.* at 65. [*51] After examining the purpose of the IGA and grant of powers thereunder, the Court of Appeals found that 5 U.S.C. App. 3, § 9(a)(2) does not prohibit duplication of functions or copying of techniques and therefore does not provide any basis for concluding that the inspector general's authority cannot overlap with that of HHS, or that a transfer of program operating responsibilities occurs when the inspector general mimics or adopts agency investigatory methods or functions in the course of an independent audit. 347 F.3d at 66 (citing *Winters Ranch P'ship v. Viadero*, 123 F.3d 327, 334 (5th Cir. 1997)). The Court of Appeals went on to explain that if HHS "fail[ed] to perform a function that is within its responsibilities, and the inspector general takes on those responsibilities, then it may be correct to speak of 'transfer' of program operating responsibilities." *Id.* (citations omitted). The Court of Appeals further held that just because HHS can and does perform routine compliance audits, that does not necessarily make them program operating responsibilities, as compliance audits are directed at enforcing rules under which the Medicare providers operate [*52] and therefore, need not be viewed as part of the "operation" of the Medicare program. The Court of Appeals summarized:

> In any event, the [IGA] contemplates the transfer of any duties that may assist the inspector general in its mission, so long as they are not "program operating responsibilities." Presumably, this would include a range of responsibilities [HHS] might perform, that do not constitute program operating responsibilities. Thus, the fact that [HHS] can and does perform some of these tasks would not alone pre-

> vent their transfer to the Office of Inspector General.
>
> . . .
>
> 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.

Id. at 67.

Based on *UMDNJ*, the Court finds the fact that ACF may have asked OIG to conduct the audits does not, in and of itself, establish an improper transfer of program operating responsibilities. [20] While the Court must accept as true, for purposes of the motion to dismiss, Pennsylvania's [*53] factual allegation that ACF requested OIG to conduct the audit, it does not, however, have to accept as true Pennsylvania's conclusory statement that ACF improperly shifted its Title IV-E responsibilities to OIG in violation of the IGA. Based on the factual allegations in the complaint, the Court cannot say that the eligibility audits that ACF has requested OIG to perform here are outside the authority granted to the inspector general under the IGA. As in *UMDNJ*, if the Title IV-E program audits that ACF wants the inspector general to perform constitute routine compliance or eligibility audits, these audits could arguably be for the purpose of recouping reimbursements improperly claimed and thus, would be more akin to enforcement or management functions, rather than program operating responsibilities. Indeed, historically OIG has conducted audits of Title IV-E programs. [21] In any event, whether ACF's request actually constitutes an unlawful shift of program operating responsibilities to the inspector general will not be known until the audits are complete and the administrative record is fully developed. Therefore, the issue of whether ACF improperly shifted its program operating [*54] responsibilities to the inspector general is not a purely legal question and cannot be answered definitively at this juncture. Although none of the factual allegations in the complaint currently supports the conclusion that the audit the inspector general seeks to conduct involves an improper shifting of program operating responsibilities, because the audit is still ongoing and the nature and scope of the audit has yet to be determined, the question of the improper shifting of program operating responsibilities can only be made after the audit is concluded and the true nature of the audit is known. [22] Thus, this issue is not "fit" or ripe for review at this time.

20 According to HHS, although both the Title IV-E reviews under 45 C.F.R. Part 1356 and OIG audits examine eligibility, OIG audits typically examine eligibility and other issues to determine whether costs were properly claimed by States and are conducted in accordance with government auditing standards issued by GAO (known as GAO Yellow Book). *See* 5 U.S.C. App. 3, § 4(b)(1)(A).

21 In paragraph 15 of the Complaint, Plaintiff suggests that OIG has conducted audits of Title IV-E programs in the past ("The auditors are going well beyond the normal audit program *used in past OIG Title IV-E audits* . . .") (emphasis added). In addition, ACF's explanation provided in the Final Rule for 45 C.F.R. § 1356.71(h) in response to comments made regarding the frequency of the eligibility reviews underscores that ACF's Title IV-E review was not intended as the sole mechanism for verifying the propriety and accuracy of the States' claims for Federal matching funds. In response to comments that the Title IV-E eligibility reviews should be conducted more or less frequently than the proposed 3-year period, ACF explained that it did not believe any change was necessary to the 3-year interval between primary reviews because, among other things, "the title IV-E review is not the sole mechanism in place to assure the propriety and accuracy of State' (sic) claiming procedures, since the ACF Regional Offices review the quarterly claims submitted by the States." 65 Fed. Reg. 4020, 4072 (Jan. 25, 2000).

[*55]

22 Nonetheless, Pennsylvania argues that some discovery is needed at this time on the issue of whether ACF improperly shifted program operating responsibilities to the inspector general. Pennsylvania should not be allowed to conduct discovery on this issue, because the facts that Pennsylvania seeks to discover will not be known until the audits are concluded. Therefore, discovery will not help Pennsylvania establish ripeness at this juncture as to Count B.

Pennsylvania does not dispute that the Court of Appeals' decision in *UMDNJ* represents controlling precedent as to the ripeness and the finality of its challenges to the OIG audits. (Pl.'s Br. at 25.) However, Pennsylvania maintains that *UMDNJ* is readily distinguishable. In particular, Pennsylvania submits that *UMDNJ* is factually distinguishable in the following six respects. First, Pennsylvania submits OIG in this case does not have an audit program that includes Title IV-E claims of the type at issue here. Second, Pennsylvania is

alleging not merely procedural irregularities but an abuse of the audit process by singling out one [*56] state for adverse treatment. Third, Pennsylvania submits HHS has refused to issue a subpoena in this case, even though one was specifically requested by Pennsylvania. Fourth, Pennsylvania contends unlike *UMDNJ*, there is no administrative remedy here through which its duty shifting and improper audit claims can be litigated. Fifth, the audits which OIG seeks to conduct here are not in the ordinary course. Finally, Pennsylvania argues it can demonstrate hardship here while the hospitals in *UMDNJ* could not. For the reasons set forth below, the Court finds no merit to Pennsylvania's argument.

With regard to the first alleged distinction, the Court finds that it is irrelevant whether the inspector general of HHS has an audit program that includes Title IV-E claims of the type at issue here. Pennsylvania reads the Court of Appeals' holding in *UMDNJ* and the IGA too narrowly. Historically, OIG has audited Title IV-E programs. This authority is derived from the IGA which does not limit the types of audits the inspector general can perform other than the restriction on shifting of program operating responsibilities. As explained below, whether the audit at issue here involves an [*57] improper shift of ACF's program operating responsibilities to the inspector general cannot be determined until the audit is completed. Therefore, the Court finds Pennsylvania's first distinction lacks merit.

As to the second alleged distinction, abuse of the audit process, while it is true that the Court of Appeals was not faced with this issue in *UMDNJ*, that does not alter the fact that the principles of finality and ripeness must still be applied to the facts of this case. Applying those principles to the alleged abuse of the audit process claim in Count C results in the same conclusion that was reached above as to the propriety of the audits in question--insufficient information exists at this juncture to determine whether any such abuse is occurring here and thus must await the conclusion of the audit and final agency action. Therefore, the Court finds Pennsylvania's second distinction also lacks merit.

With regard to the third alleged distinction, the fact that the inspector general here has not issued administrative subpoenas for Pennsylvania's documents is of no moment to the issues of whether the inspector general has the authority to conduct the audits in question, or [*58] whether the decision to conduct an audit constitutes final agency action. Thus, it is a distinction without a difference.

As to the fourth alleged distinction, no adequate remedy exists for adjudicating Pennsylvania's duty shifting and improper audit claims, if such a remedy did not exist here for these claims, the Court agrees that would be a material distinction. However, from the record in this case, it simply cannot be determined conclusively that an adequate remedy does not exist. As explained below in subpart *b*, it will not be known until the administrative investigation and audit are complete and Pennsylvania attempts to seek review of the agency's decision before the DAB as to whether an *adequate* remedy exists. Moreover, the uncertainty as to the availability of an adequate remedy before the DAB underscores the lack of ripeness as to Counts B and C and the need to let the administrative agency make this determination in the first instance.

With regard to the fifth alleged distinction, Pennsylvania attempts to argue that the holding in *UMDNJ* applies only to audits conducted "in the ordinary course," and since the audit at issue here is not being conducted "in the [*59] ordinary course," judicial review of Counts B and C is not foreclosed at this time. According to Pennsylvania, the audit at issue here is not being conducted "in the ordinary course" because it is directed solely at Pennsylvania and in excess of the authority granted inspector generals under the IGA, and HHS' conduct is expected to continue into the future. However, as explained earlier, it is premature at this juncture to determine whether the proposed audit is not being conducted in the ordinary course. Therefore, judicial review of Counts B and C must wait the conclusion of the audit and final agency action.

The sixth and final way Pennsylvania attempts to distinguish *UMDNJ* from this case is with regard to the hardship prong of the ripeness test. Pennsylvania contends there are three reasons why it can demonstrate hardship, while the hospitals in *UMDNJ* could not. First, Pennsylvania argues it cannot mount its legal challenges at the end of the audits because HHS has structured the appeal process so Pennsylvania's issues will "wash out" of the case, [23] unlike *UMDNJ*, where the Court of Appeals assumed the issues presented by the hospitals would not "wash out" and could [*60] be presented to the DAB. According to Pennsylvania, this "wash out" implicates the hardship prong of the ripeness standard because it runs afoul of the purpose of the ripeness doctrine to not permanently bar the courthouse door. However, as explained more fully below, it cannot be conclusively determined at this juncture that the courthouse door is closed to Pennsylvania. Therefore, the administrative agency and appeal procedures must be given an opportunity in the first instance to address these issues. Should the agency and/or DAB decline to address them, Pennsylvania should then seek judicial review.

23 Pennsylvania's "wash out" argument is discussed more fully below in subpart *b*.

The second reason Pennsylvania maintains it can show hardship is that it is allegedly being coerced into submitting to the audits under an actual threat of criminal prosecution. Pennsylvania argues that it has specifically alleged a genuine threat of imminent prosecution and this satisfies the ripeness requirement. [24] A close [*61] examination of the complaint in this case fails to reveal any such allegation. The only place where such allegation is made is in Pennsylvania's brief in opposition to HHS's motion to dismiss. Even so, Pennsylvania fails to set forth any allegations or argument to support that such criminal prosecution was threatened and that it is imminent. A conclusory allegation of such imminent threat, without more, is insufficient to show coercion and therefore hardship under the ripeness test. *Jacobus*, 338 F.3d 1095, 1104-05.

24 In support of this argument, Pennsylvania cites *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679 (7th Cir. 1998). *Jacobus* involved a motion to dismiss on mootness grounds. The court of appeals in that case set forth a three-part test for determining whether a credible threat of prosecution existed under a federal statute: "1) 'whether the plaintiffs have articulated a 'concrete plan' to violate the law in question'; 2) 'whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings'; and 3) 'the history of past prosecution or enforcement under the challenged statute.'" 338 F.3d at 1105 (citation omitted). Pennsylvania does not indicate whether or how it has met any of these criteria. Similarly, Pennsylvania does not explain how or why *Commodity Futures Trading Comm'n*, which sought a ruling on the justiciability of a First Amendment facial breadth challenge to criminal statutes, applies to the case at bar.

[*62] Finally, the third reason advanced by Pennsylvania to show hardship is Pennsylvania's contention that it will likely have to reserve approximately $ 200 million in child welfare funds to address the contingency that the inspector general will find overpayments and it will be compelled to repay them. [25] (Pl.'s Br. at 31.) Pennsylvania further argues that the huge size of the needed financial reserve for this audit goes well beyond the mere "'expense and annoyance of litigation that is part of the social burden of living under government.'" (*Id.* citing *UMDNJ*, 347 F.3d at 69).) Pennsylvania fails to cite any authority in support of this argument, and none appears to exist. The Court finds that while $ 200 million is a significant amount, the focus for establishing hardship in the above precedent has been on the cost of litigation, not the amount of reserves for overpayments which may or may not be assessed at the completion of the audit. The costs estimated here and in *UMDNJ* are similar. Moreover, Pennsylvania has failed to show that the $ 200 million reserve is anything more than an estimate of its potential overpayments. Given that the estimated cost of the [*63] audit to Pennsylvania is substantially similar to the amount claimed in *UMDNJ*, the Court finds that Pennsylvania has failed to demonstrate a hardship on this basis.

25 The Court notes that Pennsylvania's representation that it will likely have to reserve $ 200 million for overpayments that may be assessed as a result of the audit actually implies that a proper basis may exist for the inspector general to conduct the audit at issue here.

For the reasons set forth above, the Court finds that Pennsylvania has failed to materially distinguish *UMDNJ* from the case at bar and, therefore, *UMDNJ* controls the outcome here.

Finally, in Count C of its complaint, Pennsylvania objects to the OIG audit on the basis that the scope of the proposed audit is more extensive than any previous audit and it is the only State to be subjected to such an extensive audit. Again, for the reasons set forth above, this claim does not meet the finality requirement or the ripeness test, and therefore, is best left for the administrative [*64] agency to adjudicate in the first instance.

b. Pennsylvania's Ability to Raise Its Defenses Makes Review Inappropriate

Alternatively, HHS argues that even if Pennsylvania had established a final agency action, judicial review is nonetheless foreclosed because administrative action is reviewable under the APA only if there is no adequate remedy in a court and Pennsylvania has an adequate remedy because it may raise all of its defenses to the audit, including the allegation that the inspector general lacks the authority to conduct the audits, in any future administrative action by ACF to recover misspent Title IV-E funds. In support of this argument, HHS cites 42 U.S.C. § 1316(d); 45 C.F.R. Part 16 & §§ 74.62, 92.43, & 201.14; *Morales v. TWA*, 504 U.S. 374, 381, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); *Gen. Motors Corp. v. Volpe*, 457 F.2d 922, 923-24 (3d Cir. 1972); *N.J. Hosp. Ass'n v. United States*, 23 F.Supp. 2d 497, 501 (D.N.J. 1998); and several written decisions of the DAB.

In response, Pennsylvania counters that it will not be able to raise its legal challenges to the propriety of the inspector general's audit because HHS has [*65] structured the appeal process so Pennsylvania's issues will "wash out" of the case. In particular, Pennsylvania contends the "wash out" of the issues flows from the way HHS has structured the appeal process. According to

Pennsylvania, the inspector general's audit never results in an appealable administrative action because the inspector general provides the evidence obtained during the audits to HHS, and using this evidence, HHS determines that an overpayment exists. Pennsylvania maintains that it can appeal this overpayment determination, but it cannot challenge how or why the evidence was obtained by the inspector general because of the "'fruit of the poisonous tree' doctrine and its associated exclusionary rule do not apply in civil proceedings." (Pl.'s Br. at 29.) In support of this argument, Pennsylvania cites *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984). However, that case is completely inapposite in that the Supreme Court in *Lopez-Mendoza* considered whether to apply the exclusionary rule to civil deportation proceedings. Notwithstanding this distinction, Pennsylvania fails to explain how that case has any relevance here, or how the holding in *Lopez-Mendoza* [*66] supports its argument that it will be unable to challenge the propriety of the audit before the DAB.

Moreover, Pennsylvania's "wash out" argument is undermined by the decisions of the DAB. Related to its "wash out" argument is Pennsylvania's disagreement with HHS's argument that it may raise all of its defenses to the audit to the DAB. Pennsylvania maintains the DAB would refuse to consider the issues of whether the inspector general's audit violated the IGA or was conducted improperly. Pennsylvania submits that some discovery is needed to show that the DAB narrowly construes its own jurisdiction and therefore no viable administrative remedy exists. The Court finds no merit to Pennsylvania's argument. Indeed, a review of Part 16 of Title 45, of the Code of Federal Regulations reveals that the DAB has jurisdiction over all disallowances under Title IV-E. 45 C.F.R. § 16.13 and Part 16 App., § B(a)(1). The regulations further provide that the DAB is bound by all applicable laws and regulations. 45 C.F.R. § 16.14. While the DAB has construed this provision to preclude it from considering constitutional challenges to a statutory provision, [*67] *see N.Y. State Office of Children & Family Servs.*, DAB Decision No. 1757 (Dec. 21, 2000), the DAB does not appear to be precluded from considering whether ACF's policies and interpretations of statutes and regulations are valid, *see id.*, *and Cal. Dep't of Soc. Servs.*, DAB Decision No. 1959 (Jan. 25, 2005). Also, the DAB has previously considered whether the inspector general's audit findings and methodologies with regard to audits of claims under Title IV-E programs are correct. *See N.Y. State Dep't of Soc. Servs.*, DAB Decision No. 1358 (Sept. 30, 1992). In light of these decisions of the DAB and that Pennsylvania has not advanced a constitutional challenge to a statute here, the Court cannot find that the DAB would refuse to consider Pennsylvania's challenges to the propriety of the inspector general's audit and, in fact, these decisions suggest that it is likely that the DAB would review Pennsylvania's challenges to the audit. At the very least, judicial review is not foreclosed and therefore, the Court declines to find Pennsylvania presently lacks an adequate remedy on this basis.

Pennsylvania further suggests that its challenge to the audit is similar to an issue of [*68] public policy that is capable of repetition but evades review. In this regard, Pennsylvania submits that the "short order" doctrine provides yet another basis for judicial review of its challenges to the inspector general's audit. [26] Pennsylvania contends that because of the "wash out" problem discussed earlier, the initiation of the inspector general's audit constitutes the kind of "short order" that is subject to judicial review. Pennsylvania's reliance on the "short-order" doctrine is misplaced. First, as explained previously, Pennsylvania's "wash out" argument is undermined by the written decisions of the DAB, and therefore, this is not a situation where the actions of ACF and OIG evade review without a chance for redress. Second, and perhaps more importantly, *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 514-15, 31 S. Ct. 279, 55 L. Ed. 310 (1911), involved *final* orders of the ICC which expired before the civil proceeding challenging their enforcement had concluded. In the instant case, there are no final orders in the first instance. Accordingly, the "short-order" doctrine is simply inapposite and therefore, does not provide a basis for judicial review.

> 26 The "short order" doctrine was created by the Supreme Court to ensure that judicial review of administrative decisions would not be "defeated by shortterm orders capable of repetition, yet evading review . . . without a chance of redress." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911); *Finberg v. Sullivan*, 634 F.2d 50, 55 (3d Cir. 1980) (To avoid mootness under the "short order" doctrine, "a complaining party must demonstrate a 'reasonable expectation' that he will be subject to a recurrence of the activity he challenges[, and] . . . that the activity is 'by its very nature' short in duration, 'so that it could not, or probably would not, be able to be adjudicated while fully 'live.'") (citations omitted).

[*69] In summary, because there appear to be administrative remedies available to Pennsylvania for review of its challenges to the inspector general's audit, the Court concludes it lacks jurisdiction to review Pennsylvania's challenges to Counts B and C at this time. [27]

27 The exhaustion doctrine also supports this Court's determination that Pennsylvania's claims are not entitled to judicial review at this time. Generally, exhaustion of administrative remedies is mandated "so that court proceedings do not prematurely interrupt an ongoing administrative process." *Commw. of PA Dep't of Public Welfare v. United States*, Civ.A. No. 99-175, 2001 U.S. Dist. LEXIS 3492, *47 (W.D.Pa. Feb. 7, 2001) (citing *Kleissler v. United States Forest Serv.*, 183 F.3d 196, 201 (3d Cir. 1999)). Consequently, federal courts have followed this rule because it will "(1) avoid 'premature interruption of the administrative process,' (2) allow the agency to 'develop the necessary factual background,' (3) give the agency the 'first chance' to exercise its discretion, (4) properly defer to the agency's expertise, (5) provide the agency with an opportunity 'to discover and correct its own errors,' and (6) deter the 'deliberate flouting of administrative processes.'" *Id.* at *42-43 (quoting *Kleissler*, 183 F.3d at 201 (quoting *McKart v. United States*, 395 U.S. 185, 194-95, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). Thus, the exhaustion doctrine also supports dismissal of Pennsylvania's complaint.

[*70] ***c. Whether Decision to Initiate Audit is Committed to Agency's Discretion***

Also in the alternative, HHS argues that because the decision to initiate an audit is committed to the inspector general's discretion, it is not reviewable under the APA. In support of this argument, HHS cites 5 U.S.C. § 701(a)(2), which provides that the APA precludes review of an "agency action [that] is committed to agency discretion by law," and this provision has been interpreted by the Supreme Court to mean that review is precluded under the APA when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); *Webster v. Doe*, 486 U.S. 592, 599-600, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (quoting same). HHS submits that the IGA grants the inspector general with sweeping discretion to decide "whether and how to undertake and audit," and this discretion is limited only by what the inspector general determines to be "necessary or desirable." *Webster*, 486 U.S. at 599-600. HHS urges the Court to conclude that this statutory language lacks any [*71] meaningful standard that could be applied upon judicial review. Plaintiff counters that this exception to judicial review is applied only in "rare circumstances" where the relevant law is "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Smriko v. Ashcroft*, 387 F.3d 279, 292 (3d Cir. 2004). Plaintiff maintains that since it has alleged a violation of a specific prohibition in the IGA (§ 9(a)(2)) and that the audit is being conducted improperly, meaningful standards do exist under which judicial review of the claims in Counts B and C can occur.

Because the Court has found that the inspector general's audit does not constitute a final agency decision and that an adequate remedy exists for review of the challenged audit thus precluding judicial review at this time, the Court need not reach HHS's alternative argument that the decision to initiate the audit at issue here is committed to the agency's discretion and therefore is not reviewable under the APA.

2. The Program Instruction (Count A)

Because the holding in *UMDNJ* clearly applies to the decision to initiate the audit in this case, Pennsylvania [*72] attempts to divert the Court's attention from that holding by asserting that the Program Instruction, not the decision to initiate the audit, is the final agency action. In support of this argument, Pennsylvania submits that the Program Instruction is similar to an "action transmittal" which HHS has not disputed constitutes a final agency action, and therefore, the Program Instruction is a final agency action which has legal consequences. Assuming for purposes of argument that Pennsylvania is correct, it has still failed to show that: (1) the Program Instruction has a direct and immediate effect on Pennsylvania's day-to-day business operations, and (2) that the agency action that is allegedly causing harm to Pennsylvania is the issuance of the Program Instruction.

The mere issuance of the Program Instruction only meets one of the five indicia of finality delineated in *CEG Energy*, that is, the validity of the Program Instruction involves a purely legal question that does not require further development of the facts. This indicia of finality is clearly outweighed by the absence of the other four indicia of finality. In particular, as to the first factor, although the Program Instruction [*73] may be characterized as definitive as to its policy regarding eligibility audits of Title IV-E programs under 42 U.S.C. § 672 and 45 C.F.R. part 1356, the Program Instruction alone does not definitively answer the questions as to its validity or enforceability, or whether the inspector general has the authority to conduct audits of Title IV-E programs, or whether the inspector general's decision to choose Pennsylvania for an audit is arbitrary and capricious. The second indicia of finality is just not implicated here as it cannot be said that there was an expectation that States would immediately comply with the Program Instruction--the Program Instruction does not direct States to do anything, but rather, simply states that Section 672 and Part 1356 do not preclude other types of audits of Title

IV-E programs. As to the third indicia of finality, Pennsylvania has not and cannot show that the mere issuance of the Program Instruction had any impact, let alone an immediate impact, on its day-to-day business operations. As stated earlier, the Program Instruction does not compel the States to immediately comply with any agency rule or regulation or statute, and therefore, [*74] States are not forced to choose between costly compliance (*i.e.,* significant changes in everyday business practices) and the risk of severe criminal and civil penalties for failure to comply. Indeed, the Program Instruction does not even mention the possibility of civil or criminal penalties associated with any audits. Finally, judicial review would not speed enforcement of the Program Instruction because the validity of the Program Instruction depends on an interpretation of the Social Security Act and therefore has no relevance to the inspector general's authority to conduct the audit at issue, which is derived from the IGA, a completely separate statute. Accordingly, four of the five indicia of finality are missing with regard to the Program Instruction. Therefore, the Court finds that the issuance of the Program Instruction does not constitute final agency action.

Knowing that it cannot succeed in showing that the issuance of the Program Instruction constitutes final agency action, Pennsylvania attempts to argue that the Program Instruction is ripe for judicial review because it meets the Third Circuit's relaxed standard of ripeness in declaratory judgment cases. [28] In support [*75] of its argument that the relaxed standard of ripeness applies to the instant action, Pennsylvania cites *Khodara Envtl., Inc. v. Blakely*, 376 F.3d 187, 196 (3d Cir. 2004). In that case, plaintiff, a landfill developer, sought a declaratory judgment that a federal statute regulating development of landfills near airports was unconstitutional and did not apply to a landfill which plaintiff sought to construct and operate near a county airport. However, jurisdiction in *Khodara* was predicated on 28 U.S.C. §§ 1331, 1343; significantly, judicial review was not sought under the APA. *Khodara Envtl., Inc., ex rel Eagle Envtl, L.P. v. Beckman*, 91 F. Supp. 2d 827, 829 (W.D.Pa. 1999). *Khodara* stands in contrast to *UMDNJ* which, like the case at bar, involved a request for injunctive relief prohibiting an audit by the inspector general and applied the finality requirement under the APA and the two-part ripeness standard set forth in *Abbott Labs.* Also contrasted with *UMDNJ* and the instant case, *Khodara* did not involve a dispute over agency action, but rather, involved a pre-enforcement challenge to a federal statute on constitutional [*76] grounds. Thus, the Court of Appeals' decision in *Khodara* is factually distinguishable and therefore the Court finds that the relaxed ripeness standard does not apply to this case.

28 The Court of Appeals applies a refined ripeness test in declaratory judgment cases because typically in those cases, relief is sought before a completed injury has occurred. Thus, the Court of Appeals applied the following relaxed ripeness standard to pre-enforcement review of a statute in a declaratory judgment case: "'(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment.'" *Khodara Envtl., Inc. v. Blakely*, 376 F.3d 187, 196 (3d Cir. 2004) (quoting *Pic-A-State Pa. Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir. 1996)).

Even if the Court were to hold the relaxed ripeness standard does apply here, Pennsylvania would not be able to establish that its claim under Count A is ripe for review. Pennsylvania argues that it is obvious that [*77] the first two factors of the relaxed ripeness test are met here. As to the third factor, Pennsylvania contends that the satisfaction of the third factor, "utility of the judgment should also be apparent since the extent to which States may be held financially liable for errors in their programs affects how they allocate resources, and whether millions of dollars in financial reserves must be set aside to cover potential losses instead of being used for current child welfare purposes." (Pl.'s Br. at 24.) However, the Court finds Pennsylvania's application of the third factor misses the mark. [29] A ruling on the validity of the Program Instruction will not resolve the issue of the propriety of the proposed audit because a ruling on the validity of the Program Instruction involves construction of the Social Security Act, while the authority of the inspector general to conduct the audit in question is derived from the IGA. Therefore, the Court is not convinced that a useful purpose would be served by exercising jurisdiction over Pennsylvania's claim in Count A. Accordingly, the Court finds that Count A is not ripe for review at this time under either the traditional ripeness standard applied [*78] in analyzing APA cases or the relaxed standard applied in declaratory judgment cases.

29 Also, it does not appear that Pennsylvania has met the first factor of the relaxed ripeness standard-adversity of interest. To satisfy this factor, courts have required a substantial threat of real harm which remains real and immediate throughout the course of the litigation. *See Presbytery of NJ of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1463 (3d Cir. 1994) (citing *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 649 (3d Cir. 1990)). As explained above, no such imminent threat of enforcement exists here.

B. Summary

In summary, the Court finds Pennsylvania has failed to show that the alleged conduct of ACF and/or the inspector general constitutes final agency action such that it is entitled to review under the APA. The Court further finds that Pennsylvania has failed to show that its claims are ripe for review. Therefore, the Court finds it lacks jurisdiction [*79] over Pennsylvania's complaint and will dismiss the complaint in its entirety without prejudice.

V. PENNSYLVANIA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court finds it cannot rule on the validity of the Program Instruction because as stated earlier, it lacks subject matter jurisdiction over that claim. Therefore, the Court will deny Pennsylvania's Motion for Partial Summary Judgment as to Count A.

VI. HHS'S MOTION TO STRIKE/STAY DISCOVERY

On December 8, 13, and 16, 2005, Pennsylvania served several discovery requests on HHS prior to a Rule 26(f) conference, case management conference, and entry of a Western District Local Rule 16.1 Initial Scheduling Order. On December 19, 2005, HHS filed a motion to strike the discovery requests and to stay future discovery pending the resolution of its motion to dismiss filed that same date. The Court delayed ruling on the motion to strike/stay discovery as it found that a ruling on this motion required an understanding and resolution of the substantive issues raised in the motion to dismiss and motion for partial summary judgment. Given its finding that the conduct in question does not constitute final agency action and [*80] that further factual development is required at the administrative level, the Court concludes that HHS's motion to strike/stay discovery should be granted. Allowing discovery in this case would run afoul of principles of exhaustion, and since Congress has provided an administrative remedy for the challenges raised here, the agency should be given the first chance to exercise its discretion and develop the necessary factual background. *Kleissler*, 183 F.3d at 201 (citing *McKart v. United States*, 395 U.S. 185, 194-95 (1969)). Accordingly, the Court will grant Defendants' Motion to Strike/Stay Discovery.

VII. CONCLUSION

For the reasons set forth above, the Court will grant Defendants' Motion to Dismiss without prejudice, deny Plaintiff's Motion for Partial Summary Judgment, and grant Defendants' Motion to Strike/Stay Discovery. An Order consistent with this opinion will follow.

Dated: September 19th, 2006

BY THE COURT:

s/ Donetta W. Ambrose

Chief United States District Judge

ORDER OF COURT

AND NOW, this **19th** day of September, 2006, it is Ordered that the referral to Magistrate Judge Lenihan dated September 28, 2005, is vacated.

It [*81] is further Ordered that Defendants' Motion to Dismiss (Docket No. 5) is granted; that Plaintiff's Motion for Summary Judgment (Docket No. 15) is denied; that Defendants' Motion to Strike improperly Served Discovery and Stay Future Discovery Pending Resolution of the Motion to Dismiss (Docket No. 7) is granted and the case is dismissed without prejudice. Judgment is entered in favor of Defendants and against Plaintiff.

BY THE COURT:

Donetta W. Ambrose,

Chief U. S. District Judge

LEXSEE

Analysis
As of: Mar 18, 2011

G. KEVIN JONES, Plaintiff-Appellant, v. MANUAL LUJAN, Secretary of the Interior, Defendant-Appellee

No. 90-4173

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1991 U.S. App. LEXIS 13687

June 25, 1991, Filed

NOTICE: [*1] THIS ORDER AND JUDGMENT HAS NO PRECEDENTIAL VALUE AND SHALL NOT BE CITED, OR USED BY ANY COURT WITHIN THE TENTH CIRCUIT, EXCEPT FOR PURPOSES OF ESTABLISHING THE DOCTRINES OF THE LAW OF THE CASE, RES JUDICATA, OR COLLATERAL ESTOPPEL. 10TH CIR. R. 36.3.

SUBSEQUENT HISTORY: Reported as Table Case at 936 F.2d 583, 1991 U.S. App. LEXIS 19274.

PRIOR HISTORY: Appeal from the United States District Court for the District of Utah; District No. 88-C-405-S.

DISPOSITION: AFFIRMED and REVERSED and REMANDED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sought review of a judgment from the United States District Court for the District of Utah which denied appellant's motion for an order to enforce a settlement agreement with appellee Secretary of the Interior for a permanent injunction and for attorney's fees and costs in an underlying handicap discrimination action against appellant's employer, the United States Department of the Interior.

OVERVIEW: Appellant employee and his employer United States Department of the Interior entered into a stipulated settlement of appellant's pending discrimination action which called for a cease in an investigation by the Department of the Interior Inspector General alleged to have been initiated in retaliation for the discrimination action. Appellant filed a motion in part for an order enforcing the settlement agreement against appellee Secretary of the Interior. The district court denied appellant's motion. The court reversed the order as to the settlement agreement. The Inspector General Act of 1978, 5 U.S.C.S. app. § 3, precluded any agreement by appellee that limited or proscribed the Inspector General's investigative powers. Where parties intended a result that was not in their power to accomplish, a settlement agreement was not enforceable. However, a party to a contract that was impossible to fully perform could nonetheless have been held to that contract if he had agreed to assume the risk of the impossibility. The case was remanded for determination of whether appellant knowingly took that risk. If he did not, he was entitled to have his original complaint reinstated.

OUTCOME: The court affirmed the judgment that denied appellant's request for attorney's fees and costs, but reversed and remanded the case as to the denial of appellant's request for enforcement of the settlement agreement because the agreement was impossible to fully perform. If it was determined that appellant did not knowingly assume the risk of the impossibility, he was entitled to have his discrimination complaint reinstated.

CORE TERMS: settlement agreement, inspector, attorney's fees, settlement, General Act, reinstatement, oral argument, investigative, knowingly, initiated, audit

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials
[HN1]The Inspector General of the Department of the Interior has independent authority to investigate the possible existence of an activity constituting a violation of law, rules, or regulations. Inspector General Act of 1978, 5 U.S.C.S. app. 3, §§ 7(a), 2(1).

Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview
[HN2]The appellate court construes a settlement stipulation in the same manner as a contract to determine how it should be enforced.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview
Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview
Labor & Employment Law > Affirmative Action > Consent Decrees
[HN3]The interpretation and enforcement of a Title VII settlement agreement is governed by federal common law principles.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Contracts Law > Contract Interpretation > General Overview
[HN4]When a trial court looks to extrinsic evidence to determine the intent of the parties to a contract, the appellate court reviews that determination, as a question of fact, under a clearly erroneous standard. When the district court bases its interpretation solely on the contract language, however, appellate review is not so limited.

Civil Procedure > Pretrial Matters > Subpoenas
Governments > Federal Government > Claims By & Against
[HN5]Section 3(a) of the Inspector General Act provides, in part, that neither the head of the establishment nor the officer next in rank below such head shall 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.

Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview
Contracts Law > Types of Contracts > Settlement Agreements
[HN6]Where the parties intended a result that was not in their power to accomplish, a settlement agreement may not be enforceable. However, a party to a contract that is impossible to fully perform may nonetheless be held to that contract if he agreed to assume the risk of the impossibility.

JUDGES: Stephanie K. Seymour, Seth, and Moore, Circuit Judges.

OPINION BY: SEYMOUR

OPINION

ORDER AND JUDGMENT

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff G. Kevin Jones filed a Title VII complaint against his employer, the United States Department of the Interior, alleging handicap discrimination. While the suit was pending in the district court, the Department of the Interior Inspector General (the IG) initiated an investigation of alleged violations of department regulations by plaintiff. [1] The parties negotiated and entered into a stipulated settlement of the pending Title VII suit [*2] (the Settlement Agreement), and the district court accepted the settlement and dismissed the case. Rec. vol. I, doc. 108. The Settlement Agreement addressed the IG's investigation, which plaintiff alleged was initiated in retaliation for his discrimination suit.

1 [HN1]The Inspector General of the Department of the Interior has independent authority to investigate "the possible existence of an activity constituting a violation of law, rules, or regulations . . . ." Inspector General Act of 1978, U.S.C. app. 3, §§ 7(a), 2(1).

Defendant subsequently filed a motion to amend or clarify the Settlement Agreement, contending that it could be interpreted to interfere with the IG's independent statutory authority to conduct its investigations, in violation of 5 U.S.C. app. 3, § 3(a). Rec. vol. I, doc. 109. The district court denied the motion. Alleging that the IG was continuing its investigation, and that such ongoing investigation was a breach of the Settlement Agreement, plaintiff filed a motion for order enforcing the Settlement

[*3] Agreement, for a permanent injunction, and for attorney's fees and costs. The district court denied plaintiff's motion. He appeals, seeking either enforcement of the Settlement Agreement or reinstatement of his complaint.

[HN2]"We construe a settlement stipulation in the same manner as a contract to determine how it should be enforced." *Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981*, 836 F.2d 462, 465 (10th Cir. 1987). [HN3]The interpretation and enforcement of a Title VII settlement agreement is governed by federal common law principles. *Snider v. Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991).

[HN4]When a trial court looks to extrinsic evidence to determine the intent of the parties to a contract, we review that determination, as a question of fact, under a clearly erroneous standard. *See EDO Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1455 n.9 (10th Cir. 1990). When the district court bases its interpretation solely on the contract language, however, our review is not so limited. *See Valley Nat'l Bank v. Abdnor*, 918 F.2d 128, 130 (10th Cir. 1990).

On appeal, the central issue is [*4] whether the Settlement Agreement can be enforced so as to require the IG to cease its investigation of plaintiff. The district court concluded that it could not enforce the Settlement Agreement as plaintiff requested because the IG was not a party to the agreement and because the court had no jurisdiction over the IG. The Inspector General Act of 1978, 5 U.S.C. app. 3, precludes any agreement by defendant that limits or proscribes the IG's investigative powers. *See* 5 U.S.C. app. 3, § 3(a); [2] *United States v. Iannone*, 610 F.2d 943, 947 & n.2 (D.C. Cir. 1979). As the defendant noted, the IG's independent investigative power is "a matter over which neither the parties nor this Court have any control." Rec. vol. I, doc. 144 at 22. Therefore, we agree with the district court's conclusion that it may not enforce the Settlement Agreement against the IG.

2 [HN5]Section 3(a) of the inspector General Act provides, in part:

> Neither the head of the establishment nor the officer next in rank below such head shall 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.

[*5] We next turn to plaintiff's alternative argument that his complaint should be reinstated. The district court found "that the parties intended to compromise, waive and lay to rest any and all disputes and claims against each other . . . including those claims contemplated by the Inspector General's investigation." Rec. vol. I, doc. 161 at 3. That finding was based on the language of the Settlement Agreement. *Id.* For substantially the same reasons contained in its opinion dated September 19, 1990, we agree with the district court that the parties intended to effect a settlement which would dispose of any claims involving the IG's investigation of plaintiff, insofar as that investigation relates to plaintiff's employment up to the date of the Settlement Agreement.

[HN6]Where the parties intended a result that was not in their power to accomplish, a settlement agreement may not be enforceable. *See Gull Laboratories, Inc. v. Diagnostic Technology, Inc.*, 695 F. Supp. 1151, 1153 (D. Utah 1988). However, a party to a contract that is impossible to fully perform may nonetheless be held to that contract if he agreed to assume the risk of the impossibility. *See generally* [*6] 18 *W. Jaeger, Williston on Contracts*, § 1972A (3d ed. 1978). There is some indication in this record that plaintiff was aware of the problem concerning the IG before the settlement agreement was executed. *See, e.g.*, (Transcript of Hearing at 5).

Accordingly, we remand to the district court to determine whether plaintiff knowingly took the risk that the Settlement Agreement could not be enforced so as to prohibit the IG's investigation. If plaintiff did so, he is not entitled to have the Settlement Agreement set aside and to reinstate his complaint. Conversely, should the district court determine that plaintiff did not knowingly take that risk, he is entitled to have the Settlement Agreement set aside and to move for reinstatement of his original complaint. *See, e.g., Stipelcovich v. Sand Dollar Marine Inc.*, 805 F.2d 599, 604-07 (5th Cir. 1986) (plaintiff moved for reinstatement of her complaint under Fed. R. Civ. P. 60(b)(6)).

Plaintiff also appeals the district court's denial of his request for attorney's fees and costs. In light of our conclusion that the Settlement Agreement may not be enforced against the Inspector General, we affirm the district court's [*7] denial of plaintiff's request for attorney's fees and costs associated with bringing this motion.

The judgment of the United States District Court for the District of Utah is AFFIRMED as to plaintiff's request for attorney's fees and costs, and the case is REVERSED and REMANDED to the district court for further proceedings consistent with this opinion.

LEXSEE

Caution
As of: Mar 18, 2011

UNITED STATES OF AMERICA ex rel. HAROLD R. FINE, Plaintiff, vs. ADVANCED SCIENCES, INC., Defendant.

CIV 91-0794 JC/WWD

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

879 F. Supp. 1092; 1995 U.S. Dist. LEXIS 3695

January 6, 1995, FILED; January 9, 1995, ENTERED

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant company made a motion to dismiss a qui tam action by relator inspector general pursuant to the Fraud Claims Act (FCA), 31 U.S.C.S. § 3730.

OVERVIEW: During the inspector general's employment, he discovered that the company was intentionally requesting reimbursement for costs that were unreimbursable under the contracting regulations. The inspector general referred the matter to the investigative branch and subsequently brought the qui tam action. Upon consideration, the court granted the company's motion after converting it to a motion for summary judgment. The court held that the inspector general could not bring the qui tam action because a conflict existed between the FCA and the Inspector General Act (IGA), 5 U.S.C.S. app. 3, §§ 1-12. The court noted that the Inspector General's office was created for the purpose of preventing fraud in order that an inspector general who pursued a qui tam action could use the information gained through his employment for his own purposes to gain the bounty under the FCA. The court also held that it did not have jurisdiction over the qui tam action because the inspector general was not the original source of the information as he obtained it from his audits. The court did note, however, that the inspector general had met the requirement of public disclosure of the information.

OUTCOME: The court granted the company's motion for summary judgment in the inspector general's qui tam action pursuant to the FCA.

CORE TERMS: qui tam, public disclosure, audit, publicly, summary judgment, jurisdictional requirements, audit reports, allegations of fraud, investigative, confidential, accounting, bounty, federal government, prior knowledge, disclosure, convert, reimbursement, contracting, contractors, qualify, Freedom of Information Act FOIA, matter of law, conflicts of interest, government official, accounting firm, attorneys general, prevent fraud, executive branch, issue of fact, jurisdictional

LexisNexis(R) Headnotes

Governments > Federal Government > Claims By & Against
[HN1]In qui tam actions, the individual who brings the suit on behalf of the United States is referred to as the relator. Technically, the United States is the plaintiff.

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
Labor & Employment Law > Employer Liability > False Claims Act > Remedies > Treble Damages
[HN2] 31 U.S.C.S. § 3730 allows for persons who know of fraud against the federal government to sue for the government to recover the fraudulently obtained funds. 31 U.S.C.S. § 3730(b). The Fraud Claims Act (FCA) grants a bounty to a successful relator that can

range up to 30 percent of the damages recovered by the government to encourage the exposure of fraud. § 3730(d). The government has the option in a qui tam action to step into the place of the relator and to sue in its own right. § 3730(b). Moreover, the government is entitled to treble damages if a violation of the FCA can be proven by the relator or the government. § 3729(a).

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
[HN3]The Fraud Claims Act limits the courts' jurisdiction over four matters. 31 U.S.C.S. § 3730(e). First, the courts lack jurisdiction over actions brought by former or present members of the armed forces. § 3730(e)(1). Second, the courts may not exercise jurisdiction over actions brought against members of Congress, the judiciary or the upper levels of the executive branch. § 3730(e)(2). Third, the courts are precluded from presiding over matters that are already the subject of a civil suit in which the United States is a party. § 3730(e)(3). Finally, the courts lack jurisdiction over actions based upon the public disclosure of allegations or transaction in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. § 3730(3)(4)(A). An "original source" is an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action under this section that is based on the information. § 3730(3)(4)(B).

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
[HN4]Generally, a court cannot convert a Fed. R. Civ. P. 12(b)(1) motion to a Rule 56 motion for summary judgment. However, if the jurisdictional requirement is based upon the same statute that provides for the substantive claim, then the jurisdictional issues are properly decided under Rules 12(b)(6) and 56.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
[HN5]Government employees generally can bring qui tam actions based on information acquired during the performance of their duties as long as they satisfy jurisdictional requirements.

Governments > Legislation > Interpretation
[HN6]Courts must read potentially conflicting statutes in a way that gives meaning to each statute. A court cannot choose to give effect to one statute over another, and is required absent a clearly expressed congressional intention to the contrary to regard each as effective. A court must interpret a statute consistently with the body of law of which it is a part because this is a compatibility which by benign fiction the court assumes congress always has in mind."

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
[HN7]The court must presume that jurisdiction does not exist in a qui tam action without a contrary showing by the relator because federal courts are courts of limited jurisdiction. Thus, the relator must show: (1) that his complaint was not based upon the public disclosure of allegations contained in an administrative report or investigation; but, if the complaint was based on such a disclosure, then (2) the relator must show that he was the original source of the information serving as the basis of the allegations. 31 U.S.C.S. § 3730(3)(e)(4)(A & B).

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
[HN8]A public disclosure occurs when allegations of fraud are revealed to members of the public with no prior knowledge thereof. The allegations need not be widely

distributed but they must be irretrievably released into the public domain to people with no obligation to keep the information confidential. Under this definition, the government need not affirmatively release the information to the public to result in a public disclosure. Instead, the court must decide whether the allegations of fraud were revealed to at least one member of the public who had no obligation to keep the matter confidential.

Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
[HN9]A public disclosure does not occur when an official of the federal government informs another federal official of allegations of fraud.

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
[HN10]The Fraud Claims Act requires for a public disclosure that congressional, administrative, or Government Accounting Office report, hearing audit or investigation contain the allegations that have been revealed and on which a complaint is based. 31 U.S.C.S. § 3730(e)(4)(A).

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
Labor & Employment Law > Employer Liability > False Claims Act > Remedies > Civil Penalties
[HN11]A public disclosure will not bar a qui tam action if the relator is the "original source" of the allegations on which the complaint is based. 31 U.S.C.S. § 3730(e)(4)(A). The Fraud Claims Act (FCA) defines an "original source" as having direct and independent knowledge of the information on which the allegations are based and have voluntarily provided the information to the government before filing an action. § 3730(e)(4)(B). Some courts have construed the FCA to also require that the relator be the source of the information to the entity that disclosed the allegations.

COUNSEL: [**1] For Plaintiff: Duff H. Westbrook, Esq., Albuquerque, N.M. Maureen Sanders, Esq., Albuquerque, N.M.

For Defendant: Pamela J. Mazza, Esq., Andrew P. Hallowell, Esq., Philip M. Dearborn, Esq., PILIERO, MAZZA & PARGAMENT, Washington, D.C. Gary King, Esq., Advanced Sciences, Inc., Albuquerque, New Mexico.

JUDGES: John E. Conway, CHIEF UNITED STATES DISTRICT JUDGE

OPINION BY: John E. Conway

OPINION

[*1093] ***MEMORANDUM OPINION***

THIS MATTER came on for consideration of the Defendant's Motion to Dismiss, filed November 19, 1993. The Court converts this motion to a Motion for Summary Judgment. After reviewing the motion and the memoranda submitted by the parties and after hearing oral arguments, the Court finds that the motion is **well taken** and will be **GRANTED.**

The Relator [1], Harold R. Fine, makes his claims under the *qui tam* provisions of the Fraud Claims Act (FCA). 31 U.S.C. § 3730. The Defendant argues that the Court should dismiss the Relator's claims on two grounds. First, as a past employee of the Office of the Inspector General in the Department of Energy (IG/DOE), the Relator is barred from bringing a *qui tam* action because of the conflict between the FCA and the Inspector [**2] General Act (IGA). 5 U.S.C. app. 3 §§ 1-12. Second, the Defendant argues that the Relator fails to satisfy the jurisdictional requirements set out in the FCA.

1 [HN1]In *qui tam* actions, the individual who brings the suit on behalf of the United States is referred to as the relator. Technically, the United States is the Plaintiff.

BACKGROUND

The IG/DOE employed Harold Fine from 1982 until his resignation on July 15, 1991. The IG/DOE conducts audits and investigations of government contractors to determine whether they follow the regulations and rules governing the performance of federal contracts. Specifically, the IG/DOE monitors the reimbursable costs claimed by government contractors to make sure the costs are deductible under the relevant contract and regulations. The IG/DOE then creates a report detailing the audits and their findings. Mr. Fine's duties at IG/DOE included managing and supervising audits and the preparation of audit reports.

After reviewing audits of Advanced Sciences, Inc. (ASI), [**3] Mr. Fine concluded that ASI was intentionally requesting reimbursement for costs that were unreimbursable under the contracting regulations. Therefore, he referred the matter to the investigative branch of IG/DOE, but no actions were taken. Just one month after his resignation from the IG/DOE, Mr. Fine brought this *qui tam* action based on the information regarding ASI he obtained through his job.

Before filing his *qui tam* action, Mr. Fine revealed the information regarding ASI's submissions of costs on four occasions. First, Mr. Fine sent a letter unauthorized by his superiors dated March 20, 1990 to Richard Kaheny, Director of Contracting at White Sands Missile Range. This letter contained Mr. Fine's interpretation of the adequacy of ASI's accounting system and financial controls. Second, Mr. Fine gave Donald Sikora, a "volunteer leader" of the American Association of Retired People for New Mexico, a memorandum dated April 9, 1990 and the March 20 letter that he sent to Richard Kaheny. Mr. Fine prepared the April 9 memorandum and entitled it "Referral of Possible False Claims by Contractor." In it, Mr. Fine expressed his concerns regarding ASI to the investigative branch [**4] of IG/DOE. Third, Mr. Fine also gave a copy of the March 20 letter to Burt Mazer, an accountant with a private firm, to get his opinion on Mr. Fine's analysis of ASI's accounting system. Fourth, Mr. Fine's attorney, Duff Westbrook, sent a letter to Senator David Pryor in which he generally explained Mr. Fine's allegations concerning ASI among other matters.

***Qui Tam* Actions and the FCA**

The first step in the analysis is to briefly review the *qui tam* provisions of the FCA. [HN2]Section 3730 allows for persons who know of [*1094] fraud against the federal government to sue for the government to recover the fraudulently obtained funds. 31 U.S.C. § 3730(b). The FCA grants a bounty to a successful relator that can range up to 30% of the damages recovered by the government to encourage the exposure of fraud. *Id.* at § 3730(d). The government has the option in a *qui tam* action to step into the place of the relator and to sue in its own right. *Id.* at § 3730(b). Moreover, the government is entitled to treble damages if a violation of the FCA can be proven by the relator or the government. *Id.* at § 3729(a).

The United States refused to replace the Relator as allowed by section [**5] 3730. Instead, the United States filed an Amicus Curiae Brief arguing that an Inspector General (IG) employee lacks standing to bring a *qui tam* action based on information gathered during the performance of his duties.

Other courts have recounted in detail in history of *qui tam* actions. *See, e.g., U.S. v. X. Quinn*, 304 U.S. App. D.C. 347, 14 F.3d 645, 649-51 (D.C. Cir. 1994). It is sufficient for this analysis to note that the *qui tam* statute has gone through several different changes between the time it was first drafted in 1863 and the present. During this period, Congress has sought to prevent fraud against the government by empowering citizens to act as private attorneys general using *qui tam* actions. Congress has attempted to design the FCA to balance the creation of incentives for whistle-blowing insiders to come forward with information on fraud against the discouragement of plaintiffs who have no independent knowledge of fraud. *See id.* at 649. The present jurisdictional requirement in section 3730 of the FCA represents Congress' most recent attempt to strike this balance.

In its current form, [HN3]the FCA limits the courts' jurisdiction over four matters. [**6] 31 U.S.C. 3730(e). First, the courts lack jurisdiction over actions brought by former or present members of the armed forces. *Id.* at 3730(e)(1). Second, the courts may not exercise jurisdiction over actions brought against members of Congress, the judiciary or the upper levels of the executive branch. *Id.* at 3730(e)(2). Third, the courts are precluded from presiding over matters that are already the subject of a civil suit in which the United States is a party. *Id.* at 3730(e)(3). Finally, the courts lack jurisdiction over actions:

> ...based upon the public disclosure of allegations or transaction in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. at 3730(3)(4)(A). An "original source" is:

> ...an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action [**7] under this section that is based on the information.

Id. at 3730(3)(4)(B).

Converting to Motion for Summary Judgment

The Defendant moved to dismiss the Relator's claims pursuant to Section 12(b) of the Federal Rules of Civil Procedure without specifying the applicable subsection. The jurisdictional aspects of the Defendant's motion appear to require the application of Rule 12(b)(1), and [HN4]generally, a court cannot convert a 12(b)(1) motion to a Rule 56 motion for summary judgment. *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987). However, if the jurisdictional requirement is based upon the same statute that provides for the substantive claim, then the jurisdictional issues are properly decided under Rules 12(b)(6) and 56. *Id.*, and *see Redmon v. U.S.*, 934 F.2d 1151, 1155 (10th Cir. 1991). Here, the same section of the FCA that provides for *qui tam* actions sets out the jurisdictional requirements. Because I have relied on the affidavits and other material submitted by both parties, I convert the 12(b)(6) motion to one for summary judgment.

[*1095] **IG EMPLOYEES ARE BARRED FROM BRINGING *QUI TAM* ACTIONS**

It is well settled that [HN5]government employees [**8] *generally* can bring *qui tam* actions based on information acquired during the performance of their duties as long as they satisfy jurisdictional requirements. *See, e.g., United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1501 (11th Cir. 1991). As pointed out by Mr. Fine, Congress has not expressly prohibited IG employees from bringing *qui tam* actions. Nonetheless, I construe the FCA to prohibit IG employees from filing *qui tam* actions. Without this bar, the availability of these FCA actions will undermine the intended effectiveness of the IGA.

Congress intended both the FCA and the IGA to strengthen the government's antifraud measures, but designed them to uncover fraud in different ways. Congress intended the FCA to encourage individual citizens with knowledge of fraud to divulge the information. On the other hand, Congress designed the IGA to provide a governmental agency with not only independent authority but with civil and criminal investigative powers to use in pursuing fraud.

The primary mission of the offices of Inspectors General is to prevent, deter and identify fraud, abuse and waste in government operations and programs. 5 U.S.C. app. § 2(2)(B). [**9] Congress' intent was to create an investigative body that would be free of conflicts and competing interests and thus could effectively investigate fraud. *See* S.Rep. No. 1071, 95th Cong. 2d Sess., 6-7 (1978). When Congress passed this statute it was concerned about:

> ...government inefficiency, [and thus] created offices of Inspector General in a number of departments and agencies. 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." The Committee blamed these failures in large part on deficiencies in the organization and incentives of executive branch auditors and investigators. The Inspectors General were, therefore, to provide interagency 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."

[**10] *U.S. v. Aero Mayflower Transit Co.*, 265 U.S. App. D.C. 383, 831 F.2d 1142, 1144-45 (D.C. Cir. 1987).

On the other hand, the FCA encourages individuals to step forward with information on fraud by providing potentially substantial bounties if the United States prevails in a *qui tam* action. Under the FCA, a relator can recover up to 90% of the actual damages done to the government because the government can receive trebled damages. *See* 31 U.S.C. §§ 3729(a) & 3730(d). When drafting the IGA, Congress surely did not anticipate the incentives created by the bounties established in the later-amended version of the FCA. Clearly these incentives create conflicts of interest from which Congress was trying to insulate IG employees.

IG employees are charged with strictly protecting the government's interest in deterring fraud. Yet, the availability of FCA bounties could foster a potential for self-dealing, diminished loyalty to the Federal Government, and the pursuit of fraud through private means rather than the procedures set out in the IGA. IG employees could opt to use their investigatory powers to gather information for their own benefit by strengthening a potential *qui tam* [**11] claim. In such a case, the IG employee might refrain from revealing instances of fraud until it would be more lucrative to bring a *qui tam* action. Allowing IG employees to bring *qui tam* actions could thus undermine the independence of the IG office and create actual, not merely potential, conflicts of interest for its employees.

[HN6]Courts must read potentially conflicting statutes in a way that gives meaning to each statute. *Watt v. Alaska*, 451 U.S. 259, 267, 68 L. Ed. 2d 80, 101 S. Ct. 1673 (1981). A Court cannot choose to give effect [*1096] to one statute over another, and is required "absent a clearly expressed Congressional intention to the contrary to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). A court must interpret a statute consistently with the body of law of which it is a part because this is "a compatibility which by benign fiction we assume Congress always has in mind." *Green v. Bock Laundry Machine Company*, 490 U.S. 504, 528, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989) (Scalia, J. concurring).

The Relator asserts that Congress considered the conflict between the FCA and the IGA because Congress intended [**12] the two statutes to be complimentary and to prevent fraud through the coordination of government and the public efforts. I find no indication that Congress intended to undermine the effectiveness of the IGA when it passed the FCA. The Relator's construction of the statutes would have precisely that effect.

Considering these principles of statutory construction, and to uphold Congress' purposes and intentions as expressed in both the FCA and the IGA, I find that IG employees are barred from bringing *qui tam* actions under the FCA based on information discovered within the scope of their employment with that agency. To find otherwise and permit Mr. Fine to bring the present action would defeat the harmonious integration of the two statutes. Because there is no dispute on any of the material facts regarding this issue, I hold as a matter of law that the Defendant is entitled to summary judgment on this basis.

THE COURT HAS NO JURISDICTION OVER THIS MATTER

I further find a second ground on which to grant the Defendant's Motion for Summary Judgment. I hold that the Relator failed to satisfy the public disclosure/original source jurisdictional requirement in the FCA.

[HN7]The Court [**13] must presume that jurisdiction does not exist in a *qui tam* action without a contrary showing by the Relator because federal courts are courts of limited jurisdiction. *U.S. ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 551 (10th Cir. 1992). Thus, the Relator must show: (1) that his Complaint was not based upon the public disclosure of allegations contained in an administrative report or investigation; but, if the Complaint was based on such a disclosure, then (2) the Relator must show that he was the original source of the information serving as the basis of the allegations. 31 U.S.C. 3730(3)(e)(4)(A & B).

1) Public Disclosures

The FCA does not define a "public disclosure," and the Tenth Circuit has also provided only limited help on the meaning of this term. Thus, I look to other Circuits and adopt the Second Circuit's definition. The Second Circuit held that [HN8]a public disclosure occurs when "allegations of fraud are revealed to members of the public with no prior knowledge thereof." *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2nd Cir. 1992). The allegations need not be widely distributed but they must be irretrievably released into the public [**14] domain to people with no obligation to keep the information confidential. *Id.* Under this definition, the government need not affirmatively release the information to the public to result in a public disclosure. Instead, the court must decide whether the allegations of fraud were revealed to at least one member of the public who had no obligation to keep the matter confidential.

I will next consider each of Mr. Fine's disclosures to decide whether they are public disclosures within the meaning of the FCA. I will also decide whether the availability of the IG audit reports to the public through the Freedom of Information Act (FOIA) constitutes a public disclosure.

a) Mr. Fine publicly disclosed the allegations when he sent the April 20 memorandum and March 20 letter to Donald Sikora.

Mr. Fine gave a memorandum and a letter dated April 9, 1990 and March 20, 1990 respectively to Donald Sikora. The April 9 memorandum contained a description of the specific costs questioned in the audit report generated by the IG/DOE and Mr. Fine. The allegations in this memorandum cover [*1097] the same areas of improperly claimed costs described in the Complaint. While the memorandum is [**15] not as specific as the Complaint, both documents describe the same costs, such as: bid and proposal costs, travel costs, entertainment costs, membership fees, political contributions, costs of trade show booths, sponsorship fees, costs for color brochures and tax preparation.

For a public disclosure, the allegations in the April 9 memorandum need not be identical to the allegations in the Complaint. Rather, the allegations in the Complaint need only be "based upon" the publicly disclosed allegations. *U.S. ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992). "Based upon" should be understood to mean "supported by," and thus *qui tam* actions even partially supported by publicly disclosed allegations are "based upon" those allegations within the

meaning of the FCA. *Id.* Here, the April 9 memorandum and the Complaint both allege that ASI improperly claimed certain costs. That similarity is sufficient to conclude that the allegations in the memorandum support the allegations in the Complaint. Therefore, I find that Mr. Fine's Complaint is based on the April 9 memorandum.

The March 20 letter is less specific than the April 9 memorandum. Nonetheless, I [**16] find that the allegations in the letter support Mr. Fine's Complaint. Mr. Fine states in his letter that IG/DOE audits reveal that ASI claimed reimbursement under its contracts for unallowable costs. This general allegation is at the heart of his Complaint against ASI. Thus, I find that sufficient identity exists between the allegations in the letter and Mr. Fine's Complaint for the Complaint to be based on the March 20 letter.

By releasing the April 9 memorandum and the March 20 letter to Mr. Sikora, Mr. Fine publicly disclosed the allegations. Mr. Sikora was a member of the public and had no prior knowledge of the fraud and apparently had no obligation to keep the information confidential. Thus, under the Second Circuit's definition, releasing the allegations to Mr. Sikora qualifies as a public disclosure.

Mr. Fine argues that he released the information to Mr. Sikora in 1991 for assistance in determining whether the Department of Energy (DOE) discriminated against Mr. Fine because of his age. At that time, Mr. Sikora was a "volunteer leader" of the American Association of Retired Persons for New Mexico. Subsequently, in 1992, Mr. Fine designated Mr. Sikora to be his representative [**17] in the DOE's administrative proceedings on Mr. Fine's discrimination claim. However, Mr. Fine's point is irrelevant, because he fails to create an issue of fact regarding whether the release of the allegations to Mr. Sikora qualifies as a public disclosure.

b) Mr. Fine did not publicly disclose the allegations when he sent the March 20 letter to Richard Kaheny.

Mr. Fine originally wrote the March 20 letter to Mr. Kaheny who was the Director of Contracting for the Army at the White Sands Missile Range. As I discussed above, Mr. Fine's Complaint is based on the letter.

However, I find that Mr. Kaheny's receipt of this letter was not a public disclosure. Mr. Kaheny was a federal official when he received the letter. [HN9]A public disclosure does not occur when an official of the federal government informs another federal official of allegations of fraud. *See U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). Nowhere does it appear in section 3730 that Congress intended a public disclosure to occur every time one government official discussed allegations of fraud with another official.

c) Mr. Fine publicly disclosed the [18] allegations when he sent the March 20 letter to Mr. Mazer.**

Mr. Fine offers no evidence to create an issue of material fact regarding the Defendant's contentions about Mr. Mazer. Therefore, I accept the facts as stated by the Defendant as uncontroverted. *See Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). Mr. Mazer worked for a private accounting firm. His firm was not under contract with the government at the time that Mr. Fine solicited Mr. Mazer's opinion regarding the conclusions of the March 20 letter. Mr. Mazer had no [*1098] independent knowledge of the allegations because he was not employed by his accounting firm when it conducted the ASI audit that is the subject of the March 20 letter. Thus, as a matter of law, the release of the letter to Mr. Mazer was a public disclosure because he was a member of the public, had no prior knowledge of the fraud and had no obligation to keep the disclosure confidential.

d) Mr. Fine did not publicly disclose the allegations when his attorney sent the letter to Senator Pryor.

Counsel for Mr. Fine sent a letter to Senator Pryor that, among other things, specifically mentioned ASI and its [**19] "numerous false or unjust enrichment claims for reimbursement." Based on *U.S. ex rel. Precision Co.*, this allegation is sufficient to serve as the basis for the public disclosure of the allegations in Mr. Fine's Complaint. However, Senator Pryor and his staff, like Mr. Kaheny, are government officials and revealing the allegations to them does not qualify as a public disclosure.

e) The allegations were not publicly disclosed because they were potentially available to the public.

The Defendant argues that the statements in IG/DOE's audit reports regarding ASI are potentially accessible to the public through the Freedom of Information Act (FOIA) and thus have been publicly disclosed. To support this proposition, the Defendant cites to Circuit decisions that the potential accessibility of discovery

material to the public renders the material publicly disclosed within the meaning of section 3730. *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2nd Cir. 1993) *and* *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3rd Cir. 1991). However, Mr. Fine has presented evidence that [**20] raises an issue of fact as to whether the audit report would have been accessible through FOIA. *See* Fine Affidavit and Deposition of William Costello, pp. 100-101, attached to Memorandum in Opposition to Defendant's Motion to Dismiss, Exhibit 5. Thus, summary judgment on this issue is improper.

f) The allegations in Mr. Fine's Complaint were contained in an administrative report.

[HN10]The FCA requires for a public disclosure that "congressional, administrative, or Government Accounting Office report, hearing audit or investigation" contain the allegations that have been revealed and on which a Complaint is based. 31 U.S.C. § 3730(e)(4)(A). Here, IG audit reports on ASI contained the allegations at issue. While Mr. Fine never released those audits, he revealed some of the allegations contained in the audits. Thus, that part of the definition of a public disclosure is also satisfied.

2) Original Source

[HN11]A public disclosure will not bar a *qui tam* action if the relator is the "original source" of the allegations on which the Complaint is based. 31 U.S.C. § 3730(e)(4)(A). The FCA defines an "original source" as having "direct and independent knowledge of the [**21] information on which the allegations are based and have voluntarily provided the information to the Government before filing an action." *Id.* at § 3730(e)(4)(B). Some courts have construed the FCA to also require that the relator be the source of the information to the entity that disclosed the allegations. *Chen-Cheng Wang ex rel. v. FMC Corp*, 975 F.2d 1412, 1418 (9th Cir. 1992); *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2nd Cir. 1990); and *U.S. ex rel. Fine v. Sandia Corp.*, Civ. No. 92-0354 JP/JHG, slip op. at 17 (D.N.M. April 22, 1994); *contra* *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1351-55 (4th Cir. 1994). However, I need not decide whether to apply this additional requirement because Mr. Fine did not have direct and independent knowledge of the information in his Complaint.

Mr. Fine discovered the information that underlies his Complaint within the scope of his duties as an Inspector General. As a government auditor, his duties included collecting and analyzing the information produced through audits conducted by others. He used the information from those audits as the basis for his Complaint and had only second hand [**22] information on which to base his allegations. Thus, Mr. Fine was not the [*1099] original source of the allegations. *U.S. ex rel. Fine v. Sandia Corp.*, at 18-19, *and see* *U.S. ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990).

In conclusion, the Defendant's Motion for Summary Judgment is appropriate on both grounds. First, IG employees are barred from bringing *qui tam* actions. Second, the Court lacks subject matter jurisdiction over this matter. An order in accordance with this opinion shall be entered.

John E. Conway

CHIEF UNITED STATES DISTRICT JUDGE

ORDER

THIS MATTER came on for consideration of the Defendant's Motion to Dismiss, filed November 19, 1993, and the motion was converted by the Court to a motion for Summary Judgment. A memorandum opinion was entered this date.

Wherefore,

IT IS HEREBY ORDERED that the Defendant be, and hereby is, **GRANTED** Summary Judgment on all claims. The Complaint is hereby dismissed in its entirety with prejudice.

DATED January 6, 1995.

John E. Conway

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA EX REL., Plaintiff, HAROLD R. FINE, Plaintiff-Appellant, v. CHEVRON, U.S.A., INC.; BECHTEL PETROLEUM OPERATIONS, INC.; and WILLIAMS BROTHERS ENGINEERING COMPANY, Defendants-Appellees. UNITED STATES OF AMERICA EX REL., Plaintiff, HAROLD R. FINE, Plaintiff-Appellant, v. THE UNIVERSITY OF CALIFORNIA, and THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendants-Appellees.

No. 93-15012, No. 93-15728

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

72 F.3d 740; 1995 U.S. App. LEXIS 35022; 11 I.E.R. Cas. (BNA) 353; 95 Cal. Daily Op. Service 9438; 95 Daily Journal DAR 16440; 40 Cont. Cas. Fed. (CCH) P76,924

August 31, 1995, Argued and Submitted, San Francisco, California
December 12, 1995, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of California. D.C. No. CV-91-03224-RHS. Robert H. Schnacke, Senior District Judge, Presiding. Appeal from the United States District Court for the Northern District of California. D.C. No. CV-91-03608-FMS. Fern M. Smith, District Judge, Presiding.

This Opinion Substituted on Grant of Rehearing En Banc for Vacated Opinion of November 2, 1994, Previously Reported at: 1994 U.S. App. LEXIS 30498.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant whistleblower sought review of a decision from the United States District Court for the Northern District of California, which dismissed two qui tam actions that he brought under the False Claims Act against appellees, university and company. Appellant contended that the district court had jurisdiction because he voluntarily provided the information to the government.

OVERVIEW: Appellant whistleblower sought review of the dismissal of two qui tam actions brought under the False Claims Act against appellees, university and company. The court affirmed the dismissals. Appellant was not an "original source" because he did not voluntarily provide the information that formed the basis of the claims to the government prior to filing suit. Thus, pursuant to 31 U.S.C.S. § 3730(e)(4)(A-B), the district court did not have jurisdiction to hear the actions. Appellant provided the information underlying his claims to the government as part of his job responsibilities as a government employee. The court reasoned that the paradigm qui tam plaintiff was the whistleblowing insider and that qui tam suits were meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. Appellant's duty to disclose the fraud and his position with the government defied the paradigm. Thus his disclosure was not voluntary.

OUTCOME: The dismissal of two qui tam actions that appellant whistleblower brought under the False Claims Act against appellees, university and company, was affirmed. The district court did not have jurisdiction because, as a government employee, appellant had a duty disclose the fraud, and his disclosure was thus not voluntary.

CORE TERMS: fine, qui tam, inspectors general, false claim, government employee, audit, auditor, lawsuit, disclosure, paradigm, disclose, legislative history, public disclosure, Inspector, insider, absurd, federal employee, legal duties, come forward, narrow construction, finan-

cial interests, nonvoluntary, supervisors, qualify, salary, legal obligation, voluntariness, dictionary, join, common law

LexisNexis(R) Headnotes

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
Labor & Employment Law > Employer Liability > False Claims Act > Remedies > Civil Penalties
[HN1]To qualify as an original source for purposes of bringing an action under the False Claims Act, one must voluntarily provide the information forming the basis of the claim to the government prior to filing suit.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Governments > State & Territorial Governments > Claims By & Against
[HN2]A court of appeals reviews dismissals for lack of subject matter jurisdiction de novo.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > General Overview
Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
[HN3]See 31 U.S.C.S. § 3730(e)(4)(A-B).

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
[HN4]A relator seeking to avoid the bar against suits based on public disclosures must show both that he has direct and independent knowledge of the information on which the allegations are based, and that he has voluntarily provided the information to the government before filing an action. 31 U.S.C.S. § 3730(e)(4)(B).

Governments > Federal Government > Claims By & Against
[HN5]Voluntary means acting, or done, of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs.

COUNSEL: Stuart M. Nelkin, Nelkin & Nelkin, Houston, Texas, for the plaintiff-appellant.

Walter R. Allan, Alson Kemp, Jr., and Michael F. LaBianca, Pillsbury, Madison & Sutro, San Francisco, California, for defendant-appellee Chevron; Philip R. Placier and Scott L. Gardner, Thelen, Marrin, Johnson & Bridges, San Francisco, California, for defendant-appellee Bechtel Petroleum; Weyman I. Lundquist and Stephanie M. Hinds, Heller, Ehrman, White & McAuliffe, San Francisco, California, for defendant-appellee Williams Brothers Engineering.

William D. Hunter, John B. Clark and Patrick J. Martell, Pettit & Martin, San Francisco, California, for defendants-appellees The University of California and The Board of Regents.

Michael [**2] F. Hertz, United States Department of Justice, Washington, D.C., for amicus curiae United States.

J. Stephen Lawrence, Jr., Arnold & Porter, Washington, D.C., for amicus curiae Stanford University.

JUDGES: Before: J. Clifford Wallace, Chief Judge, Stephen Reinhardt, Robert R. Beezer, Cynthia Holcomb Hall, Alex Kozinski, Edward Leavy, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, and Michael Daly Hawkins, Circuit Judges. Opinion by Judge Hall. Separate concurrence by Judge Kozinski in which Judge T. G. Nelson joins; separate concurrence by Judge Trott in which Judge Kozinski joins; separate concurrence by Judge Hawkins in which Judge Kozinski joins; dissent by Judge Leavy in which Judge Reinhardt joins.

OPINION BY: CYNTHIA HOLCOMB HALL

OPINION

[*741] OPINION

HALL, Circuit Judge:

This is a consolidated appeal from the dismissal of two qui tam actions under the False Claims Act. The relator, Harold Fine, is a former employee of the Office of the Inspector General at the U.S. Department of Energy. He left his job and filed these, and several other, qui tam actions. Fine concedes that his actions are based upon publicly disclosed allegations and that he therefore [**3] cannot maintain the actions unless he qualifies as an "original source."

The district court, in separate orders, dismissed both actions for lack of subject matter jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On appeal by the defendants, a panel of this Court reversed and remanded. [1] A majority of the nonrecused active judges then voted to rehear the case en banc.

1 The panel opinion, which we hereby vacate, was reported at 39 F.3d 957 (9th Cir. 1994).

We now affirm both dismissals because we conclude that Fine cannot be an "original source." [HN1]To qualify as an original source, one must *voluntarily* provide the information forming the basis of the claim to the government prior to filing suit. Fine *did* provide the information underlying his claims to the government prior to filing suit. He did so, however, as a part of his job responsibilities. We hold that his provision of this information to his employer - the government - was not voluntary within the meaning of the False Claims [**4] Act; he therefore is not an original source.

I.

Harold Fine worked for almost ten years as the Assistant Manager of the Western Region Audit Office for the Office of Audits of the Office of the Inspector General at the U.S. Department of Energy. His job required him to supervise audits that other employees had conducted, and edit audit reports that others had written. During his last four years on the job, between eighty-four [*742] and ninety-seven percent of the audit reports from the Western Region Audit Office came from employees under his supervision.

He left the job in 1992, apparently disgruntled because his supervisors either could not or would not take action against every perceived violation he brought to their attention. During the year following his retirement, Fine filed a total of seven qui tam actions under the False Claims Act, two of which are at issue here. [2] Two months after his retirement, he brought one action "on behalf of the United States" against Chevron, U.S.A., et al. One month later, he filed suit against the University of California and its Board of Regents.

2 Fine also has filed actions against his former employer seeking documents under the Freedom of Information Act. *See* *Fine v. United States Dep't of Energy*, 823 F. Supp. 888 (D.N.M. 1993) (24-page opinion disposing of Fine's document requests relating to alleged fraud by the accounting firm Peat, Marwick); *Fine v. United States Dep't of Energy*, 830 F. Supp. 570 (D.N.M. 1993) (ruling on various motions involving Fine's FOIA requests). Presumably, Fine is seeking documentation to support currently pending or yet-to-be-filed qui tam actions.

[**5] After the government declined to intervene, the complaints were unsealed and served on the defendants. Discovery progressed apace until the defendants in both cases moved to dismiss. The district court granted both motions, concluding orally in the case against Chevron that "it makes no sense" to permit Fine to bring a qui tam action. In the case against the University of California, the court issued a published opinion, *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993). This ruling dismissed the case against the University of California because "Mr. Fine was not an 'original source' and [Inspector General] auditors should be barred from bringing *qui tam* actions arising from [Inspector General] audits." *Id.* at 1357. [HN2]We review these dismissals for lack of subject matter jurisdiction de novo. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, slip op. 10401, 10409 (9th Cir. 1995).

II.

Numerous of this and other courts' opinions have rehearsed the history and purposes of the False Claims Act and its qui tam provisions. *See, e.g.*, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d [**6] 810, 812-13 (9th Cir. 1995); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1418-20 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991). These cases support our observation that the paradigm qui tam case is one in which an insider at a private company brings an action against his own employer. In *Wang*, for instance, we noted that "the paradigm *qui tam* plaintiff is the 'whistleblowing insider.' *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime." *Wang*, 975 F.2d at 1419 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991)); *see, e.g., Schumer*, No. 92-55759, slip op. 10401 (9th Cir. Aug. 22, 1995) (qui tam action brought by former manager at Hughes Aircraft Company); *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) (qui tam

action brought by former employee of Northrop Corporation).

Legislative history also suggests that Congress envisioned only this paradigm suit when enacting the current version of the qui tam provisions. [**7] The Senate Report to the 1986 Amendments to the False Claims Act, for instance, states that "the Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more *private* enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986) (emphasis added). Similarly, the House Report emphasizes that "the purpose of the *qui tam* provisions of the False Claims Act is to encourage *private individuals* who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. 660, 99th Cong., 2d Sess. 23 (1986) (emphasis added).

This case, in which a *government* employee, who bore as the "paramount responsibility of his position" the duty to disclose fraud [*743] to his supervisors, *Fine*, 821 F. Supp. at 1360, defies the paradigm. That this case involves application of a statute to a factual scenario Congress may never have envisioned should not give us too much pause, however. The terms of the jurisdictional provisions governing this case are, after all, "unusually precise." *Hagood*, 929 F.2d at 1419. Our analysis of whether the district court had jurisdiction to hear Fine's claims therefore [**8] begins with the "precise" language of the statute.

III.

The False Claims Act provides:

[HN3](4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A)-(B).

The parties in this case agree that Fine's actions are based upon publicly disclosed allegations. Section 5 of the Inspector General Act of 1978 requires Inspectors General to prepare semiannual reports summarizing the activities of their offices and to furnish those reports to agency heads, Congress, [**9] and the public. *See* 5 U.S.C. app. 2, § 5. Fine concedes that he based his claims on reports he furnished to his superiors, the contents of which were properly disclosed to the public under the terms of the Inspector General Act. Thus, Fine can maintain this action only if he qualifies as an original source of the information, and we limit our discussion and holding to this question.

The statute provides that [HN4]a relator seeking to avoid the bar against suits based on public disclosures must show both that he has "direct and independent knowledge of the information on which the allegations are based," and that he "has voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B). At least two courts have addressed whether an auditor for the Office of the Inspector General can have "direct and independent knowledge." *See United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1312 (1991) (reasoning that the "fruits of [the auditor's] effort belong to his employer," so he could not have "independent knowledge" of the information); *United States ex rel. Fine v. MK-Ferguson Co.*, [**10] 861 F. Supp. 1544, 1554 (D.N.M. 1994) (holding that Harold Fine did not have direct and independent knowledge because he did not personally conduct the audits that led to the public disclosures).

Only the district court in this case, however, has addressed whether an employee of the Office of the Inspector General can meet the other part of the original source test, i.e., whether he can be deemed to have provided information to the government "voluntarily." It concluded that Fine's actions "cannot be construed as 'voluntary' [because they] were compelled by the nature of his employment." *Fine*, 821 F. Supp. at 1360. The court's holding rested on its finding that disclosing fraud was "the paramount responsibility of [Fine's] position." *Id.* Because we agree with the district court regarding the second part of the original source requirement, we need not discuss whether Fine's knowledge was direct and independent.

The district court is surely correct in its conclusion that Fine was no volunteer. He was a salaried government employee, compelled to disclose fraud by the very terms of his employment. [3] He no more voluntarily [*744] provided information to the government than we, as [**11] federal judges, voluntarily hear arguments and draft dispositions. *Cf.* *LeBlanc*, 913 F.2d at 20 (noting that a relator employed as a Quality Assurance Specialist for the United States Government Defenses Contract Administrative Service had the duty to uncover fraud as a condition of his employment).

3 Recall, in this light, that the False Claims Act provides a statutory fine of between $ 5,000 and $ 10,000 for every false claim submitted to the government, as well as triple compensatory damages. The relator is entitled to share in as much as 30% of the settlement or judgment depending on whether the United States intervenes in the action. Thus, potential recoveries for qui tam relators are staggeringly large, as well they should be for insiders in private companies who risk their jobs and reputations when they blow the whistle on their own employers. We question whether government auditors, who already receive a salary and benefits for reporting allegations of fraud, deserve or need this same incentive.

[**12] Dictionary definitions of [HN5]"voluntary" support this common-sense reading. [4] Webster's Third, for example, provides the following definition:

Acting, or done, of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs.

4 We have in the past relied on common-sense definitions to parse the terms of the qui tam provisions. In *Hagood*, for instance, we rejected in dicta the Government's proposal that "public disclosure" occurs when "a government employee 'disclosed' to himself as a member of the public the information on which he based his suit." *Hagood*, 929 F.2d at 1419. We labelled the proposition "too metaphysical a contention for the interpretation of a plain congressional enactment." *Id.* We similarly decline today to embark on a philosophical inquiry into the meaning of "voluntary."

Webster's Third New International Dictionary 2564 (1981) (definition 1(g)). Fine, by contrast, acted in exchange for valuable consideration - his salary - and under an employment-related obligation to do the very acts he claims were voluntary.

[**13] Fine nonetheless asserts that his provision of information was voluntary under the terms of the statute, and that, under the False Claims Act, the provision of information to the government is always voluntary unless compelled by subpoena. In support, he cites a single floor statement by Senator Grassley, the principal sponsor of the 1986 amendments, who stated that the voluntary disclosure requirement was intended to protect against actions in which the relator "was a source of the allegations only because the individual was subpoenaed to come forward." 132 Cong. Rec. 20,536 (1986).

This statement does not require us to conclude that Fine's provision of information was voluntary within the meaning of the False Claims Act. On its face, Senator Grassley's statement does not purport to describe the *only* situation in which the voluntary disclosure requirement would bar a qui tam suit following a public disclosure. Moreover, a single floor statement could not convince us to adopt so tortured a construction of a commonly understood word. *Cf.* *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing [**14] legislative history."). We therefore decline to adopt Fine's proposed narrow construction of the voluntary provision requirement.

Fine next argues that we *must* construe his disclosures to be voluntary, because every federal employee labors under a duty to report fraud against the government, and we certainly cannot mean to establish a rule that would bar all federal employees from the universe of potential original sources. [5] He directs us to a 1989 Executive Order entitled "Principles of Ethical Conduct for Government Officers and Employees." This order establishes that "employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." Exec. Order No. 12,674, 54 Fed. Reg. 15,159, at § 101(k) (1989). We need not decide the legal import of this order as a general matter, because the fact that Fine was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.

5 In *Hagood*, 929 F.2d 1416, we implicitly accepted the proposition that a federal employee may bring a qui tam action. We have never addressed, however, whether federal employees might be excluded as a class from qualifying as original sources. We leave this question as well, for another day.

[**15] [*745] IV.

Our conclusion that Fine is not an original source may leave the underlying instances of alleged fraud unpoliced and unpunished so far as the False Claims Act is concerned. Our concern over this state of affairs is eased a bit, however, by the Government's predictions regarding the result of a contrary ruling. The United States warns that employees of the Office of the Inspector General would have the following perverse incentives:

To spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the court-

house to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal [**16] financial interests. Contractors will be deterred from cooperating with Inspector General investigations and audits because they fear, legitimately, that their confidential work papers will be appropriated by Inspector General employees for their personal use in filing qui tam actions, rather than for legitimate governmental functions. Criminal prosecutions will be seriously compromised, since IG employees are often the government's prime witnesses in criminal and civil fraud cases, and their personal interest in the outcome of their audits and investigations will make their testimony highly impeachable. Public confidence in the integrity and impartiality of government audits and investigations will necessarily decrease.

Amicus Brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9 (footnotes omitted).

The government's urgings convince us that our reading of the statute - albeit against an unanticipated factual background - is a sensible one. The government employed Fine to assist in its efforts to root out, disclose, and prevent fraud, and rewarded him with a salary and benefits. The government has [**17] no further need to rouse him from slumber and embolden him to perform his job responsibilities through the possibility of an enormous monetary recovery from a qui tam action. His performance of his job responsibilities, including the provision to his superiors of the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act. He therefore is not an original source. Because both of his actions are based on publicly disclosed allegations or transactions, and because Fine was not an original source, we affirm the district court's dismissal of both suits.

THE PANEL OPINION IS VACATED; THE DISTRICT COURT'S JUDGMENT IS AFFIRMED.

CONCUR BY: ALEX KOZINSKI; STEPHEN S. TROTT; MICHAEL DALY HAWKINS

CONCUR

KOZINSKI, Circuit Judge, with whom Judge T.G. Nelson joins, concurring:

I write briefly to comment on the linguistic issue raised by Judge Leavy's dissent. The majority holds that, for purposes of the False Claims Act, an individual does not act voluntarily if he is legally obligated to take a particular action. In Judge Leavy's view, an individual can act voluntarily even if he is legally required to do so. Neither view is implausible: [**18] Webster's New International Dictionary (second edition, of course) gives no fewer than eight definitions for "voluntary." Some are consistent with Judge Leavy's sense: "1. Proceeding from the will, or from one's choice or full consent; produced in or by an act of choice. . . . 4. Of or pertaining to the will; subject to, or regulated by the will. . . ." *Id.* at 2858. Others support the majority: "2. Unconstrained by interference; unimpelled by another's influence. . . . 8. *Law*. Acting, or done, of one's own free will, without valuable consideration; acting, or done, without any present legal obligation to do the thing done, or any such obligation that can accrue from the existing state of affairs. . . ." *Id.*

[*746] This is not unusual; courts often construe terms with more than one nuance of meaning. In McCulloch v. *Maryland*, 17 U.S. 316, 4 Wheat. (17 U.S.) 316, 413-21, 4 L. Ed. 579 (1819), to cite a famous example, the Supreme Court grappled with the "sense" in which the word "necessary" is used in the Necessary and Proper Clause, U.S. Const. art. I, § 8 ("Congress shall have the power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, [**19] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). The word "necessary," Maryland argued, "limit[ed Congress's] right to pass laws . . . to such as are indispensable, and without which the [enumerated] powers would be nugatory." 4 Wheat. (17 U.S.) at 413. The Court avoided this linguistic trap: It noted that the word "has not a fixed character, peculiar to itself. It admits of all degrees of comparison. . . . A thing may be necessary, very necessary, absolutely or indispensably necessary." *Id.* at 414. Many laws Congress might pass pursuant to an enumerated power may be "essential to the beneficial exercise of the power, but not indispensably necessary to its existence." *Id.* at 415. Maryland's "narrow construction" would have a "baneful influence . . . on all the operations of the government . . . rendering [it] incompetent to its great objects." *Id.* at 417-18. The Court therefore rejected this "narrow construction" and held that "necessary" means, "plainly adapted to [the legislative] end." *Id.* at 421.

Here too, we are proffered a narrow construction of the term "voluntary," as reflected [**20] in Judge Leavy's dissent. But what are the consequences of adopting this construction? Under Judge Leavy's view, *any* action can be voluntary, even if the actor is subject to severe compulsion: When I hand my money to the armed man in the alley, my action is voluntary if I make

an independent decision to do so (perhaps as an act of charity). Under this construction, voluntariness turns on the actor's state of mind: If he would have disclosed fraud to the government regardless of his legal obligation to do so, his action is voluntary; if he disclosed the fraud only because he was required to do so, it's not.

There are good reasons to reject this interpretation of "voluntary." First, it would be highly unusual to have a federal court's subject matter jurisdiction hinge on what's going on in someone's head, without any possibility of objective verification. So construed, the voluntariness requirement would be reduced to a formality, as it would be nearly impossible to refute a relator's assertion that he acted voluntarily, despite whatever legal or moral compulsion he might have been subject to.

Perhaps more important, the interpretation of "voluntary" embraced by Judge Leavy does [**21] nothing at all to further the purposes of the 1986 Amendments to the False Claims Act. The Amendments, as I read them, were designed to give incentives for disclosure to individuals who otherwise would have no reason to disclose and who might, in fact, suffer as a result. The Amendments surely weren't designed to force the government to pay for information to which it's already entitled. *See* *United States ex rel. LeBlanc* v. *Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied sub nom.*, *LeBlanc* v. *United States*, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1312 (1991). Yet that is what Judge Leavy's interpretation of the term would do, by forcing the government to pay Mr. Fine for information it owns.

IG employees are, in fact, precisely the kind of people who should be excluded from bringing *qui tam* suits under the 1986 Amendments. The government pays salaries calculated to reward them for finding and turning over information about waste, fraud and abuse; it holds out the threat of discipline for failure to fulfill these duties; it imposes criminal sanctions for misusing or suppressing information obtained as part of an investigation. At the same time, IG employees are not subject to the types [**22] of pressures to withhold information that might burden employees of private companies, or other government employees. These other employees might well be risking their careers by coming forward with information about their superiors; IG employees are insulated [*747] from the agency's chain of command. *See* 5 U.S.C.A. app. 3 §§ 2,3(a),(b). Thus, it makes no sense at all to give IG employees additional incentives to come forward with information.

Were there no plausible interpretation of the term "voluntary" that would exclude IG employees, I might feel constrained to agree with the dissent. But, given that one of the dictionary definitions of "voluntary" is "acting without any present legal obligation," Judge Leavy is surely mistaken when he claims that the majority adopts "a contorted view of voluntariness." Dissent at 15506.

I don't dispute that Judge Leavy's definition of "voluntary" is also legitimate. But I can't agree with his implicit assumption that this is the only legitimate construction of the term, or the right one for this statute. Because the majority's construction of "voluntary" falls comfortably within the range of meanings to which the term is susceptible, and because [**23] it is consistent with the purposes of the 1986 Amendments to the False Claims Act, I am pleased to join Judge Hall's majority opinion.

TROTT, Circuit Judge, Concurring in the result:

Although I concur in the result reached by the majority, I arrive at that destination by a different analytical route, one that does not depend on the meaning in the statute of the word "voluntary."

Judge Hall is on target when she quotes *Wang* for the proposition that "the paradigm *qui tam* plaintiff is the 'whistleblowing insider.'" *Wang ex rel United States v FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Based on the record, she is also correct when she observes (1) that "legislative history also suggests that Congress envisioned only this paradigm suit when enacting the current version of the *qui tam* provisions," and (2) that this case "defies the paradigm." But she stops here rather than taking the next logical step which is to reject out of hand Mr. Fine's claim that the statute can be abused for a fanciful purpose for which it was never intended.

When the provisions of the *qui tam* statutes are read in conjunction with the complementary provisions of the Inspector General [**24] Act, 5 U.S.C. app. 3 et seq., one concludes that Congress could not have contemplated permitting a current or retired Inspector General employee to bring a lawsuit such as this for personal gain. To quote the government's sensible amicus brief, such a lawsuit would give "every government auditor a personal financial stake in matters that he is directed to pursue as part of his federal duties." The idea that Congress would countenance such a result without saying so strikes me as absurd. Why would Congress silently permit auditors like Inspector Fine to use their salaried jobs to set up private lawsuits when such auditors are also subject to a myriad of legal duties and responsibilities, all of which command independence and freedom from personal involvement in their work? Such provisions covering Inspector General employees prohibit the use of public office for private gain, 5 C.F.R. §§ 2635.101(b)(7), 2635.702; the use of government property or government time for personal purposes, 5 C.F.R. §§ 2635.704, 2635.705; the trafficking in "inside information" for personal advantage, 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a); the participation in any government matter in which the employee [**25] has a

financial interest, 5 C.F.R. §§ 2635.402, 2635.501, 2635.502; and last but not least, the holding of financial interests that may conflict with the impartial performance of government duties, 5 C.F.R. § 2635.403. Government employees aren't even permitted to use "frequent flier miles" for personal use, but they can pursue lucrative *qui tam* lawsuits? All of this makes bizarre Mr. Fine's claim that he may use this statute to sue people and companies he previously investigated.

To construe the *qui tam* provisions as would the dissent, and as did the original panel, puts such provisions at war with the Inspector General Act when they must be read to complement each other. Permitting auditors to sue literally would destroy the government's anti-fraud and anti-waste programs. The "perverse incentives" outlined by the government and adopted by the majority exceed worrisome. Imagine, for example, [*748] an employee of the IRS bringing a *qui tam* lawsuit against a company that the employee had just audited on behalf of the government. Shades of the days leading up to the French Revolution of 1789 when taxes were collected by a private concern called the "Ferme Generale," or "Tax [**26] Farm." The first to be guillotined in the Place de la Revolution during the incarnadine Reign of Terror were the hated private tax collectors who made a profit by collecting more from the public than the amount needed by the government. [1] One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr*. Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.

1 Will and Ariel Durant, The Story of Civilization, Vol. 10, Rousseau and Revolution 935-36 (1967); Stephen Jay Gould, Bully for Brontosaurus 360-63 (1991).

The mistake Judge Leavy makes in attempting to dismiss the government's "chamber of horrors" by claiming that the government can clean up any [**27] disaster by taking over an ex-employee's lawsuit is a simple one: it overlooks the agency-wide conflict of interest muddle already made and the rest of the Inspector Fines who haven't yet filed. To quote the government, "Auditors' testimony in government fraud cases, upon which the government places substantial reliance in obtaining criminal convictions and civil judgments, will be subject to impeachment by reason of their potential personal financial interest in the *outcome of their audits*." (emphasis added). Just as the King's horses and the King's men discovered in the nursery rhyme, this mess would be impossible to unscramble. Moreover, presumably the government *already had* the opportunity to file such a suit and turned it down - just as happened in this case, unless it had been conveniently soft-pedaled by a wily auditor looking towards retirement. Must the government be expected to intervene in a lawsuit in which it has no confidence just to save itself from an errant employee?

When one reads everything pertaining to this issue, the answer comes through loud and clear: *no one* in Congress ever contemplated government employees like Mr. Fine bringing this kind of private [**28] lawsuit. The explanation for Congress' failure explicitly to prohibit such a possibility is that it is so far out in left field that no one anticipated that it might happen. Indeed, it is out of the stadium. Judge Leavy asks why Congress would want to turn down dollars recovered this way by an employee? That's the wrong question. The right one is why Congress with one hand would burden employees with conflict of interest rules, and then encourage them to violate those rules with the other?

Even were I to agree with the dissent that the majority's reading of this statute is strained, my conclusion would be the same. In this respect, I borrow a page from Justice Scalia's concurring opinion in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989) where he says,

We are confronted here with a statute which, if interpreted literally, produces an absurd . . . result. . . . I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption to verify that what seems to us an unthinkable disposition was indeed unthought of . . . . It would suffice to observe that counsel have not provided, nor [**29] have we discovered, a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition.

See also *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 15 L. Ed. 2d 827, 86 S. Ct. 852 (1966) (when the construction of the words of a statute would lead to absurd or futile results, a court may look "beyond those words to the purpose of the act").

Justice Breyer endorses this approach in his 1991 Justice Lester W. Roth Lecture, 65 So. Cal. L. Rev. 845, 848 (1992). Justice Breyer says that

[*749] Blackstone himself, more than two hundred years ago, pointed out that a court need not follow the literal language of a statute where doing so would produce an absurd result. He said that if "collaterally . . . absurd consequences, manifestly contrary to common

reason," arise out of statutes, those statutes "are, with regard to those collateral consequences, void."

In summary, Mr. Fine's lawsuit runs aground not on a shoal, but on the very shores of the territory to which he lays claim. I vote to vacate the panel opinion and to affirm the district court's judgment.

HAWKINS, Circuit Judge, concurrence in which Judge Kozinski joins:

Judge Hall pens a thoughtful opinion and reaches, I believe, an entirely [**30] correct result. I would get there via a somewhat different route. This is a case in which we are fundamentally called upon to reconcile two separate Acts of Congress sharing a common purpose: the investigation and reporting of allegations of fraud on the government. The district court should be affirmed because a side by side comparison of these two measures leads inescapably to the conclusion that Congress could not have intended that an auditor in the employ of an Inspector General - whose very job it is to detect and pursue allegations of fraud - should share in the substantial financial rewards intended for those who have no such job.

The policy implications which flow from concluding otherwise are frightening. Agents of the United States who are sworn to gather facts in a fair and neutral manner would, like the small town traffic magistrates of a thankfully bygone era, have a personal financial stake in the outcome of their efforts. Persons whose job it is to discover and report fraud to their supervisors would benefit from down playing the importance of their discoveries. Congress intended that inspectors general conduct professional inquiries and report the facts as they find [**31] them. As part of the effort to detect fraud, Congress also intended to enlist support from "whistleblowers" - persons outside the formal investigative structure. It is difficult to imagine that Congress, through the enactment of these two complementary measures, could have intended the creation of some sort of mad combination of the Sheriff of Nottingham and Inspector Clouseau.

DISSENT BY: EDWARD LEAVY

DISSENT

LEAVY, Circuit Judge, with whom Judge Reinhardt joins, dissenting:

I dissent. There is a reason the majority has difficulty finding common ground for its holding that an Inspector General employee cannot be an "original source" for purposes of a qui tam action. Nothing in the False Claims Act or its legislative history suggests that an Inspector General employee may not bring a qui tam action.

To reach its result, the majority makes two assumptions: first, that Congress failed to consider Inspector General employees as possible qui tam relators, and, second, that, if Congress had considered them, it would have excluded Inspector General employees from the operation of the False Claims Act. It is not our role to legislate on behalf of Congress.

In addition, legislative history [**32] shows that, in amending the False Claims Act in 1986, Congress sought to encourage people to come forward with information regarding fraud so that it could recover monies lost to the treasury. False Claims Amendments Act of 1986; Senate Judiciary Committee, S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986), reprinted in 1986 U.S.C.A.A.N. 5266. The 1986 amendments were intended, in part, to encourage *government employees* voluntarily to disclose fraud by giving them "an opportunity to speak up and take action without fear and with some assurance their disclosures will lead to results." *Id.* at 5271. It is incongruous for the majority to read these amendments to bar a government employee, such as Fine, who reported the fraud to his supervisors and unsuccessfully urged them to act from bringing a qui tam action.

To encourage qui tam actions, Congress removed a broad jurisdictional bar and set forth a more specific and less restrictive set of jurisdictional bars. 31 U.S.C. § 3730(e). These "exclusions of federal jurisdiction, set out in the 1986 amendments to the False [*750] Claims Act, are unusually precise." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, [**33] 1419 (9th Cir. 1991). "A straightforward reading of the 1986 False Claims Act reveals that Congress did not explicitly exclude government employees from the class of proper qui tam relators." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1503 (11th Cir. 1991); *accord Hagood*, 929 F.2d at 1420. Neither did Congress explicitly exclude Inspector General employees. Why would Congress? Why would the Government be less willing to take dollars recovered by an Inspector General employee than by any other government employee or by any other person?

To effect the assumed desire of Congress, the majority holds that Inspector General employees do not qualify as original sources because their provision of information to the Government is not voluntary as required by statute: "the provision of information when one has a legal duty to do so renders the performance of that duty nonvoluntary." This is a contorted view of voluntariness. I have a legal duty not to jay walk. Does that make my failure to jay walk a nonvoluntary act? Our lives are cir-

cumscribed with legal duties. That does not make our choices to perform such duties nonvoluntary acts.

It is quite clear why Congress [**34] included the "voluntarily" language in the statute. Senator Grassley, the principle sponsor of the 1986 amendments to the False Claims Act, explained the reason on the floor of the Senate. He stated that the purpose was to prevent qui tam actions by a person who is a "source of the allegations only because the individual was subpoenaed to come forward." 132 Cong. Rec. 20,536 (1986). Senator Grassley's remarks provide the only reasonable interpretation of the meaning of the word "voluntarily." The majority's interpretation of the term "voluntarily" is not a reasonable one because it assumes - unnecessarily - that Congress chose a most unlikely and unduly complicated way to achieve a very simple objective. The majority does not explain why Congress did not simply say that some or all government employees are barred from filing qui tam actions, if that was its intent, instead of creating an implicit bar through the requirement that a disclosure be made "voluntarily." The majority's interpretation is made all the more implausible by its admission that Congress might well not have realized that its use of the word "voluntarily" would have the effect that the majority gives to it here.

[**35] Finally, in Section IV the majority ignores an area where Congress has acted. To justify leaving some instances of fraud unpoliced and unpunished, the majority evokes the veritable chamber of horrors which might develop if Inspector General employees were permitted to bring qui tam actions. Congress took care of this. Congress gave the Attorney General control over any qui tam litigation if she, after being served with a copy of the complaint as required by statute, enters an appearance within sixty days of such service. 31 U.S.C. § 3730 (2). "If the Government proceeds with the action, the action is conducted only by the Government." *Id.* at 3730(3).

In response to the parade of horribles that some would portray, I would add that I do not believe that Fine or any other government employee enjoys unfettered freedom to file qui tam actions under any and all circumstances. Whether the information on which government employees would base their suits is public or not, they owe their employer or ex-employer a duty of loyalty under common law, as well as a host of related duties under statutes, regulations, and professional codes of ethics. Just as under common law an employee cannot [**36] pursue a business opportunity he learned of through his job without notifying his employer of that opportunity and giving his employer a chance to pursue that opportunity, *General Automotive Mfg. Co. v. Singer*, 19 Wis. 2d 528, 120 N.W.2d 659 (Wis. 1963), so a government auditor may not file a qui tam action based on information he learned through his job without first giving the government an opportunity to act on the allegations itself. Such common law, statutory, regulatory and ethical obligations - not a strained reading of the word "voluntarily" - are sufficient to meet the concerns raised by my colleagues. In any event, not only are Fine's qui tam actions not barred by the [*751] provisions of statute, but permitting qui tam actions such as Fine's would further the purpose of the statute - ferreting out fraud and recovering money for the federal coffers.

The False Claims Act says "a person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b). Nothing in the Act bars an Inspector General employee, or any other government employee, from bringing the action. I would allow Fine to proceed with [**37] his claims.

UNITED STATES OF AMERICA, ex rel. HAROLD R. FINE, Plaintiff, v. MK-FERGUSON COMPANY and INDUSTRIAL CONSTRUCTORS CORPORATION, Defendants.

CIV. NO. 91-1122 JB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

861 F. Supp. 1544; 1994 U.S. Dist. LEXIS 12834

August 26, 1994, Decided
August 29, 1994, Filed, Entered

CORE TERMS: qui tam, publicly, audit, public disclosure, audit reports, disclosure, jurisdictional, questioned, winter, site, shutdown, overhead, false claims, government employees, administrative hearing, news media, decontamination, prosecute, pond, pad, legislative history, wood chip, reconstruction, subcontract, fraudulent, retention, cell, subject matter jurisdiction, information obtained, civil action

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JUDGES: Burciaga

OPINION BY: JUAN G. BURCIAGA

OPINION

[*1545] MEMORANDUM OPINION AND ORDER

THIS MATTER came on for a hearing before the Court on July 15, 1994, on Plaintiff's December 21, 1993 motion to strike the affidavit of Walter Perry and Defendants Industrial Construction Corporation's and MK-Ferguson's August 12, 1993 motions to dismiss. The Court, having reviewed the submissions of the parties, the relevant law, and having heard the arguments of counsel, finds Plaintiff's motion is not well taken and is denied. [1] Defendant Industrial Construction Corporation's motion is also not well taken and is denied. The Court finds Defendant MK-Ferguson's motion is well taken in part and is granted in part.

1 Matters outside the pleadings may be considered in deciding on a motion to dismiss for lack of subject matter jurisdiction. Village Harbor, Inc. v. United States, 559 F.2d 247, 249 (5th Cir. 1977). The affidavit of Walter Perry conforms to the Federal Rules of Evidence and will therefore be admitted for the limited purpose of determining whether the Court has subject matter jurisdiction over this action.

[**2] [*1546] Harold Fine initiated this *qui tam* [2] action on behalf of the United States Government and himself pursuant to the private enforcement provision of the False Claims Act, 31 U.S.C. § 3730 (1988) ("FCA"). Defendant Industrial Construction Corporation ("ICC") asserts that present and former employees of any Inspector General's office should be absolutely barred from bringing *qui tam* actions based on information which they received via their employment. Defendant MK-Ferguson ("MK-F") contends that the Court is statutorily barred from asserting jurisdiction over this action because it is based on publicly disclosed transactions and allegations of which the Relator [3] was not an original source.

2 *Qui tam* comes from the Latin phrase, *"qui tam pro domino rege quam pro si ipso in hac parte sequitur,"* which translates, "who sues on behalf of the King as well as for himself." A *qui tam* action is one to recover a penalty "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state . . . ." Black's Law Dictionary 867 (6th ed. 1990).

[**3]

3 In *qui tam* actions, the informer who initiates the action is termed the "relator." The United States of America is technically the Plaintiff.

I. BACKGROUND

In 1978, Congress passed the Uranium Mill Tailings Radiation Control Act. 42 U.S.C. §§ 7901-7942 (1988). This Act authorized the establishment of the Uranium Mill Tailings Remediation Action ("UMTRA"), a program designed to safely remediate and contain residual mill tailings from uranium mining sites. UMTRA designated 24 sites for remediation. A site in Lakeview, Oregon was among them.

UMTRA directed the United States Department of Energy ("DOE") to enter into cooperative agreements with states containing UMTRA sites. Under these agreements, the DOE is responsible for 90 percent of the costs of remediation; the state is responsible for the remaining 10 percent. The state is authorized to question any of the costs incurred by the DOE.

The State of Oregon and the DOE entered into a UMTRA cooperative agreement. The DOE selected MK-F as the prime contractor responsible for the performance of all engineering [**4] and construction activities at the Lakeview UMTRA site. MK-F selected ICC to perform all construction work. The State of Oregon was not a party to either the prime contract between the DOE and MK-F or the subcontract between MK-F and ICC.

Some time after commencing work on the site, MK-F and ICC claimed additional costs, asserting that conditions at the site were not as anticipated. The DOE reimbursed the Defendants for these additional costs. The State of Oregon, however, questioned some of the additional costs claimed by the Defendants, ordered audits of Defendants' records, and sent a report of these contested costs to the DOE. The DOE's subsequent investigation concluded that most of the allegations made by Oregon had been resolved. Oregon, unsatisfied with the DOE investigation, requested that an audit of Defendants' records be performed by the DOE's Inspector General's ("DOE-IG's") Office. The DOE-IG subcontracted the performance of this audit to ADC, Ltd., an independent contracting firm. The Inspector General's Office issued its final report, based on ADC's audit, on April 30, 1991.

The Relator, now treasurer of Bernalillo County, was an employee of the United States Government [**5] for 31 years. He served 22 years with the General Accounting Office and nine with the DOE's Inspector General's Office, where he was an assistant manager of the Western Region Audit Office. Between July of 1987 and July of 1991, 84 to 97 percent of the audit reports issued by the Western Region Audit Office came from employees under his supervision. Fine retired in July of 1991, "motivated in part by (his) perception that (his) supervisors . . . condoned fraud against the government by 'watering down' reports" and by reporting false claims not as such, but as "unnecessary expenditures," "questioned costs," or "unsupported costs." (Fine Aff. P 5).

While working for the DOE's Inspector General, the Relator was peripherally involved [*1547] in the audits of the MK-F and ICC cost claims. After retiring, he filed this *qui tam* action under the FCA in November of 1991, alleging that Defendants made false claims against the federal government through their contract to remediate the Lakeview UMTRA site.

II. THE FALSE CLAIMS ACT

The False Claims Act is a tool for combatting fraud perpetrated against the United States Government. S. Rep. No. 345, 99th Cong., 2d Sess. 4 1986, reprinted in 1986 [**6] U.S.C.C.A.N. 5266, 5274 (hereinafter "S. Rep."). It was enacted during the Civil War at the behest of President Abraham Lincoln to control fraud in defense contracts. Erickson v. Am. Inst. of Bio. Sciences, 716 F. Supp. 908, 915 (E.D. Va. 1989). The original Act made use of the ancient concept of *qui tam* actions, allowing private citizens with knowledge of fraud to sue the perpetrators of the fraud on behalf of the government. Successful relators recovered 50 percent of the awarded damages under the 1863 Act, and the government received the other half. Such was the state of the FCA for the next 80 years.

During World War II, several *qui tam* actions were brought by relators who had no independent or personal knowledge of the fraud which they were alleging, but apparently based their actions on information obtained from criminal indictments brought by the government. Such actions were labeled "parasitic" or "copy-cat" suits. The Supreme Court addressed the legitimacy of such suits in United States ex rel. Marcus v. Hess, 317 U.S.

537, 87 L. Ed. 443, 63 S. Ct. 379 (1943). The Court held [**7] that such actions were not barred by the statute and that *qui tam* actions may be filed by anyone, regardless of the source of the information forming the basis of the suit. Id. at 540-48. The ruling in Hess led Congress to amend the *qui tam* provisions of the FCA. The 1943 amendments barred *qui tam* actions based on information which the Government possessed, regardless of whether the Government was actually utilizing the information to prosecute fraud. S. Rep. at 5277.

During the late 1970s and early 1980s, incidents of fraud in government contracts once again became prevalent. A 1981 General Accounting Office study reported that "most fraud goes undetected, [and of] the fraud that is detected, . . . the Government prosecutes and recovers its money in only a small percentage of cases." S. Rep. at 5267 (quotation omitted). In 1978, Congress passed the Inspector General Act ("IGA") to combat fraud in government contracts and within government agencies and departments. The IGA created independent IG offices within government departments. These offices are charged with monitoring, investigating, and reporting [**8] fraud. See United States ex rel. Fine v. Univ. of Cal., 821 F. Supp. 1356, 1361 (N.D. Cal. 1993).

Even after passage of the IGA, Congress felt that there existed "serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools" for prosecuting fraud. S. Rep. at 5269. In an attempt to remedy this perceived problem, Congress amended the False Claims Act in 1986 by expanding the scope of *qui tam* actions. The 1986 amendments sought to strike a balance between, on the one hand, encouraging people to come forward with information regarding fraud, and on the other, preventing parasitic lawsuits. The amendments replaced the general jurisdictional bar on *qui tam* actions based on information in the possession of the government with a more specific and less restrictive set of jurisdictional bars. The amended FCA now prohibits courts from asserting jurisdiction over the subject matter of *qui tam* actions which are:

> based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, [**9] hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). 31 U.S.C. § 3730(e)(4)(B) defines the phrase "original source" as "an individual who has direct and independent knowledge of the information [*1548] on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

III. ANALYSIS

A. WHETHER INSPECTOR GENERAL EMPLOYEES ARE *PER SE* BARRED FROM BRINGING *QUI TAM* ACTIONS UNDER THE FCA

The FCA states that "a person may bring a civil action," 31 U.S.C. § 3730(b)(1), under its provisions. This section has been consistently interpreted to include government employees, so long as they were not specifically barred by other provisions of the Act. United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1501 (11th Cir. 1991); Erickson v. Am. Inst. of Bio. Sciences, 716 F. Supp. 908, 912-18 (E.D. Va. 1989). [**10]

Limited caselaw exists on the more specific issue of whether IG employees should be prohibited from bringing *qui tam* actions. The District Court for the Southern District of Florida refused to prohibit a former IG employee from bringing a *qui tam* action based on information he had obtained as an IG employee. United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1159-61 (S.D. Fla. 1990). The District Court for the Northern District of California, however, held that IG employees were barred, for policy reasons, from bringing *qui tam* actions under the FCA where "the relevant information was obtained as part of an IG investigation." United States ex rel. Fine v. Univ. of Cal., 821 F. Supp. 1356, 1361 (N.D. Cal. 1993).

Section 3730(e) of the Act expressly enumerates certain actions over which no court may assert jurisdiction. [4] Government employees, including IG employees, are not so excluded. These enumerated exclusions should be considered exhaustive. "Enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." In re Cash Currency Exchange, Inc., 762 F.2d 542, 552 (7th Cir. 1985) [**11] (citation omitted).

> 4 31 U.S.C. § 3730(e) **Certain actions barred.**
>
> (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b)of this section against a member of the armed forces arising out of such person's service in the armed forces.

> (2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
>
> . . . .
>
> (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> . . . .

[**12] The IGA is discussed at some length in the legislative history of the 1986 Amendments to the FCA. See S. Rep. at 5269-73. To judicially imply an IG employee jurisdictional bar in the *qui tam* provisions of the FCA would be, in essence, a declaration that Congress failed to consider Inspector General employees as possible *qui tam* relators, and that if Congress had considered them, they would have been compelled to exclude them from the operation of the Act. It is not for this Court to make such assumptions, especially in light of the importance of *qui tam* jurisdiction to the history of the FCA and the attention the IGA received in the legislative history of the 1986 amendments. As the Ninth Circuit wrote, "The new jurisdictional bars were carefully crafted. They were framed by those surely aware of [Marcus v.] Hess, its holding that 'any person' means 'any person,' and its declaration that arguments about the limits on suits by informers should be addressed to Congress not the courts." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991).

[*1549] In its argument, Defendant adopts the position that [**13] "it makes no sense to permit government employees who receive salaries for the purpose of uncovering and reporting fraud to collect bounties under the FCA," United States ex rel. Fine v. Chevron, U.S.A., Civ. No. 91-3224 (N.D. Cal. 1991), and that to permit such suits is an "absurd result." United States ex rel. Fine v. Univ. of Cal., 821 F. Supp. 1356, 1361 (N.D. Cal 1993). This Court cannot agree.

The concerns motivating Congress to amend the FCA in 1986 were that fraud was rampant, that it was undetected, and that even if detected, it was not prosecuted. S. Rep. at 5267. The legislative history notes the limited success of the IGA, and that "available Department of Justice records show most fraud referrals . . . remain uncollected." Id. at 5269. The report further addressed the problem of government employees' unwillingness to report fraud in the belief that nothing would be done to correct the activity even if it was reported. Id. at 5270. Allowing IG employees to bring *qui tam* suits certainly addresses this problem of governmental failure to prosecute. Because the federal government must necessarily select, from among numerous allegations [**14] of fraud, which to prosecute, allowing IG employees to pursue *qui tam* claims based on information obtained while employed as IG investigators might enhance the government's limited ability to detect and remedy fraud. The premise behind the *qui tam* provisions applies to IG employees as well as to other citizens--if not more so, as IG employees have access to information that most other citizens do not.

Admittedly, the benefits of permitting IG employees to bring *qui tam* suits could be outweighed by potential conflicts of interest. As the court in Fine posited, "Allowing IG auditors to reap huge bounties from *qui tam* actions could create serious ethical conflicts and prevent them from fulfilling their employment responsibilities." Fine, 821 F. Supp. at 1361. That IG employees might be willing to risk their employment by withholding information, out of greed, for a chance to recover a maximum of 30 percent of a *qui tam* award is a possibility, albeit speculative, which might undermine the effectiveness of the Inspector General's offices. Such concerns, however, are not a valid basis for judicially implying restrictions to the application [**15] of the FCA. This concern is more properly addressed to Congress. As the Eleventh Circuit Court of Appeals reasoned, when faced with the more general question of whether any government employees should be able to bring *qui tam* actions:

> The concerns articulated by the United States [that government employees should not be personally rewarded for "parasitical use of information obtained and developed in the course of government employment"] may be legitimate ones, and application of the [FCA] since its 1986 Amendment may have revealed difficulties in the administration of *qui tam* suits, particularly those brought by government

> employees. Notwithstanding this recognition, however, we are charged only with interpreting the statute before us and not with amending it . . . .

United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1503-04 (11th Cir. 1991) (citations omitted). Because it is the domain of the legislature and not the judiciary to create exceptions to statutory rules, this Court will not prohibit IG employees from bringing otherwise legitimate *qui tam* actions under the FCA.

B. WHETHER THE RELATOR'S CLAIMS ARE BASED UPON [**16] PUBLICLY DISCLOSED INFORMATION OF WHICH THE RELATOR WAS NOT AN ORIGINAL SOURCE

MK-F contends the Relator is barred under section 3730(e)(4) of the FCA from bringing this action. MK-F argues that the Relator's action is based upon allegations and transactions which were publicly disclosed (1) in a draft report of an audit conducted by the State of Oregon, (2) during an investigation by DOE of the costs questioned by the Oregon audit, and (3) by the DOE-IG audit report. MK-F further argues the Relator is not an original source of this publicly disclosed information.

The inquiry into whether the Court has jurisdiction under section 3730(e)(4) is a [*1550] four-tiered analysis. The Court must determine (1) whether disclosure has occurred in one of the methods listed in section 3730(e)(4); (2) whether the information has been "publicly" disclosed within the meaning of the statute; (3) if so, whether the relator "based" his suit on the public disclosure; and (4) if so, whether the relator is an "original source" of the information in question. See United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1500 n.12 (11th Cir. 1991), quoting United States ex rel. Stinson et al. v. Prudential Ins. Co., 736 F. Supp. 614, 617 (D.N.J. 1990), [**17] aff'd, 944 F.2d 1149 (3d Cir. 1991).

1. Methods of Disclosure

The Eleventh Circuit has held that the list of the methods of public disclosure in section 3730(e)(4) of the statute is exclusive; disclosure by other means will not invoke the bar. United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1499-1500 (11th Cir. 1991) ("Congress could easily have used 'such as' or 'for example' to indicate that its list was not exhaustive. Because it did not, however, we will not give the statute a broader effect than that which appears in its plain language."). The Court agrees.

Defendant MK-F contends the draft report of the audit conducted by the State of Oregon publicly disclosed transactions or allegations which form the basis of Relator's action. Regardless of the verity of this assertion, such public disclosures will invoke the jurisdictional bar only if it is in one of the forms listed in section 3730(e)(4)(A): "a criminal, civil, or administrative hearing, [or] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . . ." The terms "report" [**18] and "audit" are both modified by "congressional, administrative, or Government Accounting Office." Neither the Oregon audit nor the draft of the report of that audit was made by Congress, an administrative agency, or the Government Accounting Office. Neither, then, can form the basis for invocation of the section 3730(e)(4)(A) jurisdictional bar. The other sources of information at issue in this case derive from reports or investigations of the DOE, however, and therefore fall within one of the listed methods of disclosure.

2. "Public" Disclosure

Given that one of the listed methods of disclosure is implicated, the next inquiry is how "publicly" must the information have been disclosed for the jurisdictional bar to apply? The Tenth Circuit is basically silent as to the extent to which given information must have been disclosed so at to bar *qui tam* actions. [5] Other circuits have taken a variety of approaches. The Third Circuit held that information has been publicly disclosed if it "would have been equally available to strangers to the transaction had they chosen to look for it, as it was to the relator." United States ex rel. Stinson et al. v. Prudential Ins. Co., 944 F.2d 1149, 1155-1156 (3d Cir. 1991). [**19] The First Circuit stated, "The logical reading [of the statute] is that [section 3730(e)(4)] serves to prohibit courts from hearing *qui tam* actions based on information made available to the public during the course of a government hearing, investigation or audit or from the news media." United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 499 U.S. 921, 113 L. Ed. 2d 246, 111 S. Ct. 1312 (1991). The Second Circuit held that allegations are publicly disclosed when they are placed in the "public domain." United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990).

> 5 In United States ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992), cert. denied, U.S. , 113 S. Ct. 1364, 122 L. Ed. 2d 742 (1993), the only Tenth Circuit case to discuss *qui tam* jurisdiction under the FCA since 1986, the court focused on the "based upon" component of the analysis. The court in Precision seemed to assume, without discussion or analysis, that the allegations and transactions at issue had been publicly disclosed. Id. at 552.

> All that remained of the court's analysis was whether the relator's action was based upon those publicly disclosed allegations or transactions. Id. at 552-54.

[**20] Analysis of the rationale governing these cases, and the purposes underlying the FCA, yields the following principle: aside from disclosures resulting from news media exposure, public disclosure occurs when the government has affirmatively provided to [*1551] members of the general public access to information upon which the FCA claim is based. The linchpin of this formulation of the public disclosure test is the requirement that the government perform some affirmative act of disclosure. The mere existence of a report, audit, or investigation containing information pertaining to fraud does not, in and of itself, constitute public disclosure.

The plain meaning of the FCA supports this interpretation. "Disclosure" is modified by "public." 31 U.S.C. § 3730(e)(4)(A). "Disclosure" is defined, in part, as "the act" of disclosing, Webster's Third New International Dictionary 645 (1976), a definition which connotes some positive action taken with the intent to disclose.

Not only does this interpretation comport with the FCA's plain meaning, but it also furthers the Act's purposes and is consistent with its legislative history. "Public disclosure" must mean something [**21] more than the mere preparation of documentation regarding fraud. Equating public disclosure with the existence of documentation would be tantamount to barring *qui tam* actions based on information in the possession of the government--exactly the situation Congress was attempting to eliminate in 1986. Not requiring some positive act of disclosure would reinstate the pre-1986 jurisdictional bar based on mere "government knowledge" of information pertaining to fraud. Congress sought to replace this restrictive jurisdictional prerequisite in part because of its concern that the government was not pursuing known instances of fraud. S. Rep. at 5267-69. As a consequence of the government's perceived inability or unwillingness to prosecute fraud, Congress gave private attorneys general greater access to the courts. If the mere existence of a "no action" recommendation buried in an unreleased internal audit report has the effect of foreclosing *qui tam* actions, the 1986 amendments were for naught.

Generally, this affirmative disclosure requirement has significance only in cases where the disclosure is predicated solely on a report, audit, or investigation. A criminal or civil action [**22] in state or federal court always constitutes public disclosure. An open administrative hearing would likewise constitute public disclosure. However, an audit, report, or investigation would not constitute public disclosure unless the audit, report or investigation culminated in a civil, criminal, or administrative hearing, was the subject of a news media report, or was meaningfully documented and published or otherwise made available to the public.

Applying these principles to the case at bar, Defendant MK-F argues that the DOE investigation publicly disclosed the allegations at issue. Defendant does not reveal how the investigated information became public, only that MK-F, by providing information and documentation to the DOE, publicly disclosed that information. Defendant relies on United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2nd Cir. 1992), in which the court held that interviews of "innocent" employees of the defendant's company, during the execution of a search warrant, constituted public disclosure of fraud allegations to those employees. Id. at 322-23. Because some of those employees were "strangers [**23] to the fraud," the court reasoned that they constituted "the public" for the purposes of section 3730(e)(4). Id. at 322. The questionable reasoning of the Doe court aside, the record in this case does not indicate to whom the relevant allegations or transactions were divulged and whether those people were "innocent" or unknowing of the fraud allegations.

From the record, it is difficult to determine the extent to which, if any, the DOE investigation disclosed meaningful information to the public. In any event, it is apparent to the Court that the DOE did not perform any affirmative act of disclosure during the course of its investigation. Therefore, the Court concludes that the DOE investigation was not publicly disclosed within the meaning of the FCA.

Defendant finally claims that the audit performed by the DOE Inspector General's Office and the final report made of that audit publicly disclosed transactions and allegations upon which the Relator's action is based. If the audit report was publicly disclosed, any *qui tam* action based on allegations or transactions reported therein will be [*1552] barred under the statute unless the Relator was an original [**24] source of this information.

As discussed, the mere preparation of a report by an administrative agency will not constitute public disclosure. However, the report was released to the State of Oregon before this action was commenced, and the Relator conceded in his deposition that once the State of Oregon received the final report of the Inspector General's audit, it became publicly available. Therefore, if any of the Relator's claims are based upon allegations and transactions disclosed in the DOE-IG audit report, they will be subject to the jurisdictional bar of section 3730(e)(4)(A).

3. "Based Upon Public Disclosures

31 U.S.C. § 3730(e)(4)(A) states that courts will not have jurisdiction over claims based upon publicly disclosed allegations or transactions unless the person bringing the action is an original source of the information. The Relator in this case has alleged wrongdoing by Defendants in six matters under the Lakeview UMTRA contract between the DOE and MK-F and under the subcontract between MK-F and ICC. These matters are as follows:

> 1. Cost of Waste Water Retention Pond Liner--Relator claims that ICC fraudulently submitted [**25] a claim which exceeded the actual cost by $ 14,690.
>
> 2. Winter Shutdown Costs--Relator alleges that ICC had been using equipment at other job sites for which it made fraudulent claims as idle equipment, totalling $ 127,110.
>
> 3. Overhead Costs for Deleted Work--Relator alleges that ICC made fraudulent claims for overhead costs associated with construction of a wood chip cell, which it knew had been deleted from the project, in the amount of $ 40,168.
>
> 4. Construction of the Decontamination Pad--Relator claims that ICC falsely submitted claims totalling $ 86,009 for reconstruction of the decontamination pad as new work outside of the original contract, when it knew that such work was part of its initial bid.
>
> 5. Rental Costs During Winter Shutdown--Relator claims that defendant ICC submitted claims for rental costs based on estimates (65 percent of "Blue Book" costs), when it knew that actual costs were required and that actual costs were much less than 65 percent of the Blue Book costs. (Amount undetermined).
>
> 6. Use of Estimated Overhead Rates--Relator alleges that ICC made claims of overhead for contract modifications at a 15 percent rate when it knew the actual costs to be between [**26] eight and 13 percent. (Amount undetermined).

The DOE Inspector General's audit questioned the costs of four activities associated with the DOE-MK-F contract and the MK-F-ICC subcontract:

> 1. The deletion of an unnecessary wood chip encapsulation cell (design costs for item not approved by the State of Oregon and with unearned overhead costs), totalling $ 44,263;
>
> 2. Decontamination pad reconstruction (costs of meeting the subcontract commitments of ICC and which were the responsibility of ICC), for $ 86,009;
>
> 3. Payment of equipment standby costs during the 1987-1988 and 1988-1989 winter periods (costs not allowable against Oregon because total costs exceeded the approved total cost limitation in the DOE-Oregon agreement), for $ 940,457; and
>
> 4. Construction of waste water retention ponds--specifically, water retention pond number three (unreasonable costs supported only by inaccurate, incomplete, and outdated cost data), for $ 14,690.

The purposes of the audit were to determine if the costs of the four activities were allowable under the terms of the MK-F contract and the DOE-Oregon agreement and incurred under generally accepted business practices.

Of the Relator's six [**27] allegations, three were publicly disclosed in the DOE-IG audit. Relator's claim involving the wood chip encapsulation cell is essentially the same as the costs questioned by the audit report. The Relator's claims for costs of reconstruction of the [*1553] decontamination pad and the cost of the liner in water detention pond number three are precisely those questioned by the audit report. Relator's actions regarding these costs are therefore based on publicly disclosed allegations. The Court is prevented from adjudicating these claims unless the Relator is an original source of this information.

Both the Relator and the audit report questioned winter shutdown costs. However, the audit report questioned the entire $ 940,000 cost of winter shutdown, while the Relator's claim only alleges that certain specific costs associated with winter shutdown were fraudulent. Additionally, Relator argues that the audit report did not question the acceptability of the Defendant's claims for winter shutdown costs, but only questioned whether the DOE could seek ten percent of those costs from the State of Oregon because, at the time the claims were

made, the cost of the project exceeded the total cost limitation [**28] stated in the DOE-Oregon agreement.

Nevertheless, the Relator does make allegations about the permissibility of some of the same costs questioned by the DOE-IG audit report, and therefore the Court must dismiss these claims regarding winter shutdown costs pursuant to United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548 (10th Cir. 1992), cert. denied, U.S. , 113 S. Ct. 1364, 122 L. Ed. 2d 742 (1993). In that case, the Tenth Circuit ruled that "the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." Id. at 552. Therefore, "a plaintiff whose *qui tam* action which is based *in any part* upon publicly disclosed allegations or transactions is subject to the 'original source' jurisdictional requirement." Id. at 553 (emphasis added). As the Relator's claims are based in part upon the allegations contained in the DOE-IG report, they are barred by section 3730(e)(4).

Relator's final claim (item 19 of Relator's complaint), that ICC has unreasonably and impermissibly [**29] used estimates that were higher than actual costs in billing overhead, when it knew that actual figures were required, has not been addressed in any publicly disclosed document. The jurisdictional bar does not at all apply to this part of the Relator's action.

4. Original Source

If a relator brings an action under the FCA which is based upon the public disclosure of allegations or transactions, the Court may only assert subject matter jurisdiction over that action if the relator shows that he is an original source of the publicly disclosed information. Section 3730(e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." The Relator must demonstrate that he is an original source of the information upon which he bases his claims surrounding the construction of the waste water retention pond, the reconstruction of the decontamination pad, the unearned overhead for the deleted wood chip encapsulation cell, and costs associated with winter shutdowns. These [**30] are the only allegations based upon publicly disclosed information.

Under the FCA, an original source must have "direct and independent knowledge of the information" that was publicly disclosed. Some courts have added the requirement that the relator "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2nd. Cir. 1990); see also United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992) ("To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit."). "The paradigmatic 'original source' is a whistleblowing insider[, such as] 'individuals who are close observers or otherwise involved in the fraudulent activity.' Other relators may also qualify if their information results from their own investigations." United States ex rel. Stinson et al. v. Prudential Ins. Co., 944 F.2d 1149, 1161 (3rd Cir. 1991), quoting S. Rep. at 5269.

This Court agrees with the above reasoning. [**31] The purpose of requiring "direct and independent" knowledge of the information [*1554] upon which an action is based is to prevent relators from bringing parasitic actions and contributing little or no additional information of value. With regard to the four claims the Relator has made which were publicly disclosed in the DOE-IG audit report, he has contributed no real personal effort or knowledge. His claims basically mimic the allegations made in that audit and in the Oregon audit with which he was familiar. He did not conduct the investigations which led to those publicly disclosed allegations.

Because the Relator did not have direct and independent knowledge of the information upon which his allegations are based, this Court need not consider whether he "voluntarily provided the information to the Government," as is required of an "original source" under section 3730(e)(4)(B).

IV. CONCLUSION

The Court concludes that nothing in the False Claims Act precludes IG employees from maintaining *qui tam* actions. Additionally, the jurisdictional bar of section 3730(e)(4) does not bar the Relator's claim based on higher than actual overhead costs, an allegation which was not publicly disclosed. [**32] The Court, however, may not assert jurisdiction over the Relator's remaining claims because they are based upon allegations publicly disclosed in the DOE-IG audit report.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant ICC's motion to dismiss be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant MK-F's motion to dismiss be, and hereby is, granted in part. The Relator's claims other than item 19 of the complaint are dismissed.

IT IS FURTHER ORDERED that Plaintiff's motion to strike the affidavit of Walter Perry be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendants' request for attorney's fees be, and hereby is, denied.

Dated this 26th day of August, 1994.

Juan G. Burciaga

Chief Judge

LEXSEE

Questioned
As of: Mar 18, 2011

UNITED STATES OF AMERICA, ex rel. MARY L. HOLMES, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Movant-Appellee, v. CONSUMER INSURANCE GROUP; JOHN R. HIGHTOWER, Defendants.

No. 01-1077

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

318 F.3d 1199; 2003 U.S. App. LEXIS 2387

February 10, 2003, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D.C. No. 99-D-665).
Panel decision of February 19, 2002, reported at: United States ex rel. Holmes v. Consumer Ins. Group, 279 F.3d 1245, 2002 U.S. App. LEXIS 2576 (10th Cir. Colo. 2002).

DISPOSITION: REVERSED, REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant postal employee brought a qui tam action under the False Claims Act, 31 U.S.C.S. §§ 3729-33, against defendant postal customer. Appellee government intervened and moved to dismiss the postal employee. The United States District Court for the District of Colorado dismissed the postal employee. The postal employee appealed.

OVERVIEW: The postal employee claimed that, pursuant to 31 U.S.C.S. § 3730(e)(4), there was no public disclosure of information at the time she filed the action, and, in any event, she qualified as an original source of the information upon which her complaint was based. The court initially held that the district court erred in finding that it lacked subject matter jurisdiction over the postal employee's action. The government's disclosure of information to three witnesses in its investigation did not result in a "public disclosure" for purposes of 31 U.S.C.S. § 3730(e)(4)(A) because each witness participated, to some degree, in the alleged fraudulent scheme, and, thus, were previously informed of the fraudulent scheme prior to their respective interviews with government investigators. Furthermore, the postal employee was entitled to proceed as a relator under 31 U.S.C.S. § 3730(b)(1) because, although the postal employee may have been acting in her official capacity when she obtained the information that was the basis for her qui tam action, it was apparent that she was acting in her individual capacity as a person in filing and pursuing the qui tam action.

OUTCOME: The judgment was reversed and remanded.

CORE TERMS: qui tam, government employee, public disclosure, federal employee, disclosure, mailing, grant of jurisdiction, jurisdictional, postmaster, post office, private persons, parasitic, postal, job duties, qualify, bulk, ambiguity, ongoing, civil action, construe, heading, statutory language, conflicts of interest, inspector, matter jurisdiction, wrongdoing, per se, information obtained, duties to report, citation omitted

LexisNexis(R) Headnotes

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
[HN1]See 31 U.S.C.S. § 3730(e)(4)(A), (B).

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Remedies > Civil Penalties
[HN2]Satisfaction of the provisions of 31 U.S.C.S. § 3730(e)(4) is a question of subject matter jurisdiction. Thus, issues involving the interpretation and application of 31 U.S.C.S. § 3730(e)(4) are reviewed de novo. Because federal courts are courts of limited jurisdiction, federal courts presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction. Therefore, the party invoking federal jurisdiction bears the burden of alleging facts essential to show jurisdiction under the False Claims Act, 31 U.S.C.S. §§ 3729-33, as well as supporting those allegations by competent proof.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
[HN3]When a court's subject matter jurisdiction depends upon the same statute that creates the substantive claims, the jurisdictional inquiry is necessarily intertwined with the merits. More specifically, the jurisdictional question of whether a "public disclosure" under 31 U.S.C.S. § 3730(e)(4) has occurred arises out of the same statute that creates the cause of action. These "intertwined" jurisdictional inquiries should be resolved under Fed. R. Civ. P. 12(b)(6) or, after proper conversion into a motion for summary judgment, under Fed. R. Civ. P. 56.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
[HN4]Where a district court relies on affidavits and other evidence submitted by the parties, a motion to dismiss for failure to state a claim should be treated as a motion for summary judgment under Fed. R. Civ. P. 56.

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source
Labor & Employment Law > Employer Liability > False Claims Act > Remedies > Civil Penalties
[HN5]Generally speaking, the jurisdictional inquiry under 31 U.S.C.S. § 3730(e)(4)(A) involves four questions: (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act, 31 U.S.C.S. §§ 3729-33; (3) whether the relator's complaint is "based upon" this "public disclosure"; and, if so, (4) whether the relator qualifies as an "original source" under 31 U.S.C.S. § 3730(e)(4)(B). If the answer to any of the first three questions is "no," the jurisdictional inquiry ends and the qui tam action proceeds, regardless of whether the relator is an original source. The last inquiry, whether the relator is an original source, is necessary only if the answer to each of the first three questions is "yes," indicating the relator's complaint is based upon a specified public disclosure.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
[HN6]Applicability of the four-part jurisdictional inquiry set forth in 31 U.S.C.S. § 3730(e)(4) does not hinge upon whether the government is actively involved in an investigation of the alleged fraud. Rather, the four-part jurisdictional inquiry is applicable in all cases filed by qui tam relators and, as outlined above, subject matter jurisdiction hinges upon the outcome of that inquiry. Although the presence or absence of an ongoing government investigation is relevant in applying the inquiry, it clearly is not the determinative factor.

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN7]A government employee who discovers fraud in the scope of his or her employment, and who is required to report that fraud, is a "person" entitled to bring suit under the False Claims Act (FCA), 31 U.S.C.S. §§ 3729-33. The fact that an employee learns of fraud in the course of his or her employment and has a duty to report fraud does not bar the government employee's FCA action.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN8]The term "public disclosure," for purposes of the False Claims Act, 31 U.S.C.S. §§ 3729-33, signifies more than the mere theoretical or potential availability of information. In order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through some affirmative act of disclosure. The mere possession by a person or an entity of information pertaining to fraud, obtained through an independent investigation and not disclosed to others, does not amount to "public disclosure." Rather, public disclosure occurs only when the allegations or fraudulent transactions are affirmatively provided to others not previously informed thereof.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar

[HN9]In order for there to be a public disclosure under 31 U.S.C.S. § 3730(e)(4), the recipient of the disclosed information must be a stranger to the fraud.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN10]As the language of 31 U.S.C.S. § 3730(b)(1) makes clear, every qui tam action is considered to be filed on behalf of the relator and the government and both parties benefit from any financial recovery obtained in the action.

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Jurisdictional Bar

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Original Source

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN11]Where there was no public disclosure, the jurisdictional inquiry under 31 U.S.C.S. § 3730(e)(4) ceases, regardless of whether the relator qualifies as an original source.

Governments > Legislation > Interpretation

[HN12]As in all cases involving statutory construction, the court's starting point must be the language employed by U.S. Congress, and the court assumes that the legislative purpose is expressed by the ordinary meaning of the words used. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN13] 31 U.S.C.S. § 3730(b)(1) provides, in pertinent part, that a person may bring a civil action for a violation of 31 U.S.C.S. § 3729 for the person and for the United States Government.

Governments > Federal Government > Claims By & Against

Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions

[HN14]For purposes of being a person under 31 U.S.C.S. § 3730(b)(1), the Dictionary Act defines the word "person" for purposes of determining the meaning of any Act of Congress as including "individuals." 1 U.S.C.S. § 1. Likewise, authoritative dictionaries generally define the word "person" as a "human being."

Governments > Legislation > Interpretation
[HN15]When a word is not defined by statute, courts normally construe it in accord with its ordinary or natural meaning.

Governments > Legislation > Interpretation
[HN16]The title of a statutory provision cannot limit the plain meaning of the text, and instead can only be used when it sheds light on some ambiguous word or phrase.

Governments > Legislation > Interpretation
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
[HN17]Under the doctrine of "scrivener's error," a court may give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result.

Governments > Federal Government > Employees & Officials
[HN18]Principles of agency law control the relationship between a federal employee and the government.

Governments > Legislation > Interpretation
[HN19]Identical words used in different parts of the same act are intended to have the same meaning.

Governments > Federal Government > Claims By & Against
[HN20] 31 U.S.C.S. § 3729(a) imposes liability on any "person" who commits one of several listed violations.

Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials
Labor & Employment Law > Employer Liability > False Claims Act > Coverage & Definitions > Qui Tam Actions
[HN21]Nothing in the False Claims Act, 31 U.S.C.S. §§ 3729-33, expressly precludes federal employees from filing qui tam suits.

Governments > Legislation > Interpretation
[HN22]For statutory construction purposes, the natural meaning of words cannot be displaced by reference to difficulties in administration.

COUNSEL: Craig D. Joyce, Walters & Joyce, P.C., Denver, Colorado, for the Plaintiff-Appellant.

Charles W. Scarborough, Appellate Staff Civil Division, Department of Justice, Robert D. McCallum, Jr., Assistant Attorney General; John W. Suthers, United States Attorney; Douglas N. Letter, Appellate Staff Civil Division, Department of Justice with him on the brief, Washington, D.C., for the Movant-Appellee.

JUDGES: Before TACHA, Chief Judge, SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, MURPHY, LUCERO, HARTZ, and O'BRIEN, Circuit Judges.

OPINION BY: MURPHY

OPINION

ON REHEARING EN BANC

[*1200] **BRISCOE**, Circuit Judge.

Relator Mary L. Holmes appeals the district court's dismissal, for lack of subject matter jurisdiction, of her claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729-33. A divided panel of this court affirmed the district court's judgment. See United States ex rel. Holmes v. Consumer Ins. Group, 279 F.3d 1245 (10th Cir. 2002). This court subsequently granted rehearing en banc. Upon rehearing, we vacate our prior opinion in this case, [**2] reverse the judgment of the district court, and remand for further proceedings.

I.

Since 1985, Holmes has served as the postmaster in Poncha Springs, Colorado. In October 1995, Cameron Benton and Henry Modrejewski, employees of defendant Consumer Insurance Group (CIG), inquired at the Poncha Springs post office about the cost of bulk mailing. After Holmes calculated the cost of CIG's intended mailing, Modrejewski told Holmes "that was not the rate they were being charged for the same type [of] mailing at the Howard, Colorado post office." App. at 101. More specifically, Holmes was informed that CIG was being charged "per pound," rather than "per piece," at the Howard post office. Id. at 10. The "per pound" rate, which is significantly lower than the "per piece" rate, applies if each individual piece of mail weighs in excess of 3.3062 ounces. Holmes called Jenny McKinnon, the Howard postmaster, who confirmed that CIG was receiving the "per pound" rate at the Howard post office.

Assuming that McKinnon was correct, Holmes accepted CIG's bulk mailing at the "per pound" rate.

After further checking, Holmes concluded that her initial calculation was correct and that CIG's bulk mailing [**3] did not qualify for the "per pound" rate because each [*1201] individual piece weighed only .3 ounces. Holmes informed Benton of her conclusion. Benton responded that CIG could not afford to use the "per piece" rate because it was "prohibitively expensive." Id. at 11. After speaking with Benton, Holmes contacted McKinnon at the Howard post office and informed her that CIG's bulk mailings did not, in fact, qualify for the "per pound" rate.

Nearly two years later, in August 1997, Holmes was training an acting postmaster, Al Ferguson, at the Howard post office concerning how to "close out the books and make sure everything balanced for the year." Id. at 85. During a lunch break, Holmes asked Ferguson the rate CIG was being charged for bulk mailings. According to Holmes, she was curious whether McKinnon had corrected the bulk mail rates for CIG because CIG was trucking all of its mail to the Howard post office. Ferguson told Holmes that CIG was still being charged the "per pound" rate. Upon returning to the Howard post office, Holmes and Ferguson "did some calculations and determined that the CIG mailings were . . . being undercharged by about $ 200,000 per year." Id. at 86. Holmes also [**4] discovered that CIG had been falsely certifying that its bulk mailings weighed in excess of 3.3062 ounces per piece. Holmes reported her findings concerning CIG's bulk mailings to her manager, who oversaw both the Poncha Springs and Howard post offices.

In December 1997, after allegedly hearing nothing from postal inspectors, Holmes wrote to the Inspector General's Office in Washington, D.C., and reported the problem concerning CIG's bulk mailings. The Inspector General's Office responded by letter in March 1998, stating, in pertinent part, that Holmes' "information" had been "reviewed . . . and referred . . . to the appropriate Office of Inspector General Director for action deemed warranted," and that Holmes would "be contacted if additional details were needed." Id. at 54. As Holmes was allegedly concerned that the Inspector General's Office would take no action, she also reported the problem to a postal systems coordinator.

In late March 1998, the Postal Inspection Service began an administrative investigation into Holmes' allegations regarding CIG's bulk mailings. On April 1, 1998, postal inspector James Hayson (the lead agent), accompanied by three other postal inspectors, [**5] a postal inspector general agent, and two revenue assurance analysts, spent a week at the Howard post office collecting and reviewing documents concerning CIG's mailings. "During the subsequent months," Hayson "located and interviewed at least ten individuals including current and former employees of [CIG] and current and former employees of the Postal Service." Id. In particular, Hayson interviewed Benton and Modrejewski, who no longer worked for CIG. Hayson also interviewed Jim Benbrook, a current employee of CIG who acknowledged transporting many of the mailings at issue to the Howard post office. Benbrook initially denied knowledge of the alleged fraud, but evidence subsequently obtained by the government "suggests that [he] was an active participant in the fraud." Govt. Br. at 10. During all of the interviews, Hayson "disclosed the Government's suspicions that CIG had knowingly underpaid postage based on false mailing statements . . . and that John Hightower[, CIG's owner,] knew the mailing statements were false." App. at 35.

In July 1998, Hayson referred the case to the United States Attorney's Office for the District of Colorado, which began working on the case jointly [**6] with the Postal Inspection Service. In August 1998, the Postal Inspection Service served an administrative subpoena on CIG demanding production [*1202] of documents and information related to the company's mailings, and CIG responded to the subpoena in November 1998. "From December 1998 through 1999, the U.S. Attorney's Office and the Postal Inspection Service continued jointly to build a case against CIG by analyzing the documents produced by CIG pursuant to the . . . subpoena." Id. at 36.

On April 2, 1999, Holmes filed this qui tam action under seal. The government intervened and moved to dismiss Holmes as a party for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4). The government asserted that (1) it had publicly disclosed information concerning the fraud allegations against CIG in the course of its administrative investigation (i.e., by interviewing Benbrook, Benton, and Modrejewski and informing them about its suspicions); (2) Holmes' qui tam action was based upon those "publicly disclosed" allegations; and (3) Holmes did not qualify as an "original source" of the information contained in her complaint because she was obligated, as part [**7] of her job duties, to report fraud and procedural irregularities. The district court granted the government's motion to dismiss Holmes as a party and, at her request, entered judgment against her so that she could immediately appeal her dismissal from the case.

II.

Holmes contends that the district court erred in dismissing her from the case for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4). According to Holmes, § 3730(e)(4) does not bar her from proceed-

ing as a relator because there had been no "public disclosure" of information at the time she filed the action, and, in any event, she qualifies as an "original source" of the information upon which her complaint was based.

Section 3730(e)(4) provides:

> [HN1](A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the [**8] information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A), (B). [HN2]"Satisfaction of the provisions of 31 U.S.C. § 3730(e)(4) is a question of subject matter jurisdiction." United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1003 (10th Cir. 1996). Thus, issues involving the interpretation and application of § 3730(e)(4) are reviewed de novo. United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551 (10th Cir. 1992). Because federal courts are courts of limited jurisdiction, "we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction." Id. Therefore, Holmes, the party invoking federal jurisdiction, bears "the burden of alleging facts essential to show jurisdiction under the False Claims Act as well as supporting those allegations by competent [**9] proof." Fine, 99 F.3d at 1004. [1]

> 1 The dissent criticizes our discussion of and reliance on Fine. In our view, the rationale for our analysis of Fine is clear. In the proceedings in the district court, the government argued, and the district court agreed, there was a lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4). Since Holmes, the appellant, contends the district court erred in its ruling, it is logical to first address that issue.

[HN3] [*1203] When, as here, a court's subject matter jurisdiction depends upon the same statute that creates the substantive claims, the jurisdictional inquiry is necessarily intertwined with the merits. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). More specifically, the jurisdictional question of whether a "public disclosure" has occurred arises out of the same statute that creates the cause of action. United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1518 (10th Cir. 1996). [**10] We have determined that these "intertwined" jurisdictional inquiries should be resolved under Federal Rule of Civil Procedure 12(b)(6) or, after proper conversion into a motion for summary judgment, under Rule 56. Id. The district court here purportedly resolved the government's motion to dismiss under Rule 12(b)(6). However, [HN4]because the district court relied on affidavits and other evidence submitted by the parties, the motion should have been treated as a motion for summary judgment under Rule 56. We therefore proceed to review the motion as one for summary judgment.

[HN5]Generally speaking, the jurisdictional inquiry under 31 U.S.C. § 3730(e)(4)(A) involves four questions: (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the FCA; (3) whether the relator's complaint is "based upon" this "public disclosure"; and, if so, (4) whether the relator qualifies as an "original source" under § 3730(e)(4)(B). Fine, 99 F.3d at 1004. If the answer to any of the first three questions is "no," the jurisdictional inquiry [**11] ends and the qui tam action proceeds, regardless of whether the relator is an original source. The last inquiry, whether the relator is an original source, is necessary only if the answer to each of the first three questions is "yes," indicating the relator's complaint is based upon a specified public disclosure. Id.; see Precision, 971 F.2d at 552 & n. 2.

In concluding that it lacked subject matter jurisdiction over Holmes' qui tam claims, the district court acknowledged, but did not ultimately apply, the four-part inquiry. According to the district court, the four-part inquiry is applicable only "where the government is not actively investigating the alleged wrongdoing." App. at 125. The district court concluded that the purpose of the four-part inquiry under such circumstances is to determine "whether the government is 'capable' of pursuing the suit itself." Id. The court further concluded that, in situations where the "government is actively pursuing the alleged wrongdoing when the qui tam action is sought," the four-part inquiry is unnecessary "because it is clear that the government has already identified the problem." Id. (internal quotation and citation omitted). [**12] Applying this unique analytical framework, the district

court concluded that it lacked subject matter jurisdiction over Holmes' qui tam claims:

> In this case, it is undisputed that, prior to the filing of the qui tam complaint by Holmes, the OIG [Office of Inspector General] and PIS [Postal Inspection Service] were involved in an active administrative investigation of the matters at issue in this suit and had identified the probable offenders. When the investigation substantiated fraud by CIG, Holmes was publicly commended and received a $ 500 bonus from her employer for her service. In July of [*1204] 1998, prior to the filing of Holmes' Complaint, the matter was referred to the Attorney General's office and accepted for civil action. Between 1998 and the time the Complaint was filed, the Attorney General's office continued to build a case against CIG. Because the PIS and OIG investigation and their subsequent referral of the matter to the Attorney General set the government "squarely on the trail of the alleged fraud," it would therefore "be contrary to the purposes of the FCA to exercise jurisdiction over [the relator's] claim." Because my fundamental task in interpreting the FCA [**13] is "to give effect to the intent of Congress," I must grant the United States' Motion to Dismiss Holmes. It makes no difference that Holmes, as part of her role as postmaster, initially alerted the PIS and OIG to the alleged wrongdoing and spurred them to investigate.

Id. at 126 (internal citations omitted).

We reject the district court's analysis. [HN6]Applicability of the four-part jurisdictional inquiry set forth in § 3730(e)(4) does not hinge upon whether the government is actively involved in an investigation of the alleged fraud. Rather, the four-part jurisdictional inquiry is applicable in all cases filed by qui tam relators and, as outlined above, subject matter jurisdiction hinges upon the outcome of that inquiry. Although the presence or absence of an ongoing government investigation is relevant in applying the inquiry, it clearly is not the determinative factor. Under the district court's analytical framework, a prospective relator would have to report his or her information to the government and then immediately file suit in an attempt to act before the government instituted an investigation into the allegations. Further, the district court's analytical framework [**14] is contrary to Congressional intent in that it could prevent persons with legitimate inside knowledge of wrongdoing from pursuing a qui tam action.

The government asserts we can affirm the district court's judgment on alternative grounds. Focusing on parts two and four of the four-part inquiry, the government argues that a "public disclosure" occurred when government investigators questioned the three current and former CIG employees, [2] and, in any event, Holmes does not qualify as an "original source" because she was obligated to report the alleged fraud (and thus did not "voluntarily" report it). Because we conclude that no "public disclosure" occurred, under Fine we do not proceed to address the "original source" question. The government also argues that a government employee who obtains information about fraud in the scope of his or her employment, and who is required to report that fraud, is not a "person" entitled to bring a civil action under 31 U.S.C. § 3730(b)(1). We conclude [HN7]the government employee who discovers fraud under these circumstances is a "person" entitled to bring suit under the FCA. The fact that an employee learns of fraud in the course [**15] of his or her employment and has a duty to report fraud does not bar the government employee's FCA action.

> 2 Although it is uncontroverted that a number of postal employees were also interviewed during the course of the administrative investigation, the government makes no attempt to assert that these resulted in a "public disclosure" of the allegations at issue. Indeed, the government concedes that its "disclosures to former and current employees of CIG . . . have always been the sole basis for application of the public disclosure bar in this case." Govt. Br. at 37.

Public disclosure

The term "public disclosure" is not defined in the FCA. In Ramseyer, we held that [HN8]the term "signifies more than the [*1205] mere theoretical or potential availability of information." 90 F.3d at 1519. "In order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through some affirmative act of disclosure." Id. Thus, we stated: [**16]

> The mere possession by a person or an entity of information pertaining to fraud, obtained through an independent investigation and not disclosed to others, does not amount to "public disclosure." Rather, public disclosure occurs only when the allegations or fraudulent transactions are

> affirmatively provided to others not previously informed thereof.

Id. at 1521 (emphasis added).

Applying these principles to the case at hand, we conclude that a public disclosure did not occur when, during the course of their administrative investigation, government investigators questioned Benbrook, Benton, and Modrejewski. It is uncontroverted that all three individuals participated, to some degree, in the alleged fraudulent scheme, and thus were "previously informed" of the fraudulent scheme prior to their respective interviews with government investigators. [3]

> 3 Benbrook "transported many of the mailings at issue from CIG to the Howard post office" and "submitted false certifications to the Howard post office in order to qualify the CIG bulk mailings for the lower postage rates." Holmes Br. at 8. Benton had talked to Holmes about a bulk mailing in October 1995, and he was aware "that CIG's bulk mailings did not qualify for the lower postage rates CIG was receiving from the Howard post office." Id. at 9. Modrejewski "accompanied . . . Benton during the visit to the Poncha Springs post office" in October 1995, and "knew that the rates for CIG's bulk mailing quoted by [Holmes] . . . were higher than the rates CIG was receiving from the Howard post office." Id.

[**17] The government concedes "there is some support" in Ramseyer and its progeny for the notion that, [HN9]in order for there to be a public disclosure, the recipient of the disclosed information must be a stranger to the fraud. Govt. Br. at 22. Notwithstanding this concession, however, the government attempts to distinguish these cases by arguing that they "do not address the different situation where there have been no disclosures to strangers to the fraud, but the Government is fully aware of the allegations and is actively pursuing its own investigation." Id. Although the government's argument is not exactly clear, it appears the government is effectively asking us to modify the "public disclosure" test if the government is aware of the allegations, actively pursuing an investigation into the allegations, and responsible for the disclosure(s).

The government argues that, at a minimum, its "disclosures to the two former CIG employees [Benton and Modrejewski] during its investigation [in this case] should trigger the public disclosure bar, even though it turned out that they were not strangers to the fraud." Id. at 34. However, the government does not clearly explain why the disclosure [**18] to these two individuals should be deemed sufficient to constitute a "public disclosure." Apparently, the government finds significant the fact that the two men no longer work for CIG. However, it offers no principled distinction between these two men and the one man (Benbrook) who still works for CIG, since all three men had prior knowledge of the alleged wrongdoing. Further, the government cites no case where a court has held that a disclosure to a person familiar with the fraud constitutes a "public disclosure" for purposes of § 3730(e)(4).

The government makes several other perplexing, and at times disingenuous, arguments in an effort to demonstrate why a "public disclosure" has occurred within the [*1206] meaning of § 3730(e)(4). Citing United States ex. rel Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992), it suggests that "the Second Circuit has squarely held that disclosures made by the Government to employees of a defendant corporation during the course of a fraud investigation constitute public disclosures under section 3730(e)(4)(A)." Govt. Br. at 21. A review of the Doe decision, however, demonstrates that the holding is not as broad as described by the government. [**19] In concluding that a public disclosure had occurred within the meaning of § 3730(e)(4)(A), the court focused not on the fact that the government generally had disclosed information to the defendant's employees, but rather that the disclosures had been made to many employees who were innocent and knew nothing about the defendant's wrongdoing:

> Here, . . . the allegations of fraud were not just potentially accessible to strangers, they were actually divulged to strangers to the fraud, namely the innocent employees of John Doe Corp. While the search warrant was being executed, the investigators spoke to numerous employees of John Doe Corp., some of whom knew of the fraud. But, more importantly, many of these individuals knew nothing about defendants' ongoing scheme; they were strangers to the fraud. These people were neither targets of the investigation nor potential witnesses. The government may have hoped that these individuals were potential witnesses, but it is clear that they were not.

960 F.2d at 322-23. [4] Thus, contrary to the government's assertions, the decision in Doe supports the conclusion that no public disclosure occurred in this case when the government [**20] interviewed persons who were involved in, or had prior knowledge of, the alleged wrongdoing. [5]

4 In light of the fact that all three witnesses at issue in this case had prior knowledge of the fraud, it is unnecessary for us to decide whether questioning "innocent" employees of a company suspected of wrongdoing constitutes a "public disclosure" for purposes of the FCA.

5 The government makes a similar, overly broad characterization of our decision in Fine. See Govt. Br. at 21 ("Likewise, this Court has made clear that a disclosure of allegations to even a single person outside the Government will trigger the jurisdictional bar."). Although we concluded that a "public disclosure" had occurred based upon the disclosure of information to a single individual, a key aspect of our conclusion was that the individual to whom the information was disclosed was "previously unconnected with the alleged fraud." 99 F.3d at 1005.

[**21] One other aspect of Doe requires mention. Throughout its "public disclosure" discussion, the government repeatedly cites Doe for the proposition that the purpose of the "public disclosure" test "was 'to prod the government into action, rather than allowing it to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the best interest of the government.'" Govt. Br. at 25 (quoting Doe, 960 F.2d at 323). A careful review of the Doe decision demonstrates that the government is again misconstruing what was stated. Importantly, the language quoted by the government does not refer to the "public disclosure" test implemented by the 1986 amendments, but rather to the 1986 amendments in general. See 960 F.2d at 323 ("One reason for the 1986 amendments was to prod the government into action."). We agree that "prodding" the government into action was obviously Congress' impetus for jettisoning the pre-1986 "government knowledge" standard, under which qui tam actions were barred if the federal government already possessed information upon which a qui tam action was based. That does not [*1207] mean, however, that the purpose of the "public disclosure" [**22] test was the same. Rather, a review of the amendments and the legislative history makes clear that the purpose of the "public disclosure" test was to help identify and prevent "parasitic" qui tam actions. [6] E.g., Susan G. Fentin, The False Claims Act Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" provision of 31 U.S.C. 3730(e)(4), 17 W. New Eng. L. Rev. 255, 296 (1995) (noting that "Congress' fundamental purpose in the 1986 amendments was to encourage qui tam suits that were not parasitic in nature").

6 The government makes several arguments that are tied to its mischaracterization of the Doe quotation. For example, the government argues that "in cases where there is no evidence that the Government is aware of fraud allegations prior to a qui tam filing, ... determining whether a disclosure of fraud allegations has been made to at least one individual 'not previously informed thereof' is a reasonable proxy for assessing whether the Government will be made aware of the allegations - and feel some pressure to act on them - even without the impetus of a qui tam suit." Govt. Br. at 30. However, the point of the public disclosure requirement is not to determine whether there is an impetus for the government to take action - the filing of the qui tam lawsuit takes care of that. Rather, the point of the public disclosure test is to determine whether the qui tam lawsuit is a parasitic one. The government also repeatedly suggests that "the sole purpose of looking for a disclosure is to determine if the Government is already on the trail of the fraud." Govt. Br. at 39. This is clearly incorrect.

[**23] The government suggests that if we do not accept its position, it will be forced "to make disclosures of relevant allegations to 'innocent' third parties in order to satisfy the public disclosure bar - and ensure that opportunistic qui tam suits will be barred." Govt. Br. at 31. We reject the government's argument for two reasons. First, we question its blanket characterization of qui tam suits filed by government employees as "opportunistic." While it is certainly possible for a government employee to file a parasitic qui tam action (e.g., based on knowledge obtained secondhand through other employees), that is not always the case. Here, for example, we do not view Holmes' action as parasitic or opportunistic. [7] Rather, Holmes has direct and independent knowledge of the fraud allegedly committed by CIG, since she is the person responsible for ferreting it out in the first place. Second, we believe the test we have adopted for determining whether a "public disclosure" has occurred is sound, and we are not persuaded there is an alternative test that accurately reflects the statutory language of 3730(e)(4)(A).

7 We reject the various criticisms leveled by the dissent at Holmes' suit and motives. A parasitic suit is one in which the relator uses information already in the public domain rather than information personally obtained in order to file suit. Holmes' suit obviously does not fit that mold. As for the dissent's comment that Holmes' "sole reason for filing [suit] was her own financial gain," Dissent at 18, that is obviously the motive of most, if not all, relators. Without the financial incentives of the qui tam provisions, few, if any, qui tam actions would be filed. Further, [HN10]as the language of 3730(b)(1) makes clear, every qui

tam action is considered to be filed on behalf of the relator and the government and both parties benefit from any financial recovery obtained in the action.

[**24] The government next complains that a rule requiring disclosure "to individuals with no prior knowledge of the fraud would necessitate a bizarre minitrial concerning the state of mind of various witnesses." Govt. Br. at 31-32. Obviously, a court faced with a public disclosure question may have to make factual findings regarding when and to whom a disclosure occurred. Nothing in the FCA suggests this is inappropriate. In any event, nothing of the sort was required in this case, where the government has conceded that [*1208] the three witnesses at issue were all involved in, or at least had prior knowledge of, the alleged wrongdoing.

Finally, the government argues that the "stranger-to-the-fraud" test "is flawed on its own terms because not all 'strangers' have incentives to disseminate information about fraud, and some individuals who have prior knowledge of fraud may have compelling incentives not to further publicize it." Govt. Br. at 33. In other words, the government complains that "the stranger-to-the fraud theory assumes that only those who have no prior knowledge of fraud are likely to make information about fraud public." Id. Although the government is undoubtedly correct that different [**25] people may have varying incentives to publicize information, that factor, in our view, is not relevant in determining whether a "public disclosure" has occurred within the meaning of the FCA. Moreover, the government has not offered a convincing test that could adequately replace the "stranger-to-the-fraud" rule.

We conclude that the government's disclosure of information to the three witnesses did not result in a "public disclosure" for purposes of § 3730(e)(4)(A).

Original source

Having concluded that no "public disclosure" occurred within the meaning of 3730(e)(4), we need not determine whether Holmes was an "original source" of the information underlying her complaint. As previously discussed, [HN11]where, as here, there was no public disclosure, the jurisdictional inquiry under § 3730(e)(4) ceases, regardless of whether the relator qualifies as an original source.

"Person" entitled to bring action under 31 U.S.C. § 3730(b)(1)

In its en banc brief, the government contends for the first time that Holmes cannot qualify as a potential relator under the FCA's general qui tam provision, 31 U.S.C. § 3730(b)(1). Specifically, [**26] the government argues that a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is not a "person" entitled to bring a civil action under 3730(b)(1).

[HN12]"As in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 71 L. Ed. 2d 748, 102 S. Ct. 1534 (1982) (internal quotations and citations omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as sive." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980).

[HN13]Section 3730(b)(1) provides, in pertinent part, that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." The word "person" is not defined in the FCA. [HN14]The Dictionary Act, however, defines the word "person" for purposes of "determining the meaning of any Act of Congress" as [**27] including "individuals." 1 U.S.C. § 1. Likewise, authoritative dictionaries generally define the word "person" as a "human being." See Oxford English Dictionary Online (2002) (defining "person" as "an individual human being; a man, woman, or child"); Webster's Third New Int'l Dictionary 1686 (1993) (defining "person" as "an individual human being"); Black's Law Dictionary 1142 (6th ed. 1990) (defining "person" as "a human being (i.e. natural person)"). Thus, while it reasonably might be debated whether the word "person" includes or excludes certain types of entities (e.g., corporations), there can be no doubt that it unambiguously encompasses [*1209] all individual human beings, including Holmes. Cf. Hafer v. Melo, 502 U.S. 21, 27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991) (concluding, in context of case filed pursuant to 42 U.S.C. § 1983, that "[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person'"); see generally Smith v. United States, 508 U.S. 223, 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050 (1993) [HN15]("When a word is not defined by statute, we normally [**28] construe it in accord with its ordinary or natural meaning."). [8]

8 The dissent disputes that it is redefining the term "person" as used in 3730(b)(1). However, by applying its "distinctness" test, it seeks to narrow the plain meaning of the word "person" in order to exclude those natural persons who work for the federal government, have job duties that include uncovering and reporting fraud, and are participating in an ongoing investigation of alleged

fraud. This three-part test is not contained within the language of the statute.

The government also directs our attention to § 3730(b)'s title, "Actions by private persons," suggesting that this somehow limits who may qualify as a relator under the provision. In our view, § 3730(b)'s title, which was added by Congress in 1986, was simply intended as an easy reference for the reader of the statute, and not as a substantive amendment to the statute. In any event, the Supreme court has explained that [HN16]the title of a statutory provision "'cannot limit the plain [**29] meaning of the text,'" and instead can only be used "'when [it] sheds light on some ambiguous word or phrase.'" Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998) (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947)). Even assuming the word "person" is ambiguous (which we conclude it is not), employment of § 3730(b)'s title could only lead to one of two conclusions -- either that all government employees fall within the class of "persons" capable of filing suit under the qui tam provisions, or that all government employees fall outside that class. See Black's Law Dictionary 1196 (indicating "private person" is a "term sometimes used to refer to persons other than those holding public office or in military services"). Not only would adoption of the latter conclusion result in a total ban on government employees filing suit under the qui tam act, it would render superfluous the specific exclusions adopted by Congress in 31 U.S.C. § 3730(e)(1) (prohibiting "former or present members of the armed forces" from filing qui tam actions "against a member of the armed forces [**30] arising out of such person's service in the armed forces").

We also reject any assertion that the word "person" can be uniquely defined on the basis of a "scrivener's error." [HN17]Under the doctrine of "scrivener's error," a court may "give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result." United States v. X-Citement Video, Inc., 513 U.S. 64, 82, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994) (Scalia, J., dissenting). Although there may be valid public policy reasons why certain government employees should be precluded from availing themselves of the qui tam provisions of the FCA, it cannot be said that defining the word "person" as encompassing all individuals, including government employees, would produce an "absurd and arguably unconstitutional result." Nor can it be said that the interpretation now urged by the government was "genuinely intended [by Congress] but inadequately expressed." Id. In enacting the 1986 amendments to the FCA, it appears clear that Congress did not consider the question of whether government employees should be [*1210] allowed to use information obtained in [**31] the course of their employment as the basis for a qui tam action. If we were to interpret the word "person" in the unusual manner urged by the government, we would end up "rewriting the statute rather than correcting a technical mistake." Id.

Finally, the government argues that a federal employee who discovers fraud in the course of his or her employment and who is required to report it, is not a "person" entitled to bring a civil action under § 3730(b)(1) because the acquisition of such information within the scope of a federal employee's job eliminates the critical distinction between the government and the individual qui tam plaintiff. This argument finds no support in the ordinary meaning of the word "person." In particular, we fail to see how the word could rationally be construed to exclude some, but not all, government employees, and under some, but not all, conditions. Further, we find no support for this argument in [HN18]principles of agency law, which control the relationship between a federal employee, such as Holmes, and the government. For example, it is apparent that Holmes, in filing her complaint in this matter, was not acting within the scope of her employment and was [**32] therefore not acting "as the government" since she was not employed to file suit under the FCA and there is no indication that the preparation or filing of her suit occurred substantially within the time and space limits imposed on her employment by the government. See Restatement (Second) of Agency § 228 (1957) (discussing when the conduct of a servant is or is not within the scope of his or her employment); see generally Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) (noting that "the Restatement . . . is a useful beginning point for a discussion of general agency principles"). Thus, even though she may have been acting "as the government," i.e., in her official capacity, when she obtained the information that now forms the basis of her qui tam complaint, it is apparent that she is acting as a "person," i.e., in her individual capacity, in filing and pursuing this qui tam action. Cf. Hafer, 502 U.S. at 25 (discussing, in context of § 1983 action, the difference between suing government officials in their official and individual capacities). This conclusion is further supported by the language of § 3730(b)(1) [**33] which states that a "person may bring a civil action for violation of section 3729 for the person and for the United States Government." (Emphasis added.) As applied here, Holmes brought this action in her individual capacity and sought relief for herself and for the government.

In our view, the dissent reads too much into the phrase "for the person and for the United States Government." As we read it, the phrase simply indicates that

the relator functions as the partial assignee of the United States and emphasizes that both the relator and the government have an interest in the lawsuit and both will benefit should any recovery occur. See generally Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 772-74, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000). To suggest that the phrase also limits the term "person" by imposing a "distinctness" requirement stretches the phrase too far. Further, if Congress intended to exclude some or all federal government employees from the class of persons able to file suit under § 3730(b)(1), it knew how to do so in a much clearer fashion than by use of the phrase "for the person and for the United States Government." For example, when Congress [**34] originally enacted 31 U.S.C. § 3729, the general liability provision of the FCA, it indicated that liability could be imposed only on "any person not in the military or naval forces of the United States, nor in the militia called into or [*1211] actually employed in the service of the United States." Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. Similar exclusionary language, e.g., "a person not employed in the service of the United States," could have been used in 3730(b)(1) if Congress intended to carve out some type of exception for government employees.

The dissent's attempted narrowing of the term "person" flies in the face of the principle that [HN19]"identical words used in different parts of the same act are intended to have the same meaning." Dep't of Revenue v. ACF Indus., Inc., 510 U.S. 332, 342, 127 L. Ed. 2d 165, 114 S. Ct. 843 (1994) (internal quotations omitted). Not only is the term "person" used in other provisions of 3730, e.g., § 3730(a) (authorizing the Attorney General to file suit against any "person" determined to have violated § 3729), it is used throughout the FCA in general. [9]

> 9 For example, [HN20]3729(a) imposes liability on any "person" who commits one of several listed violations. A reading of this statute indicates, and case law confirms, that it is entirely possible that such "person" can include a government employee who commits violations related to employment (i.e., in the parlance of the dissent, a person who is acting "as the government). See United States v. Carpentieri, 23 F. Supp. 2d 433 (S.D.N.Y. 1998) (FCA suit brought by government against postal employee alleging that employee made false statements regarding his medical history in application for employment and in subsequent applications for disability benefits); United States v. Bottini, 19 F. Supp. 2d 632 (W.D. La. 1997) (FCA suit brought by government federal employee who allegedly presented false or fraudulent claims for payment of workers' compensation benefits under the Federal Employees Compensation Act).

[**35] The dissent charges us with construing § 3730(b)(1) as if it read "any person," and suggests there is a critical distinction between the phrase "a person" and the phrase "any person." However, the Supreme Court refuted this very notion in Vermont Agency, concluding the 1986 amendments to the FCA, which changed the phrasing of § 3729 from "a person" to "any person" had no effect on the meaning of the term "person." 529 U.S. at 783 n.12. We likewise conclude it is irrelevant whether the term "person" as used in § 3730(b)(1) is preceded by "a" or "any."

Finally, we believe that the history of the FCA's qui tam provision clearly rebuts the dissent's position. As originally enacted in 1863, the qui tam provision provided: "Such suit may be brought and carried on by any person, as well for himself as for the United States." Act of March 2, 1863, ch. 67, § 4, 12 Stat. 696 (emphasis added). The Supreme Court interpreted this language in a broad fashion, stating:

> Neither the language of the statute nor its history lends support to the contention made by respondents and the government. "Suit may be brought and carried on by any person," says the Act, and there are no words [**36] of exception or qualification such as we are asked to find. The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 546, 87 L. Ed. 443, 63 S. Ct. 379 (1943) (footnote omitted). Obviously, the Court found no exception or qualification in the phrase "as well for himself as for the United States." Although the statutory phrase was altered by Congress in 1982 to read "for the person and for the United States Government," 31 U.S.C. 3730(b)(1) (1982), we find it difficult to believe the change was intended to override Marcus and implement new restrictions [*1212] on who could qualify as a relator. Thus, we believe that Marcus, to the extent it construed the qui tam provision as allowing a government official to file suit as a relator based upon information obtained in the course of his or her official duties, remains valid. In other words, if the original phrase, "as [**37] well for

himself as for the United States," did not prohibit such relators, then neither does the current phrase, "for the person and for the United States Government."

III.

In a fall-back argument, the government offers several public policy reasons why federal employees should not be allowed to maintain qui tam actions based upon information obtained during the course of their employment. According to the government, "permitting Holmes to pursue a qui tam action on the facts here would be inconsistent with her specific duty as a United States Postmaster to report fraud and with numerous legal duties imposed on all federal employees." Govt. Br. at 43. For example, the government argues, permitting Holmes to proceed as a relator would be contrary to federal regulations prohibiting "the use of public office for private gain," "the use of Government property or time for personal purposes," "the use of 'nonpublic Government information' to further private interests," and "the holding of any financial interests that may conflict with the impartial performance of Government duties." Id. at 44-45. The government further argues "there is no intent expressed in the [FCA] to permit qui [**38] tam suits by federal employees whose job it is to report fraud when they encounter it," and in fact "the legislative history of the 1986 amendments to the FCA reveals an intent to 'encourage more private enforcement suits,' . . . not to encourage suits by public employees seeking to capitalize on information learned during the course of their federal employment." Id. at 45. Finally, the government argues that "permitting qui tam suits by federal employees who are already under an obligation to disclose fraud would, as a practical matter, create perverse incentives for Government employees." Id. at 45-46.

Although the government's arguments have some appeal, the fact is that [HN21]nothing in the FCA expressly precludes federal employees from filing qui tam suits. Prior to 1986, the FCA "precluded jurisdiction where the action was based upon information in the possession of the United States or any of its employees at the time of the suit." United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717, 722 n.5 (6th Cir. 1999). Thus, "government employees effectively were prohibited from bringing claims under the qui tam provision." Id. The 1986 amendments to the FCA, however, [**39] revised the qui tam provision to allow any "person" to bring such a suit. See id.; 31 U.S.C. § 3730(b). "It is not clear whether Congress intended by the amendments to allow government employees to bring suit," Burns, 186 F.3d at 722 n.5, since nothing in the amendments or the legislative history thereto addresses the issue. Indeed, it appears that Congress gave no thought to the issue at the time it formulated and enacted the 1986 amendments. See Major David Wallace, Government Employees as Qui Tam Relators, 1996-AUG Army Law. 14, 22 (1996) ("The sponsors of the 1986 FCA amendments simply did not contemplate the issue of government employees using information they learned in the course of their duties as the basis of lawsuits in their own names."); Patrick W. Hanifin, Qui Tam Suits by Federal Government Employees Based on Government Information, 20 Pub. Cont. L.J. 556, 570-71 (1991) ("The legislative history does not expressly resolve the question of whether Congress intended to permit federal source suits. This is an instance where determining what Congress thought about [*1213] an issue is difficult because Congress never thought about the [**40] issue, or at least did not express itself clearly.").

Post-1986 congressional activity suggests that Congress views the FCA as allowing federal employees to file qui tam actions. [10] "In 1990, the Subcommittee on Administrative and Governmental Relations of the House Judiciary Committee held the first oversight hearings on the Act." Virginia C. Theis, Government Employees as Qui am Plaintiffs: Subverting the Purposes of the False Claims Act, 28 Pub. Cont. L.J. 225, 238 (1999). During those hearings, "the Justice Department, the Inspector General of the Department of Health and Human Services, and John R. Phillips, an attorney who participated in drafting the amendments . . ., proposed limits on federal employees seeking to bring [FCA] actions." Id. "In 1992, Congress introduced two bills intended, in part, to address the issue of government employee relators." Wallace, supra, at 22. The first bill, H.R. 4563, "would have established limitations on government employees who filed qui tam suits based on information gained during the course of their employment." Theis, supra, at 238-39. The second bill, S. 2785, proposed banning "all qui tam suits brought by government [**41] employees who based their actions on information obtained during the course of their government employment." Wallace, supra, at 23. Both bills had critics, and neither ultimately became law.

> 10 Although subsequent legislative history has been described as "less illuminating than the contemporaneous evidence," Hagen v. Utah, 510 U.S. 399, 420, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994), we believe it is of some assistance in this case where there is little contemporaneous evidence of Congress' intent with respect to allowing government employees to file qui tam actions.

Consistent with this history, "no court has accepted the argument that government employees per se can never be relators in a qui tam action." Burns, 186 F.3d at 722 n.5. Although some judges from the Ninth Circuit have criticized the practice of allowing federal em-

ployees to bring qui tam actions, see United States ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 747 (9th Cir. 1995) (Trott, J., concurring); [**42] id. at 749 (Hawkins, J. concurring), the court has, at least in one instance, allowed a federal employee to proceed as a relator in a qui tam action. See Hagood v. Sonoma Co. Water Agency, 81 F.3d 1465, 1476 (9th Cir. 1996). Likewise, the First Circuit has held that § 3730(e)(4)(A) does not per se "prevent government employees from bringing qui tam actions based on information acquired during the course of their employment." United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990).

In our view, the most persuasive discussion of the issue comes from the Eleventh Circuit in United States ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991). There, the relator was an attorney for the United States Air Force who, "during the course of his employment with the government, . . . became aware of bidrigging on the part of a corporation seeking telecommunications contracts with the United States." Id. at 1494. The district court dismissed the suit on the grounds that the FCA contained a jurisdictional bar against suits brought by government employees based upon information acquired in the course [**43] of their employment. On appeal, the Eleventh Circuit initially determined that no public disclosure had occurred prior to the relator filing suit, and thus concluded that it was unnecessary for the relator to establish that he was an "original source" of the information on which his suit was based. Id. at 1499-1501. The court then rejected the government's argument that "the comprehensive bar against [*1214] qui tam suits by government employees in the 1943 version of the [FCA] was never repealed by the 1986 amendments." Id. at 1501. In particular, the court concluded that "the structure of the 1986 version of the Act and several basic canons of statutory interpretation make it clear that no such general prohibition any longer exists." Id. at 1502. Finally, the court rejected various public policy arguments forwarded by the government "for finding that Congress intended to bar government employees from initiating qui tam suits based upon information acquired in the course of their government employment." Id. at 1503. Specifically, the court held:

> We recognize that the concerns articulated by the United States may be legitimate [**44] ones, and that the application of the False Claims Act since its 1986 amendment may have revealed difficulties in the administration of qui tam suits, particularly those brought by government employees. (Footnote omitted.) Notwithstanding this recognition, however, we are charged only with interpreting the statute before us and not with amending it to eliminate administrative difficulties. The limits upon the judicial prerogative in interpreting statutory language were well articulated by the Supreme Court when it cautioned:
>
> Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. [HN22]"The natural meaning of words cannot be displaced by reference to difficulties in administration." Commonwealth v. Grunseit,[(1943) 67 C.L.R. 58, 80]. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them [**45] in any but an ordinary sense. The idea which is now sought to be read into the [Act] . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it.
>
> Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617-18, 64 S. Ct. 1215, 1221, 88 L. Ed. 1488 (1944). Congress could have certainly indicated its desire to prevent government employees from filing qui tam suits based upon information acquired in the course of their government employment. (Footnote and citations omitted.) The False Claims Act is devoid of any statutory language that indicates a jurisdictional bar against government employees as qui tam plaintiffs. We also note an absence of any clear indication that Congress intended such a bar to be implied in spite of the plain language of the statute. Therefore, we decline to judicially create an exception where none exists.

Williams, 931 F.2d at 1503-04.

For these same reasons, we reject the government's public policy arguments and decline to hold that government employees are per se precluded from filing qui tam actions based upon information obtained during the course of their employment. [**46] Although there

may be sound public policy reasons for limiting government employees' ability to file qui tam actions, that is Congress' prerogative, not ours. [11]

> 11 At oral argument, several members of the court noted the possibility that federal conflict-of-interest laws might be implicated by a government employee filing a qui tam action based upon information obtained in the course of his or her employment. In particular, the possibility was mentioned that such an employee might have to forfeit all or part of the recovery obtained in a qui tam action. Because the issue was not raised by the government or briefed by the parties, we find it unnecessary to resolve the issue at this time.

[*1215] **IV.**

We conclude that Mary Holmes was entitled to proceed as a relator under 31 U.S.C. § 3730(b)(1), and, because no "public disclosure" occurred within the meaning of 31 U.S.C. § 3730(e)(4), the district court had subject matter jurisdiction over her complaint. We VACATE [**47] our prior opinion in this case, REVERSE the judgment of the district court, and REMAND for further proceedings.

DISSENT BY: TACHA

DISSENT

TACHA, Chief Circuit Judge, dissenting, with whom KELLY and LUCERO, Circuit Judges join.

I. Introduction

This is the first case in which we have squarely faced the issue of whether a federal employee who (1) has a specific duty to report a specific kind of fraud, (2) discovered the alleged fraud at issue pursuant to her regular job duties, and (3) is participating in an ongoing fraud investigation as part of her job duties may bring a qui tam action based upon the alleged fraud that is the subject of the investigation. Our previous cases have expressly declined to address the question of when a federal employee may bring a qui tam action. United States ex rel. Fine v. MK-Ferguson Co., 99 F.3d 1538, 1541 n.1 (10th Cir. 1996); United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1003 n.1 (10th Cir. 1996). Because M-K Ferguson expressly avoided this issue, it is no surprise that the four-part test we articulated there is inapposite here.

The MK-Ferguson test focuses exclusively on the public disclosure bar contained [**48] in section 3730(e)(4)(A). As such, the test assumes that jurisdiction exists unless the public disclosure bar applies. Neither MK-Ferguson nor any other case in this circuit, however, has analyzed the FCA's initial grant of jurisdiction to determine whether and when its scope includes federal employees as potential relators. This latter inquiry logically precedes the question of whether the public disclosure bar applies. I therefore disagree with the majority's insistence that we rely on the MK-Ferguson test.

In a section titled "Actions by private persons," the FCA provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). This initial grant of jurisdiction plainly assumes a distinction between the government and the qui tam relator. Because such a distinction was not present in this case, I would hold that the district court lacked jurisdiction over Holmes' qui tam suit. Accordingly, I would affirm the district court's dismissal of Holmes from the case.

II. Discussion

Federal courts are courts of limited jurisdiction. When considering federal subject-matter [**49] jurisdiction, we must presume that jurisdiction is lacking, require the party asserting jurisdiction to prove that it exists, and resolve all doubts against jurisdiction. For several reasons, there is grave doubt as to whether jurisdiction exists in this case, and dismissal is therefore required.

First, a person is only a proper qui tam relator if she is distinct from the government. This requirement follows from the qualifying language in section 3730(b)(1)'s initial grant of jurisdiction, which only confers jurisdiction over qui tam actions brought "for the [relator] and for the United States Government." This distinction is absent where, as in this case, the relator is (1) a government employee whose job duties include uncovering and reporting the particular type of fraud that grounds the qui tam action, and (2) the relator is [*1216] participating in an ongoing investigation of that very same fraud.

Second, the Supreme Court has instructed us to employ statutory titles to resolve ambiguity arising from a discrepancy between the title and the text. Such ambiguity is present here, because the statute's title refers to actions by "private persons," while the text refers only to "a person. [**50] " Per the Supreme Court's instruction, we must resolve this ambiguity by reading "person" as a reference to the "private persons" referred to in the title and not to persons acting as the government with regards to the fraud at issue.

Third, the ambiguity of the text and the fact that Congress did not expressly speak to the question of federal employee relators require us to consult the purposes of the qui tam provisions. Permitting Holmes' action would not serve any of the purposes of the FCA and its

1986 amendments and would, in fact, frustrate Congress' goal of preventing parasitic suits.

Fourth, finding jurisdiction over Holmes' action is glaringly inconsistent with specific prohibitions requiring federal employees to avoid conflicts of interest. Because the qui tam provisions do not per se exclude federal employee relators, they are necessarily in some tension with conflict of interest rules governing federal employees. The majority's construction of the initial grant of jurisdiction as plenary maximizes that tension; a properly narrow construction of section 3730(b)(1) minimizes it.

A. The Presumption Against Jurisdiction

We must remember, at the outset and throughout [**51] our consideration of the statutory language, that federal courts are courts of limited jurisdiction. The first step in our analysis is to presume that the district court lacks jurisdiction and to require the party asserting jurisdiction to allege and prove that jurisdiction ists. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994); Montoya v. Chao, 296 F.3d 952, 955 (10th Cir. 2002); MK-Ferguson, 99 F.3d at 1543; United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 551 (10th Cir. 1992). Moreover, we must strictly construe statutes conferring jurisdiction, resolving any doubts against jurisdiction. Advanced Sciences, 99 F.3d at 1004; MK-Ferguson, 99 F.3d at 1543-44. Thus, a scintilla of doubt as to jurisdiction over Holmes' suit mandates dismissal.

B. The Distinction Between the Qui Tam Relator and the Government

In construing a statute, "our overriding purpose is to determine congressional intent." Chickasaw Nation v. United States, 208 F.3d 871, 878 (10th Cir. 2000) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982)). [**52] To determine a statute's plain meaning, "'[we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Id. (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)).

The FCA provides, in a section headed "Actions by private persons," that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). The Act does not make explicit the class of persons eligible to file civil suits under subsection (b). As the majority acknowledges, Congress did not explicitly consider the possibility of qui tam suits by government employees. [1] Maj. op., supra at 22, 28. But while [*1217] we lack any direct congressional statement, or even any legislative history, the text of section 3730(b)(1) does provide direction. Our starting point must be the meaning of Congress' statement that "[a] person may bring a civil action . . . for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Determining the scope of the initial grant of jurisdiction [**53] logically precedes any consideration of the public disclosure and original source inquiries.

> 1 The majority does address subsequent attempts in Congress to address this issue. Maj. op., supra at 28-29. These attempts never resulted in amendments to the FCA, however, and discussions that fail to produce legislation cannot, by definition, constitute legislative history. Congress has not spoken to the issue, and, "in any event, the view of a later Congress cannot control the interpretation of an earlier enacted tute." O'Gilvie v. United States, 519 U.S. 79, 90, 136 L. Ed. 2d 454, 117 S. Ct. 452 (1996) (internal citations omitted). Post-1986 congressional discussions are irrelevant to the meaning of the statute as a prior Congress wrote it.

The phrase "for the person and for the United States Government" reveals a fundamental assumption about the individuals filing qui tam suits namely, that they are distinct from the government. The government is not a discrete organism; it exists and acts only [**54] through people. The government cannot get up out of its chair and pursue fraud; if it does so at all, it does so through its employees. The phrase, "for the person and for the United States Government," then, requires that there be some distinction between a potential qui tam relator and the people acting as "the government" with regard to the fraud at issue. I therefore read the statute as authorizing qui tam actions only by those individuals who are distinct from the government.

When a federal employee acting pursuant to job responsibilities obtains information about possible fraud, that employee obtains that information as the government. A federal employee who is involved in an ongoing government investigation pursuant to employment duties is the government. The distinction between the individual federal employee and the government disappears in this context. Therefore, such an employee cannot use that information to file an action under section 3730(b) "for the person and for the United States Government."

Holmes is such an employee. [2] She initially learned of the alleged fraud while [*1218] acting in her capacity as postmaster. She learned that the alleged fraud was ongoing while [**55] acting as a postmaster trainer, a role within the scope of her employment. Once she had obtained information about this particular type of fraud, she had a specific duty as a postmaster to report it. Reg-

ulation 224.3 in the Postal Service's Administrative Support Manual requires a postmaster to report by memorandum "failure to pay postage, violation of franking privilege, misuse of penalty mail, depositing of advertising material in mailboxes without payment of postage, and similar schemes to evade payment of postage." (Emphasis added). Holmes does not dispute that this regulation applies to her. Nothing in the regulation limits its scope, and Holmes has provided no evidence to suggest that its scope is limited to fraud conducted or discovered at her home post office. [3] In fact, Holmes concedes its applicability when she states in her brief that she "could have met her job description responsibility to report suspected fraud by simply sending a memorandum to the Postal Inspection Service." I therefore conclude that Holmes, a federal employee with a specific duty to report the particular type of fraud at issue and a participant in the ongoing investigation, is outside the FCA's initial [**56] grant of jurisdiction.

2 As the majority correctly points out, the reason Holmes knew of the fraud allegedly committed by CIG was because "she is the person responsible for ferreting it out in the first place." Maj. op., supra, at 17 (emphasis added). This is precisely the point. The outcome, in my judgment, is dictated by the facts in this case. At some point, a potential relator's specific duty to discover and report a particular kind of fraud aligns so closely with the alleged fraud grounding her qui tam action that the distinction required by section 3730(b)(1) - between the employee as private relator and the employee as the government - collapses. The test for when that distinction collapses is necessarily fact-driven, and I do not propose that we attempt to answer in advance every scenario that might arise. We should allow the caselaw to develop the contours of such a fact-specific test.

In this case, three facts situate Holmes outside the scope of section 3730(b)(1): (1) Holmes' express duty as postmaster to discover and report the particular kind of postal fraud alleged against CIG; (2) the fact that she discovered the alleged fraud as part of her job duties; and (3) the fact that she is participating in the ongoing government investigation - which indicates that the government has neither declined to pursue nor covered up the alleged fraud. But the fact that Holmes may not bring this qui tam action in no way implies a per se ban on federal employee relators. It is the specific alignment of her job duties with the particular fraud alleged, along with her participation in the ongoing government investigation, that disqualify her. The relationship between a particular federal employee's job duties and the particular fraud alleged will vary from case to case. For example, nothing in this decision would prevent Holmes from filing a qui tam action based upon information she obtained, outside the scope of her federal employment, regarding bid rigging in the Department of Defense, because her express job duties do not direct her to discover and report such fraud. Likewise, nothing in this opinion would prevent a federal employee in the Department of Energy from basing a qui tam action on the alleged fraud in this case.

[**57]

3 Moreover, Boyle's affidavit specifically states that a postmaster who is acting as a postmaster trainer "is not relieved of his responsibilities as a postmaster, as they pertain to reporting fraud."

My statutory analysis has been criticized as requiring an unwarranted redefinition of the word "person." It requires no such thing. We must read the word "person" in context. The relevant inquiry is what the first sentence of section 3730(b)(1) means, not what one word, removed from context, means. [4] I can only conclude, therefore, that those who have criticized my analysis as a factually dependent redefinition of the word "person" have either ignored or rejected the premise of my analysis, which is that we should read all the language granting jurisdiction in order to construe its scope.

4 See, e.g., Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 134, 133 L. Ed. 2d 461, 116 S. Ct. 494 (1995) ("It is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") (quoting Deal v. United States, 508 U.S. 129, 132, 124 L. Ed. 2d 44, 113 S. Ct. 1993 (1993) (internal quotations omitted)).

[**58] My reading of the statute does not focus on the word "person" or on any other word in isolation. I know of no principle of statutory construction that instructs us or permits us to apply the plain meaning of individual words of a statute in isolation, without considering the statutory context. See, e.g., United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 455, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) ("Over and over we have stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (internal citations and quotations omitted). Rather, my

analysis seeks to understand from the statutory context what class of persons [*1219] Congress intended to be potential qui tam relators.

The majority construes section 3730(b)(1) as conferring jurisdiction over suits brought by "any person," subject only to the four subsequent express exclusions. This construction ignores the remainder of the very brief statutory language, which qualifies the initial grant of jurisdiction. [5] Moreover, this interpretation turns on its head the general [**59] rule that we must construe jurisdictional grants narrowly.

> 5 For this reason, the canon of expressio unius est exclusio alterius is inapplicable. The four subsequent, express exclusions operate only within the scope of the initial grant. The mere existence of subsequent express exceptions cannot ex ante transform a qualified grant of jurisdiction into a plenary one.

By construing the initial grant as plenary, the majority follows the Eleventh Circuit's analysis in United States ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991). But the analysis in Williams turns upon the same crucial error made by the majority: instead of applying the entire sentence of section 3730(b)(1), it applies only the first two words ("a person").

The Williams court makes a fundamental and crucial assumption: that the 1986 amendments begin by conferring jurisdiction upon everyone, then restrict it in the four express exceptions.

In defining the classes of persons eligible to bring qui tam actions, Congress [**60] had a choice:

> It could have chosen to make eligible as qui tam relators only certain defined groups of persons and exclude all others or it could have chosen to include all persons as eligible qui tam relators with certain specific exceptions. It chose the latter scheme. The statute first permits any "person" to bring a qui tam action, and then specifically excludes four groups. . . . Government employees are included in the general universe of permissible qui tam plaintiffs unless, in the particular circumstances, they fall into one of the four specifically defined excluded groups.

931 F.2d at 1502 (quoting Erickson ex rel. United States v. Am. Inst. of Biological Sciences, 716 F. Supp. 908, 912-13 (E.D. Va. 1989)) (emphasis added).

This analysis is rather conclusory and depends completely on the assumption that (1) the statute begins by conferring jurisdiction over "any person" and (2) the rest of section 3730(b)(1) is meaningless. According to Erickson, on which the Williams court relied for its construction of the jurisdictional provisions, the statute "permits any 'person' to bring a qui tam action"; and Congress therefore intended that [**61] "Government employees are included in the general universe of permissible qui tam plaintiffs unless, in the particular circumstances, they fall into one of the four specifically excluded groups." Erickson, 716 F. Supp. at 912-13.

Taking the same view, the majority boldly states that the 1986 amendments "revised the qui tam provision to allow any 'person' to bring such a suit." Maj. op., supra, at 27 (emphasis added). But the statute does not begin by conferring jurisdiction upon "any person." It says that "a person may bring a civil action for violation of section 3729 for the person and for the United States Government." That is, the original grant of jurisdiction extends not to everyone but only to those persons in a position to bring suit on behalf of themselves and the government. If there is no distinction between the person and the government, section 3730(b)(1) does not confer jurisdiction on the person. [6] [*1220] Following Erickson and Williams' lead, the majority has simply reworded the statute.

> 6 In holding that the qui tam provisions of the FCA do not impose a per se ban on government employees as relators, the First Circuit cited the same language from Erickson in United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990). Neither court seems to have considered the language very carefully, and both repeat the Erickson construction of the language without apparent analysis, as if it were a fait accompli. It is not. Furthermore, at issue in Erickson was whether the statute imposed a per se ban on federal employee relators, an issue distinct from the one before us - whether relators in the course of their duties and thereby acting as the government are within the scope of the jurisdictional provisions.

[**62] Reading the words "a person" out of context distorts the meaning of the statute by ignoring the rest of the jurisdictional language. This we may not do. A unanimous Supreme Court recently reminded us that

> [Statutory] text consists of words living a communal existence . . . the meaning of each word informing the others and all in their aggregate taking their purport from the setting in which they are used. . . . Over and over we have stressed that in

> expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. . . . Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text.

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 454-55, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) (internal citations and quotations omitted) (emphasis added). If, as we must, we assume that Congress intended the entire sentence of section 3730(b)(1) to apply, we cannot begin the jurisdictional analysis with the assumption that there must be some express or clearly implied subsequent [**63] exclusion. Rather, we begin with the assumption that when Congress delineated the class of persons who may bring qui tam actions, that class only included persons distinct from the government. The words "a person" do not confer jurisdiction over everyone unless they are read out of context.

C. The Section Title: "Actions by Private Persons"

The initial grant of jurisdiction in section 3730(b)(1) appears under the heading "Actions by Private Persons." Although the Supreme Court has cautioned that a heading may not limit a statute's plain and unambiguous meaning, see, e.g., Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998), the Court has on numerous occasions employed headings and titles as "tools available for the resolution of a doubt," Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 529, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947). [7] A title [*1221] or heading is useful when it "sheds light on some ambiguous word or phrase." Id. If there is ambiguity, then, in the text of section 3730(b), and if its heading helps clarify matters, we should consult the heading as long as we do not invoke it to limit [**64] the text's plain meaning.

> 7 See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 234, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) (quoting Bhd. of R.R. Trainmen, 331 U.S. at 528-29) (noting that "'the title of a statute and the heading of a section'" are "'tools available for the resolution of a doubt'" about a statute's meaning, and relying on presence of the word "penalties" in title of section as evidence that the section dealt with substantive crime); Mead Corp. v. Tilley, 490 U.S. 714, 723, 104 L. Ed. 2d 796, 109 S. Ct. 2156 (1989) (employing title of regulation to resolve "any possible ambiguity"); FTC v. Mandel Bros., 359 U.S. 385, 388-89, 3 L. Ed. 2d 893, 79 S. Ct. 818 (1959) (noting that the "Title of [an] Act . . . though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving ambiguity" and beginning the Court's construction of false invoicing provisions of the Fur Products Labeling Act by looking to its title and its underlying purposes); Maguire v. Commissioner, 313 U.S. 1, 9, 85 L. Ed. 1149, 61 S. Ct. 789 (1941) (employing title of tax statute as evidence of congressional intent to confine application of its text to specific property owned by decedent at the time of death).

[**65] In INS v. National Center for Immigrants' Rights, 502 U.S. 183, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991), a unanimous Supreme Court relied on the title of a regulation in circumstances similar to those in this case. INS required the Court to construe a section of a regulation entitled "Condition against unauthorized employment." The text of the section referred only to "condition barring employment," without specifying "unauthorized" employment. This inconsistency was sufficient to create ambiguity in the text: "The most critical ambiguity in the regulation is whether the proposed no-work conditions bar all employment or only unauthorized employment . . . . Although the relevant paragraph of the regulation is entitled 'Condition against unauthorized employment,' the text describes the restriction more broadly, as a 'condition barring employment.'" Id. at 189. The Court indicated that, in such circumstances, it would read the text as if the omitted adjective were present:

> In other contexts, we have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text. Such analysis obtains in this case as well. The [**66] text's generic reference to "employment" should be read as a reference to the "unauthorized employment" identified in the paragraph's title.

Id. at 189 (emphasis in original) (internal citations omitted).

Section 3730(b)(1) is ambiguous, and the section heading aids us in resolving that ambiguity. None of the individual words in section 3730(b)(1) is exotic or confusing, but we must construe the entire sentence, not individual words out of context. To me, the qualifying phrase "for the person and for the United States Government" plainly assumes a distinction between the government and the qui tam relator. In addition to the qualifying phrase in the text itself, there is also dissonance

between the title's reference to "private persons" and the text's more general reference to "a person."

Thus, ambiguity resides in (1) the phrase by which Congress qualifies the "person" entitled to bring a qui tam action and (2) the omission from the text of the adjective "private," which modifies "persons" in the heading. To resolve this ambiguity, the Supreme Court instructs us to read the word "person" in the text as a reference to the "private persons" more specifically [**67] identified in section 3730(b)'s heading. INS, 502 U.S. at 189.

Holmes obtained information of fraudulent activity in the course of her employment; she was required to report that information pursuant to her specific job duties; and she was a participant, as part of her job duties, in the ongoing government investigation of that alleged fraud. She is clearly not a "private person" in this context, and she is therefore not a proper qui tam plaintiff under the FCA. 31 U.S.C. 3730(b)(1).

I strongly disagree with the majority's assertion that employing section 3730(b)'s title mandates a conclusion either that (1) all federal employees are within "the class of 'persons' capable of filing suit under the qui tam provision," or (2) all federal employees fall outside that class. Maj. op., supra, at 21. This case has never been about a per se ban on federal employee relators, and the assertion fails for two reasons. First, the majority premises its argument on a faulty assumption namely, [*1222] that my analysis is based upon an unwarranted redefinition of "person." It is not. Rather, I consider the nexus present between the person and the government in deciding [**68] whether the potential relator satisfies section 3730(b)(1)'s distinctness requirement. Second, the only government employees outside the initial grant of jurisdiction are those acting as the government with regard to the particular evidence of fraud that grounds their qui tam suits. I do not argue and the facts of this case make it unnecessary for me to argue that Holmes should be barred merely because she is a federal employee. Rather, I would hold that she is outside the scope of the jurisdictional provisions because her job duties expressly require her to uncover and report the particular type of fraud that grounds her qui tam action. She therefore acts as the government with regard to that information and cannot bring a qui tam action for herself and for the government.

D. The Purposes of the FCA and the 1986 Amendments

It is well established that when statutory language and legislative history are inadequate, suggesting that Congress did not think about a particular problem that might arise when applying a statute, "we must analyze the policies underlying the statutory provision to determine its proper scope." Rose v. Lundy, 455 U.S. 509, 516-17, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982); [**69] see also, e.g., United States v. Sisson, 399 U.S. 267, 297-98, 26 L. Ed. 2d 608, 90 S. Ct. 2117 (1970) ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed"). The majority and I agree that "it is not clear whether Congress intended by [the 1986] amendments to allow government employees to bring suit." Maj. op., supra at 28 (citation omitted). Congress apparently gave no thought to the issue. Id. We must, therefore, consider the purposes of the FCA's qui tam provisions to determine the proper scope of section 3730(b)(1).

While my analysis remains grounded in the statutory language of section 3730(b)(1), the purposes of the FCA's qui tam provisions and its 1986 amendments bolster the conclusion that jurisdiction is lacking. "Congress instituted the qui tam provisions of the FCA to encourage private citizens to expose fraud that the government itself cannot easily uncover." United States ex rel. Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995). [**70] Moreover, the 1986 amendments' expansion of jurisdiction over qui tam actions reflects Congress' "concern that the government was not pursuing known instances of fraud." Ramseyer, 90 F.3d at 1520 ing MK-Ferguson Co., 99 F.3d at 1551). The statute as amended aims "(1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud." Ramseyer, 90 F.3d at 1519-20 (quoting Precision, 971 F.2d at 552).

Exercising jurisdiction over Holmes' action would not serve the FCA's purposes of encouraging exposure of fraud and would frustrate its goal of preventing parasitic suits. First, where a government employee has a duty to report fraud, as Holmes does as postmaster, the information underlying that employee's suit does not constitute information that the government would not otherwise uncover. The duty to report itself assures that her information is the government's information.

Second, a qui tam action by someone in Holmes' position is not prodding the [*1223] government to pursue fraud allegations [**71] it would not otherwise pursue. The undisputed facts show that the government is engaged in active pursuit of the alleged fraud. In fact, Holmes' own brief states plainly that encouraging government action was not the purpose of her suit: "After Relator was confident that the government was adequately investigating her information, she filed her lawsuit under the FCA to recover her lawful share of the

proceeds." [8] Therefore, permitting Holmes' qui tam suit would not serve the FCA's purposes of exposing fraud or encouraging the government to pursue fraud allegations.

> 8 The majority misreads both my analysis and the statute when it suggests that Holmes acted "as the government" when she obtained the information that grounds her qui tam actions and as a "person" when she filed that action to secure a "share of the proceeds" - thereby, the argument goes, satisfying section 3730(b)(1)'s requirement that she file on behalf of herself and the government. Maj. op., supra, at 22-23. First, my construction of the initial grant of jurisdiction is not premised on a factually dependent redefinition of the term "person"; thus, the majority's attempt to associate "person" with Holmes' "individual capacity" and "government" with her "official capacity" misses the point. It also, ironically, appears to engage in factually dependent reading of "person." Second, if the qualifying language "for the person and for the United States Government" means anything at all, it means that there is some distinction between the two that is relevant to the existence of jurisdiction. The majority's reading requires that a single individual can be both at the same time, simply because "the preparation and filing of her suit" need not occur at her workplace. Id. Such a construction renders the language meaningless - as does the majority opinion in general. Moreover, as Holmes acknowledges, the official investigation was already underway when she filed her action, and her sole reason for filing was her own financial gain. It is a parasitic suit, filed solely on her own behalf, not the government's.

[**72] Nor are these circumstances ones in which a private person needs to be encouraged to expose fraud. On the contrary, having acquired the information in the course of her duties as a postmaster, Holmes had a specific obligation as a postmaster to report it. Again I note that, in the performance of her duties as a postmaster, she is the government. As such, she acquired the information for the government. Moreover, a federal employee who reports a private company's fraud on the government does not have the same fear of reprisal as a company insider who acts as a whistleblower, further reducing the need for financial incentives to encourage them to disclose information about fraud. [9]

> 9 In addition to the financial incentives for a qui tam plaintiff, the statute addresses this particular concern by providing that an employee who suffers retaliatory action as a result of pursuing or assisting in an action under section 3730 "shall be entitled to all relief necessary to make the employee whole." 31 U.S.C. 3730(h).

[**73] Finally, allowing federal employees' qui tam suits in these circumstances would not serve, and would in fact frustrate, Congress' goal of preventing parasitic suits. I agree with the majority that "the point of the public disclosure test is to determine whether the qui tam suit is a parasitic one." Maj. op., supra, at 16 n.6. The public disclosure bar, however, does not address the problem of parasitic suits by government employees; it only addresses the problem of parasitic suits by private persons, who have no access to government information that has not been "publicly disclosed."

Section 3730(b)(1)'s distinctness requirement furthers the FCA's purposes. The statute's authorization of suits by "[a] person . . . for the person and for the United States Government," along with the section heading "Action by Private Persons," reflect a contrast between public and private, [*1224] between the federal government's information and private citizens' independent knowledge. Our analysis in Ramseyer is instructive. In that case, we concluded that the public disclosure bar requires actual, not merely theoretical, disclosure. 90 F.3d at 1519. Underlying our reasoning was the assumption [**74] that potential qui tam relators do not have access to governmental information that has not been made public:

> Information to which the public has potential access, but which has not actually been released to the public, cannot be the basis of a parasitic lawsuit because the relator must base the qui tam suit on information gathered from his or her own investigation. If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure government file, an opportunist qui tam plaintiff first would have to know of the report's existence in order to request access to it.

Id. at 1520. This rationale, however, does not apply to government employees who know of the allegations because of their jobs. Government employees frequently have access to government information even though it has not been "publicly disclosed," as defined in Ramseyer. Thus, there is a potential for parasitic qui tam suits by government employees before "public disclosure" occurs, just as there is a potential for such suits by private persons following public disclosure. In my view, Holmes' suit is a parasitic one for precisely [**75] this reason. [10] Holmes learned of the alleged fraud while act-

ing in the scope of her employment as a federal employee, and she had a specific duty to report this particular type of information. As such, she obtained the information on behalf of the government, and the information belongs to the government. Of course, these facts also mean that she had access to the information regardless of whether it had been "publicly disclosed." [11]

10 Again I note that Holmes' own brief evidences a specific intent to piggyback on the government's efforts.

11 The majority concludes that the "original source" inquiry need not be conducted here because there has been no public disclosure. The majority nevertheless seems to assume that Holmes would qualify as an original source, for it states - borrowing a phrase directly from the statutory definition of "original source," 31 U.S.C. 3730(e)(4)(B) - that Holmes has "direct and independent knowledge" of the alleged fraud. Maj. op., supra, at 16-17.

[**76] *E. Conflict of Interest*

Federal employees' obligations to avoid conflicts of interest further distinguish them from others who file qui tam suits. Clearly, Congress did not intend to adopt a per se ban against federal employee relators the four express exclusions directed towards federal employees that follow the initial qualified grant of jurisdiction would otherwise be superfluous. Thus, the FCA will at times be in tension with conflict of interest provisions governing federal employees. But the glaring inconsistency between these limitations on federal employees and allowing federal employees to pursue qui tam suits based upon information obtained as part of their job duties, and which their jobs require them to report, supports the conclusion that Congress intended to minimize the extent to which the FCA derogated from the requirement that federal employees avoid conflicts of interest. The majority's broad reading of the initial grant of jurisdiction maximizes the inherent tension between the qui tam provisions and the conflict of interest rules. We are, however, bound to construe statutes granting federal subject-matter jurisdiction narrowly; such a construction also minimizes [**77] the tension between section 3730(b)(1) and the conflict of interest rules.

[*1225] The most relevant among the specific prohibitions on federal employees is the prohibition on the use of "nonpublic Government information" [12] to "further any private interest." 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a). Other regulations prohibit participation in a government matter in which the employee has a financial interest, id. 2635.402, 2635.501, 2635.502; the use of public office for private gain, id. 2635.101(b)(7), 2635.702; the use of government property or time for personal purposes, id. §§ 2635.704, 2635.705; and holding a financial interest that may conflict with the impartial performance of government duties, id. § 2635.403. Moreover, Congress has specifically imposed criminal penalties on government employees who participate in matters in which they have financial interests. 18 U.S.C. § 208.

12 "Nonpublic information" means "information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the public." 5 C.F.R. 2635.703(b).

[**78] Holmes based her qui tam suit on information that she acquired in the course of her employment as a postmaster and had a specific duty to disclose. At least while the government is conducting an ongoing investigation of the allegations, Holmes' claim for a portion of the proceeds directly reduces the amount that the government may ultimately collect. To allow an employee in Holmes' position to pursue qui tam claims in these circumstances would create a personal financial stake in the relevant information. [13] "Rather than perform their jobs as they are required, government employees obligated to disclose suspected fraud may inappropriately hide fraud from their supervisors while preparing their qui tam actions for filing." United States v. Board of Trustees of the Leland Stanford, Jr. Univ., 161 F.3d 533, 542 (9th Cir. 1998) (citation omitted). We cannot conclude that Congress intended to create an incentive for government employees to withhold information about suspected fraud contrary to their specific employment obligations. [14]

13 Indeed, according to the majority opinion, it appears that Congress intended to authorize a federal employee to "cash in" whenever her job duties bring evidence of fraud across her desk - even if her job is to investigate fraud.

[**79]

14 I contrast my reasoning here with the primary policy arguments that the Eleventh Circuit rejected in Williams involving administrative difficulties - specifically, interference with the government's case and premature disclosure of allegations to defendants. 931 F.2d at 1503. I agree that these concerns do not require excluding government employees from the class of eligible qui tam plaintiffs, and we accord them no weight. The statute demonstrates that Congress considered these concerns (though not specifically with respect to government employees) and chose to mitigate them by other means. 31 U.S.C. 3730(b)(2)-(3) (requiring that a qui tam plaintiff file the complaint under seal, and allowing the

government to seek an extension of the 60-day period during which the complaint remains under seal); (b)(4) (allowing the government to take over a qui tam action by intervention); (c) (limiting the qui tam plaintiff's rights when the government intervenes).

The Williams court, although it noted the government's argument that "the False Claims Act should not allow a personal reward to government employees for the 'parasitical' use of information obtained and developed in the course of government employment," 931 F.2d at 1503, did not consider the plaintiff's particular employment obligations in this context. Such obligations are an important aspect of my analysis of Holmes' case. Moreover, to the extent that I rely upon the obligations of federal employees, I use these to inform my interpretation of the statutory language in section 3730(b)(1). I thus disagree with the Eleventh Circuit's statement that "the False Claims Act is devoid of any statutory language that indicates a jurisdictional bar against government employees as qui tam plaintiffs." Williams, 931 F.2d at 1504.

[**80] [*1226] The FCA does not specify how it applies to federal employees. The majority's construction of the initial grant of jurisdiction as plenary exacerbates the inherent tension between the qui tam provisions and the conflict of interest rules, whereas a properly narrow construction of section 3730(b)(1) minimizes that tension. We must assume that Congress did not intend to abrogate the conflict of interest rules beyond what is required for a properly narrow construction of section 3730(b)(1)'s initial grant of jurisdiction. To do otherwise needlessly fosters incoherence and flies in the face of our obligation to construe statutes granting federal subject-matter jurisdiction narrowly. Assuming that Congress intended for federal employees to adhere to applicable statutes and regulations, we should construe the FCA in a manner that is consistent with federal employees' obligations. In light of these obligations, along with the statute's evident purposes and section 3730(b)(1)'s distinction between the government and the private relator, it is my view that Congress did not intend to permit a federal employee's qui tam suit where she has a specific duty to report the specific kind of fraud [**81] that grounds the suit and is participating in an ongoing investigation as part of her job duties.

III. Conclusion

The words "a person" in the text do not indicate that section 3730(b)(1)'s initial grant of jurisdiction is plenary. The qualifying language in the text ("for the person and the . . . Government") must be given meaning, as must the adjective "private" in the title. The statute simply does not say that any person may bring a qui tam action. Such a reading ignores both the text of the qualifying phrase and the fact that the section refers to private persons, not federal employees participating as part of their job duties in the very investigations that ground their qui tam actions. It produces results that conflict with the statute's purposes, and it maximizes the inherent tension between the FCA and conflict of interest rules that apply to federal employees whereas an appropriately narrow reading of the initial grant of jurisdiction minimizes that tension.

Moreover, Holmes has confronted these obstacles in an atmosphere necessarily hostile to jurisdiction, for we must presume that no jurisdiction exists, and we are obliged to strictly construe statutes conferring jurisdiction [**82] on the federal courts. The burden is on Holmes to prove that the district court had jurisdiction. She has not done so.

For these reasons, I respectfully dissent.

LEXSEE

Willard A. Covert Barbara Covert, h & w; Ramona Abbott, a single person; Ted Nichol & Yvonne Nichol, h & w; Jerome B. Lee and Jeannine Lee, h & w; Thomas G. Humphrey & Patty Humphrey, h & w; William Espinosa, Jr. & Janet Espinosa, h & w; Aldo Pineda & Bertha Pineda, h & w; Eldon Schlabach & Marlene Schlabach, h & w; Steven L. Bohan, a single person; Mark Studd, a single person; Larry Penor, h & w, Plaintiffs v. John Herrington, Secretary, Department of Energy, United States of America, Defendant

No. C-86-730-JLQ

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

663 F. Supp. 577; 1987 U.S. Dist. LEXIS 5619

June 18, 1987, Decided
June 18, 1987, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employees instituted an action against defendant, the Secretary of the United States Department of Energy, for violations of the Privacy Act, 5 U.S.C.S. § 552a. The parties filed cross-motions for summary judgment.

OVERVIEW: After their personnel security files were disclosed by the Department of Energy (DOE) in an investigation of whether they were falsely claiming permanent residences more than 50 miles from the job site in order to obtain per diem payments and used for criminal indictments against them, the employees filed a complaint alleging that the disclosures violated the Privacy Act, 5 U.S.C.S. § 552a. It was undisputed that there was no compliance with 5 U.S.C.S. § 552a(b)(7) or 5 U.S.C.S. § 552a(b)(11). The court denied the parties' cross-motions for summary judgment ruling (1) that the DOE's Inspector General was not authorized to disclose information about potential fraud to the Department of Justice under 5 U.S.C.S. § 552a(b)(1), (2) that there were genuine issues as to whether disclosure was authorized by the "routine use" exception of 5 U.S.C.S. § 552a(b)(3), and (3) that material factual issues were outstanding as to what specific information was disclosed to the Inspector General special agents, and by them to the Department of Justice.

OUTCOME: The court denied the parties' motions for summary judgment filed in the employees' action alleging violations of the Privacy Act.

CORE TERMS: disclosure, routine, Privacy Act, personnel, security clearance, collected, violation of law, special agents, reasonable grounds, auditor, legislative history, eligibility, exemption, notice, General Act, law enforcement, need to know, authorization, investigative, compatible, summary judgment, investigator, complying, authorize, gathered, referral, inform, audit, diem, criminal prosecutions

LexisNexis(R) Headnotes

Administrative Law > Governmental Information > Personal Information > Enforcement > Jurisdiction & Venue

[HN1]Under 5 U.S.C.S. § 552a(b)(7), disclosure is permitted where it would be to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought. This procedure was designed to balance individual rights with agency uses of information by assuring

some high level evaluation of the need for the information.

Administrative Law > Governmental Information > Personal Information > General Overview

[HN2] 5 U.S.C.S. § 552a provides in pertinent part: (b) Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties; (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section; (e) Agency requirements. Each agency that maintains a system of records shall (4) subject to the provisions of paragraph 11 of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use.

Energy & Utilities Law > Conservation > General Overview

Governments > Federal Government > Employees & Officials

[HN3]Under 42 U.S.C.S. § 7138(b)(1), the Department of Energy's Inspector General must supervise, coordinate, and provide policy direction for auditing and investigate activities relating to the promotion of economy and efficiency in the administration of, or the prevention or detection of fraud or abuse in, programs and operations of the Department.

Governments > Federal Government > Employees & Officials

[HN4]Under 42 U.S.C.S. § 7138(g)(1), the Department of Energy's Inspector General is authorized (1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, and other material available to the Department which relate to programs and operations to which the Inspector General has responsibilities under this section.

Governments > Federal Government > Employees & Officials

[HN5]Under 42 U.S.C.S. § 7138(j), in carrying out his duties and responsibilities under this section, the Department of Energy's Inspector General shall report expeditiously to the Attorney General whenever the Inspector has reasonable grounds to believe there has been a violation of federal law.

Administrative Law > Governmental Information > Personal Information > General Overview

[HN6]The courts must scrupulously guard the privacy of records transferred from one agency to another for different purposes.

Administrative Law > Governmental Information > Personal Information > Conditions of Disclosure > Routine Use

Administrative Law > Governmental Information > Personal Information > Enforcement > Statutes of Limitations

Governments > Legislation > Overbreadth

[HN7]The Department of Energy's Inspector General is not exempted from complying with the Privacy Act, 5 U.S.C.S. 552a.

Administrative Law > Governmental Information > Personal Information > Conditions of Disclosure > Routine Use

[HN8] 5 U.S.C.S. § 552a(b)(3) authorizes disclosure of agency records for uses which are compatible with the purpose for which they were collected, provided that the agency publish notice of each routine use of its records, including the categories of users and the purpose of such use.

Governments > Federal Government > Employees & Officials

[HN9]The duties and responsibilities of the Department of Energy's Inspector General must be strictly contoured, and cannot be expanded by implication.

Administrative Law > Governmental Information > Personal Information > General Overview

[HN10]A dissemination of information to persons who were previously aware of the information is not a disclosure under the Privacy Act, 5 U.S.C.S. § 552a.

COUNSEL: [**1] Daryl D. Jonson, James E. Egan, for Plaintiffs.

Robert S. Linnell, Asst. U.S. Atty., for Defendant.

JUDGES: Justin L. Quackenbush, United States District Judge.

OPINION BY: QUACKENBUSH

OPINION

[*578] JUSTIN L. QUACKENBUSH, United States District Judge

BEFORE THE COURT are the summary judgment motions of plaintiffs (Ct. Rec. 10, 18) and the government (Ct. Rec. 14), heard with oral argument May 27, 1987, in Yakima, Washington. Appearing for plaintiffs were Daryl D. Jonson and James E. Egan; Assistant United States Attorney Robert S. Linnell appeared for the government.

This action was brought for violations of the Privacy Act, 5 U.S.C. § 552a after disclosures of records by the Department of Energy were used for criminal indictments against seventeen (17) "job shoppers" at the Hanford Nuclear Reservation. Only one defendant -- William A. Covert -- was brought to trial, which resulted in a judgment of acquittal. The remaining cases were dismissed or had been subject to pretrial diversion. Trial of this matter revealed that the plaintiffs were not government employees, but were employees of a company who provided workers for companies such as Westinghouse and General Electric who had contracts with the government.

[*579] Thirteen subjects of those criminal prosecutions brought [**2] this action claiming that disclosure of their personnel security files to the Department of Energy's (DOE's) Inspector General (IG) and to the Department of Justice (DOJ) was unlawful under 5 U.S.C. § 552a. They further claimed that the disclosures for use in a criminal prosecution were in direct contravention of the representations made to the job shoppers in "Supplement to Form DOE-1", which stated in pertinent part:

> Personal information on the form(s) will be used to determine an individual's eligibility for a DOE personnel security clearance or access authorization.
>
> . . . The name of the individual, Social Security number, and date and place of birth are used by DOE to establish and maintain records of DOE Personnel Clearance actions. . . . Access to or use of the information provided is permitted only to the authorized Federal Government investigative agencies conducting the investigations and to DOE personnel directly involved in the processing of the determination of the eligibility of the individual for security clearance or access authorization.
>
> . . .
>
> Att. to Ct. Rec. 213.

Rather than using the information solely to determine eligibility for security clearances, argue plaintiffs, [**3] the DOE unlawfully disclosed it in an investigation of whether job shoppers were falsely claiming permanent residences more than 50 miles from the job site in order to obtain per diem payments.

This investigation was spearheaded after Congressman Sid Morrison received a letter from a constituent alleging that a number of people employed by subcontractors of DOE were fraudulently receiving per diem payments. An auditor in the DOE's Office of the Inspector General (IG), James Steven Abernethy, examined the contract files -- including Certificates of Permanent Residence -- maintained by Westinghouse Hanford Co. and Rockwell Hanford Operations. To check the information on the Certificates of Permanent Residence, Mr. Abernethy used local telephone directories, commercial directories and property records from the Benton and Franklin County Assessors' offices. *See*, Exh. 1 to Ct. Rec. 15.

The audit information gathered by Mr. Abernethy was provided to IG Special Agents Donald Farmer and Richard Young, who then examined personnel security clearance files maintained pursuant to the Privacy Act, 5 U.S.C. § 552a, by the DOE's Safeguards and Security Division. According to the Affidavits [**4] of Mr. Farmer and Mr. Young (Exh. 3 and 4 to Ct. Rec. 15) these security files were reviewed

> . . . to confirm the information developed by Mr. Abernethy regarding these individuals' addresses and length of residence. The review also revealed (1) current employment status; (2) current residence; and (3) other information relevant to our investigation of individual claims for per diem allowance.
>
> We then compared the information obtained by Mr. Abernethy and from the personnel security files, with the data these individuals had provided in the Certificates of Permanent Residence to determine if there were discrepancies between the two sets of records. We used this information to aid in the establish-

> ment of the veracity of the statements in the Certificates of Permanent Residence.

Agents Farmer and Young then provided the IG audit and the results of their investigation to the United States Attorney, who decided to prosecute. An "oral summary of the results of the investigation" was also presented to the grand jury, which indicted the plaintiffs herein.

The motions before the court involve the propriety of disclosures to both the IG special agents and to the Department of Justice. [**5] The central issue, as discussed below, is whether the Department of Energy could turn over the subject records to the Department of Justice without complying with the Privacy Act's specific provision regarding disclosure to another governmental entity for law enforcement purposes. [HN1]Under that provision, 5 U.S.C. § 552a(b)(7), disclosure is permitted where it would be

> [*580] (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

This procedure was designed to balance individual rights with agency uses of information by "assuring some high level evaluation of the need for the information." *DOE v. DiGenova*, 250 U.S. App. D.C. 274, 779 F.2d 74, 84 (D.C. Cir. 1985).

The DOJ did not avail itself of the § 552a(b)(7) procedure, nor did it seek disclosure "pursuant to the order of a court of competent jurisdiction" under § 552a(b)(11). [**6] In the motions presently before the court, the government states that disclosure was permissible under two other statutory exceptions to the rule of non-disclosure, *i.e.*, § 552a(b)(1) and (b)(3). That statutory language is as follows:

> [HN2](b) Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, [1] the individual to whom the record pertains, unless disclosure of the record would be --
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (the above-referenced (a)(7) defines "routine use" as, "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.")
>
> . . .
>
> (e) Agency requirements. Each agency that maintains a system of records shall --
>
> . . .
>
> (4) subject to the provisions of paragraph 11 of [**7] this subsection [regarding publication in the Federal Register of notice and an opportunity to be heard on new and intended uses], publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include --
>
> . . .
>
> (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use . . .

1 It is undisputed that plaintiffs herein did not consent to disclosure of the records.

"NEED TO KNOW" EXCEPTION (5 U.S.C. § 552a(b)(1)

The threshold issue under this exception is whether the DOE's Inspector General had a need for the subject records in the performance of his duties. A corollary issue is whether the records could be disclosed to the Department of Justice, which is not an "agency which maintains the records" under (b)(1). Plaintiffs, of course, answer both queries in the negative.

Plaintiffs emphasize that the Inspector General has no authority to determine eligibility for access authorizations, the purpose for which the subject information was collected. The government does not dispute the IG has no security functions.

However, [HN3]under 42 U.S.C. § 7138(b)(1), [**8] the Inspector General must

> . . . supervise, coordinate, and provide policy direction for auditing and investigate activities relating to the promotion of economy and efficiency in the administration of, or the *prevention or detection of fraud or abuse in, programs and operations of the Department* (emphasis added).

[HN4]Under 42 U.S.C. § 7138(g)(1), the Inspector General is authorized

> [*581] (1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, and other material available to the Department which relate to programs and operations to which the Inspector General has responsibilities under this section . . . .

Finally, [HN5]under 42 U.S.C. § 7138(j),

> In carrying out his duties and responsibilities under this section, the Inspector General shall report expeditiously to the Attorney General whenever the Inspector has reasonable grounds to believe there has been a violation of federal law.

Plaintiffs argue that because the information at issue was collected for security purposes and the Inspector General has no national security function or authority, he had no responsibilities which would give rise to a "need to know" the subject information. Furthermore, [**9] since the IG is an employee of the DOE, "his disclosure of the records to the Department of Justice is not authorized under 5 U.S.C. § 552a(b)(1)" which contemplates disclosure only "to those officers and employees of the agency which maintains the record . . . ." Mr. Jonson noted in oral argument that 42 U.S.C. § 7138(j) contemplates a "report" to the Attorney General but does not authorize the turning over of records, which could be obtained by other means.

The government, in response, argues that 42 U.S.C. § 7138(b)(1) requires access to information maintained in DOE records which may be relevant to an investigation of potential fraud. It contends that Special Agents Farmer and Young clearly needed the information in the personnel security files in the performance of their duties, and thus the exception of 552a(b)(1) is invoked.

The government cites *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), in support of the applicability of 552a(b)(1). In *Beller*, the Circuit found no violation of the Privacy Act where information about a Navy enlistee's homosexual activities -- discovered during a routine investigation -- was forwarded to the Naval Investigative Service and disclosed [**10] to the commanding officer of plaintiff's naval installation. The officer had used the information in administrative proceedings to effect plaintiff's discharge. The Privacy Act discussion in *Beller* is confined largely to footnote 6 at p. 798. Citing the "need to know" language of § 552a(b)(1), the court stated:

> Disclosure by the NIS to Captain Ward, as Commanding Officer of the installation, was entirely proper. The commanding officer is responsible for the "safety, well-being and efficiency of his entire command."Captain Ward had a need for information disclosing a ground for discharging someone under his command.

Plaintiffs have attempted to distinguish *Beller*, contending that "the oral statement voluntarily made by Beller was never used for any purpose other than determining his suitability for a security clearance, a use obviously compatible with the purpose for which the underlying records and the oral statement were made in the first place. "Beller knew the reason for his interview, *i.e.*, to upgrade his security clearance, as well as the probable

effect of his oral statement concerning his homosexuality.

Plaintiffs also purport to distinguish two other cases cited by the government, [**11] *Howard v. Marsh*, 785 F.2d 645 (8th Cir. 1986) and *Hernandez v. Alexander*, 671 F.2d 402 (10th Cir. 1982), involving examinations of Equal Employment Opportunity files after Complaints were filed. In these situations, the Privacy Act did not apply where the complaining party had requested assistance from a federal agency necessitating disclosure of the otherwise-protected information. The court agrees with plaintiffs that this is distinguishable from the case at bar.

Despite the dearth of applicable case law authority on the subject, it appears to this court that under 42 U.S.C. § 7138(b)(1), the Inspector General had not only the authority but the duty to gain access to relevant information to detect potential fraud in the per diem program. However, the IG was *not* authorized to disclose the information to the Department of Justice under 5 U.S.C. § 552a(b)(1), which allows for disclosure to officers "of *the agency* which maintains the record . . ." (Emphasis added.) Indeed, the [*582] government's briefing seems to acknowledge this, as the government relies only upon the "routine use" exception of (b)(3) for disclosure to the DOJ (*see, e.g.*, Ct. Rec. 15).

[HN6]The courts must scrupulously [**12] guard the privacy of records transferred from one agency to another for different purposes. As a co-sponsor of the Privacy Act, Senator Percy, commented:

> In and of itself, any of these personal files is not particularly ominous. Most people readily accept the fact that data gathering systems are necessary to our institutions if they are to keep pace with the complex needs of a modern society. Without records there would be chaos. The real problem comes, however, when these information systems are linked with one another and are used to exchange information without the knowledge or consent of the individuals concerned. *When personal data collected by one organization for a stated purpose is used and traded by another organization for a completely unrelated purpose, individual rights could be seriously threatened.* (emphasis added)

102 Cong. Rec. 36893-4 (1974), quoted in *Ash v. United States*, 608 F.2d 178, 180 (5th Cir. 1979, *amended* 1980).

At the hearing on May 27, the court stated its initial impression that if the IG investigators had reasonable grounds to believe a crime had been committed, they probably were required to report it to the Department of Justice under 42 U.S.C. [**13] § 7138(j). The court now feels compelled to modify its position and recalls the truth spoken by the late Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late. " *Henslee v. Union Planters Bank*, 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949) (dissenting opinion).

Clearly, the legislative history of § 7138(j) indicates that [HN7]the Inspector General is not exempted from complying with the Privacy Act (see discussion of legislative history, below, re "routine use" exception). Otherwise, the result would be a thwarting of the protective provisions of the Privacy Act, intended to "prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law abiding citizens produced in recent years from actions of some overzealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies." 779 F.2d at 84, citing S. Rep. No. 1183, 93d Cong., 2d Sess. 1 (1974), *reprinted in Legislative History* at 154.

In the case at bar, the Department of Justice could have requested the subject records under § 552a(b)(7), specifying in writing the particular [**14] portions of the records requested and the law enforcement activity for which they were sought, but it did not. *See, Doe v. Naval Air Station, Pensacola, Fla.*, 768 F.2d 1229, 1232 (11th Cir. 1985). Nor did it seek a court order under (b)(11). Disclosure to the DOJ, then, was proper only if authorized by the "routine use" exception of § 552a (b)(3).

"ROUTINE USE" EXCEPTION

As stated above, [HN8] 5 U.S.C. § 552a(b)(3) authorizes disclosure of agency records for uses which are compatible with the purpose for which they were collected, provided that the agency publish notice of each routine use of its records, "including the categories of users and the purpose of such use." Under DOE System of Records DOE 43 (Att. 12 to Ct. Rec. 10, 47 *Federal Register* at p. 14312), "Personnel Security Clearance Files," the permissible routine uses are those "as listed in Appendix B." According to the pertinent part of Appendix B,

> 1. In the event that a record within this system of records maintained by this agency indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising

> by general statute or particular program pursuant thereto, the [**15] relevant records in the system of records may be referred as a routine use to the appropriate agency, whether Federal, State, local, [*583] or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

The government argues that once Special Agents Farmer and Young obtained the personnel security records, they became incorporated into System of Records DOE-54, "Investigative Files of Inspector General." Accordingly, when the records were released to the DOJ, "the record source of the information was DOE System of Records DOE-54 and not DOE-43." The "Routine Uses" description in DOE-54 states that "the records are used in IG investigations and for the referral of violations of law to law enforcement authorities. Records may be disclosed in accordance with the routine uses listed in Appendix B," quoted above.

Plaintiffs counter that in a January 13, 1986, DOE memorandum regarding access to DOE personnel security clearance files by IG investigators, it is stated that "the IG investigator will be reminded that the information is protected under the Privacy [**16] Act and that he/she is responsible for the proper safeguarding of information. Security must be notified if any of the reproduced documents are provided to a third agency." Att. 1 to Ct. Rec. 10. Furthermore, allege plaintiffs, personnel security records do not fit the DOE-54 description of "investigative transcripts, memoranda and letters," and even if they did, "disclosure is still authorized only for the routine uses listed in Appendix B to the Privacy Act notice," which do not include disclosure to the IG or DOJ. Ct. Rec. 22, pp. 12-13.

Plaintiffs give four basic reasons why disclosures to the Inspector General were not authorized as "routine uses." First, the statute at § 552a(a)(7) defines a "routine use" as being a use "for a purpose which is compatible with the purpose for which (information) is collected." Here, the records were collected for the purpose of determining eligibility for an access authorization. "Use of the information by the Inspector General for accumulating evidence to be used in a criminal prosecution unrelated to security is obviously incompatible with the purpose for which the information was gathered by DOE." Ct. Rec. 11, p. 9.

Secondly, (b)(3) authorizes [**17] disclosure of a record for "routine use" if the routine use is published in the Federal Register as required in § 552a(e)(4)(D).

> The "routine uses" upon which DOE relies, and appearing at 47 FR 14333, Appendix B, do not authorize the release of records to the Attorney General as a "routine use". . . . Further, under DOE-43 and DOE-47 "Safeguards," access to this system is limited to employees *of the agency* having a "need to know." There is no demonstrable "need to know" shown for the Inspector General.

Thirdly, argue plaintiffs, § 552a(e)(3)(B) imposes an affirmative duty upon DOE to inform individuals in writing *when the information is collected* of the routine uses to which the information may be put. The DOE failed to so inform plaintiffs, they argue. However, it should be noted that this language actually states:

> (e) Agency Requirements. Each agency that maintains a system of records shall --
>
> . . .
>
> (3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual --
>
> (B) the principal purpose or purposes for which the information is intended to be used.

Thus, the DOE [**18] need only inform of "the *principal* purpose or purposes."

Finally, plaintiffs argue that the Supplement to Form DOE-1 (quoted on the top of slip op. page 2 of this memo) "*affirmatively* told the plaintiffs that the information provided . . . would not be used for any purpose other than determining eligibility for an access authorization."

As to disclosure to the Department of Justice, plaintiffs note that Appendix B of the Privacy Act Notice (Att. 12 to Ct. Rec. 10) would permit disclosure as a "routine [*584] use" to outside law enforcement agencies only in circumstances where the records themselves indicate a violation of law." The government does not even contend that the records in issue in this proceeding contain any reasonable or probable cause to believe that any of the plaintiffs committed a crime." Plaintiffs cite *Doe v. DiGenova*, 250 U.S. App. D.C. 274, 779 F.2d 74 (D.C. Cir. 1985), in which the court found that disclosure of plaintiff's psychiatric records to a grand jury pursuant to subpoena was *not* a routine use. *DiGenova* addressed a "routine use" definition identical to the Appendix B definition in the case at bar and determined it clearly indicated that it allows for referral of records to law enforcement officials [**19] "only when the records themselves indicate a violation of law. " 779 F.2d at 86.

The government attempts to distinguish *DiGenova* by stating that in the present case, "the investigative records, when viewed in toto, themselves contained sufficient information to lead the IG special agents to believe a potential violation of law had occurred." However, plaintiffs have raised a genuine issue of material fact, Rule 56(c), Fed.R.Civ.P., as to whether a potential violation of law was apparent from the face of the protected records themselves.

It also appears to the court that there are genuine issues as to whether disclosure to the IG was compatible with the purpose for which the information was gathered, particularly where the Supplement to Form DOE-1 affirmatively represented that the information gathered would only be used for security purposes. While 42 U.S.C. § 7138(j) requires the Inspector General to report expeditiously to the Attorney General his reasonable belief that federal criminal violations may have occurred, the affidavits of Special Agents Farmer and Young fail to spell out their "reasonable grounds." [HN9]The duties and responsibilities of the Inspector General must be strictly [**20] contoured, and cannot be expanded by implication. *United States v. Iannone*, 198 U.S. App. D.C. 1, 610 F.2d 943, 946 (D.C. Cir. 1979). Moreover, it would still appear that the "reasonable grounds" must be evident from the face of the records themselves, which has not been established. If the records do not, on their face, indicate reasonable grounds to believe there have been criminal violations, the Department of Justice should have obtained them under § 552a(b)(7) or (b)(11).

This result is confirmed by the legislative history of the Inspector General Act, cited by neither party in this litigation. 42 U.S.C. § 7138(j), on which the government relies, was added to the Department of Energy Act in 1980. The legislative history of the amendment indicates that the provision set forth in (j), among others, simply "extends the requirements of the Inspector General Act of 1978 dealing with complying with GAO audit standards" to the Department of Energy's Inspector General. Act of April 3, 1980, Pub. L. No. 96-226, 1980 U.S. Code Cong. & Admin. News 746. Thus, one is directed to the Inspector General Act of 1978, 5 U.S.C. Appendix at 695, which provides at § 4(d) language identical to 42 U.S.C. § 7138(j) regarding [**21] the Inspector General's duty to report expeditiously to the Attorney General "reasonable grounds to believe there has been a violation of Federal criminal law."

The legislative history of the Inspector General Act of 1978 discussed at some length potential conflicts with the Privacy Act. *See, Senate Report*, Act of Oct. 1, 1978, Pub. L. No. 95-452, 1978 U.S. Code Cong. & Admin. News 2687-2689. The Senate Report noted that, as passed by the House of Representatives, the Inspector General Bill included a provision stating:

> In the event any record or other information requested by the Inspector General under subsection (a)(1) or (a)(2) is not considered to be available under the provisions of sections 552a(b)(1), (3) or (7) of title 5, United States Code, such record or information shall be available to the Inspector General in the same manner and to the same extent it would be available to the Comptroller General.

The Senate Report noted that this language was not in the prior legislation establishing an Office of Inspector General in the Department of Energy.

[*585] However, the Senate Report found it unnecessary to "create an exemption for the new Inspector and Auditors General [**22] comparable to the existing exemption granted to the Comptroller General," and did not include the provision in the bill as reported. It is not included in the Act. According to the Senate committee,

> The House language would grant to an Inspector and Auditor General a power that no other official of the executive branch has -- the authority to require the transfer of personal information from any agency to the Inspector and Auditor General without regard for the protections of the Privacy Act. Currently, the President, department Secretaries and heads of agencies, and all individual members of Congress and committees must comply with the Privacy Act. The committee can

> see no reason for granting special status to the Inspector and Auditors General. . . .
>
> Complying with the Privacy Act does not mean that an Inspector and Auditor General will be unable to obtain needed information to perform his responsibilities. It simply means that the information must be obtained in conformity with the exemptions and procedures of the act. Under the Privacy Act, for instance, all information within the agency would be available to the Inspector and Auditor General, based on the "intra-agency" exemption. [**23] Information sought from other agencies could generally be obtained under the "routine use" or "law enforcement" exemptions of the act.

Id. at 2688.

In the present case, while material factual issues exist as to the applicability of the "routine use" exception (*i.e*., do the records themselves indicate a violation of law?), the "law enforcement" exemption of § 552a(b)(7) could have been invoked.

The Senate Report also stated that the "expeditious reporting" requirement will allow an Inspector General to "make prompt and direct referrals to the Justice Department when he has reasonable grounds to believe there has been a violation of Federal criminal law," improving a "slower and more cumbersome" referral process. However, this does not infer that an Inspector General need not comply with the Privacy Act in obtaining protected records.

The government has also argued that no violation of the Privacy Act occurred because the information concerning plaintiffs' residences was already known and thus no disclosure occurred." [HN10]A dissemination of information to . . . persons who were previously aware of the information is not a disclosure under the Privacy Act." *Federal Deposit Ins. Corp. v. Dye*, [**24] 642 F.2d 833, 836 (5th Cir. 1981). However, the court is unable to determine, on the existing state of the record, what information was disclosed to various parties herein and at what points in time. This also precludes an entry of summary judgment as to the plaintiffs. There are material factual issues outstanding as to what specific information was disclosed to the Inspector General special agents, and by them to the Department of Justice, sufficient to avoid summary judgment for plaintiffs.

Accordingly, IT IS ORDERED that the summary judgment motions of plaintiffs (Ct. Rec. 10, 18) and the government (Ct. Rec. 14) are DENIED.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 18th day of June, 1987.

LEXSEE

TRACI LASHANTI LUTTRELL, Movant, v. DEPARTMENT OF DEFENSE, Respondent.

No. 5:10-MC-19

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

2010 U.S. Dist. LEXIS 58851

June 10, 2010, Decided
June 11, 2010, Filed

CORE TERMS: subpoena, customer, law enforcement, bank account, larceny, administrative subpoena, Privacy Act, financial records, sworn statement, unreasonably, prong, records suggests, documentary evidence, active duty, federal agencies, burdensome, satisfying, suspected, quashing, salary

COUNSEL: [*1] Traci Lashanti Luttrell, Plaintiff, Pro se.

For Department of Defense, Defendant: Matthew Lee Fesak, LEAD ATTORNEY, U.S. Attorney's Office, Raleigh, NC.

JUDGES: DAVID W. DANIEL, United States Magistrate Judge.

OPINION BY: DAVID W. DANIEL

OPINION

ORDER

This matter is before the Court on the motion by Traci Lashanti Luttrell for a court order preventing the Government from obtaining access to her financial records. [DE-1]. Movant makes this motion pursuant to the customer challenge provisions of the Right to Financial Privacy Act of 1978, and the relief she requests would essentially quash the Government subpoena at issue. The Department of Defense ("DoD") has filed a response to this motion [DE-2], and therefore the matter is now ripe for adjudication.

I. Background

On April 1, 2010, a subpeona duces tecum ("subpoena") was served upon the Custodian of Records, Wachovia Bank, 401 Market Street, Philadelphia, Pennsylvania 19106. This administrative subpoena was issued by the DoD Office of Inspector General. On April 14, 2010, Movant was served with a "Customer Notice" relative to the subpoena, along with the subpoena and challenge forms. [DE-2-2 at 9-14]. The subpoena instructed the Custodian to produce "information, documents, [*2] reports, answeres, records, accounts, papers, and other data and documentary evidence pertaining to [the bank account of Movant] for the period March 18, 2008 through the date of this subpoena[.]." Subpoena [DE-2-2 at 6]. In support of this production, the subpoena indicated that these materials were "necessary in the performance of the responsibility of the Inspector General Act" and the subpoena also indicated that the Movant was "a member of the United States Air Force Reserve, suspected of defrauding the United States." *Id.* The Customer Notice sent to Movant further elaborated that these materials were sought:

> To refute or support allegations that you provided false information on your enlistment into the United States Air Force and during the approximate period of March 2008 to March 2010, you fraudulently received unauthorized active duty pay and benefits, in violation of the Uniform Code of Military Justice (UCMJ) Article 121, Larceny and Article 132, Frauds against the United States.

Customer Notice at 1 [DE-2-2 at 9].

Movant filed the request to have this subpoena quashed on April 27, 2010 [DE-1]. By filing this motion, Movant is asserting that, pursuant to the Right to Financial [*3] Privacy Act of 1978 ("RFPA"), 12 U.S.C. § 3401 et seq., the subpoena was deficient. Specifically, Movant stated, "I do not believe that anything in these records suggests that I committed larceny or fraud." Movant's Sworn Statement [DE-1-1]. That statement is her only argument to quash the subpoena.

II. Analysis

The subpoena before the Court was issued under the Inspector General Act of 1978, 5 U.S.C. App. § 3 ("IG Act'). Pursuant to the IG Act, the Inspectors General "are provided a broad range of investigatory powers." *NASA v. Federal Labor Relations Authority*, 527 U.S. 229, 256, 119 S. Ct. 1979, 144 L. Ed. 2d 258 (1999). This authority is given to assist Inspectors General in their statutory duty to detect fraud, waste and abuse in federal programs. Accordingly, Inspectors General "are given access to 'records, reports, audits, reviews, documents, papers, recommendations, or other material.'" *Id.* (quoting 5 U.S.C. App. § 6(a)(1)). Inspectors General are thus given authority:

> [T]o require *by subpoena* the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium . . . and documentary evidence necessary in the performance of the functions assigned by this Act [.]

5 U.S.C. App. § 6(a)(4) [*4] (emphasis added).

"Federal courts will enforce an agency subpoena if (1) the inquiry is within the authority of the agency and is for a proper purpose; (2) the matter requested is reasonably related to the inquiry; and (3) the demand is not unreasonably burdensome or broad." *United States v. Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162, 165 (4th Cir. 1988); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436 (1950) (originally articulating this standard). An Inspector General subpoena is subject to the RFPA, whose purpose is "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." *United States v. First Nat'l Bank of Maryland*, 866 F. Supp. 884, 886 (D. Md. 1994) (internal citation omitted). The RFPA requires federal agencies to follow established procedures when they seek an individual's financial records. *See, e.g.*, 12 U.S.C. §§ 3405(2) & (3). The RFPA authorizes a federal agency to obtain financial records pursuant to an administrative subpoena "only [*5] if there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry." 12 U.S.C. § 3405(1). Under the RFPA, a motion to quash an administrative subpoena "shall" be denied if "there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry." 12 U.S.C. § 3410(c).

Here, the Court finds that the DoD satisfies the standards in the controlling case law and in the RFPA for enforcement of the administrative subpoena at issue. For the first prong of the *Morton Salt* test, the DoD's Inspector General has statutory authority to issue this administrative subpoena, and the purpose is proper--investigation of alleged criminal larceny by Movant. The DoD successfully demonstrates by sworn statement of Special Agent David A. Ohlinger that it is conducting a legitimate law enforcement inquiry of the Movant. Specifically, she is suspected of failing to report her change in duty status from active to inactive ready reserve, thus resulting in her being improperly paid (into her Wachovia bank account) for active duty status for about seven months. Ohlinger Declaration [*6] P 4 [De-2-2]. Luttrell was interviewed, and she claimed no knowledge of receiving military pay when she should not have. *Id.* The requested Wachovia bank account information is reasonably related to the investigation, satisfying the second prong of the *Morton Salt* test. The demand for information is limited in time to around the relevant period and not unreasonably broad or unreasonably burdensome on the bank, thus satisfying the third prong of the *Morton Salt* test. Likewise, having shown that the subpoena is part of a legitimate law enforcement inquiry and the bank records sought are relevant to that inquiry, the RFPA mandates denial of the present motion to quash. Movant's only argument in favor of quashing the subpoena is that she does not "believe that anything in these records suggests that [she] committed larceny or fraud." Movant's Sworn Statement [DE-1-1]. Her statement is not relevant to the present inquiry; while her bank account records cannot independently show she committed larceny or fraud, they may establish that she *received* a government salary and benefits in the relevant period--a key element of the charges against her. The remaining elements of the charges, namely, [*7] that she was not entitled to a government salary during the relevant period, may be established through other means. The Movant's bank account records, as requested in the subpoena, are relevant to the legitimate investigation against her. The Court finds the DoD's subpoena is proper and there is no reason that would justify quashing this subpoena.

III. Conclusion

For the reasons stated herein, Luttrell's Motion for Order Pursuant to Customer Challenge Provisions of the Right to Financial Privacy Act of 1978 [DE-1] is hereby **DENIED.** It is further **ORDERED** that subpoena recipient, Wachovia Bank, produce records responsive to the Department of Defense Inspector General subpoena within thirty (30) days of the date of service of this Order to Wachovia Bank.

This the 10th day of June, 2010.

/s/ David W. Daniel

DAVID W. DANIEL

United States Magistrate Judge