
Management Alert

OIG Access to Electronically-Stored Information
2019-IG-0001



OFFICE OF INSPECTOR GENERAL
U.S. Department of Housing and Urban Development



April 29, 2019

TO: Benjamin Carson, Sr.,
Secretary, S
Rae Oliver Davis

FROM: Rae Oliver Davis,
Inspector General, G

SUBJECT: Management Alert: OIG Access to Electronically-Stored Information
Memorandum No: 2019-IG-001

I write to inform you of the deficiencies in the process used by the U.S. Department of Housing and Urban Development (“Department”) to respond to requests for electronically-stored information (“ESI”), which result in unreasonable delays in the Office of Inspector General’s (OIG) access to departmental information. Failure to obtain timely access to Departmental ESI hampers the OIG’s ability to carry out its oversight function. Delayed access to Departmental records causes OIG oversight efforts to be diluted, become stale, or worse, halt entirely. Access to ESI—most notably e-mail communications—is critical for the OIG to operate effectively.

The Department must take immediate action to address the shortcomings in its process to ensure that the OIG has timely access to all requested records as required by the Inspector General Act of 1978 (“IG Act”).¹

HUD’s Process for Responding to OIG Requests for ESI Produces Unacceptable Delays

Currently, the Department processes OIG requests for ESI through an e-Discovery management system that the Office of General Counsel (OGC) controls and maintains. OGC relies on contractors to collect and process ESI in response to such requests. The OIG has repeatedly notified the Department that OGC’s process unreasonably delays production of records in response to OIG requests.

In December 2017, the OIG published an evaluation report (“the Evaluation”) detailing the inefficiencies in the Department’s process for responding to requests for ESI. The OIG’s evaluation showed (1) the Department provides untimely responses to OIG requests for ESI, (2) untimely responses have significant, negative effects on OIG investigations and other oversight work, and (3) untimely responses to OIG requests fail to comply with the law requiring timely

¹ The Inspector General Act of 1978 (“IG Act”), as amended, authorizes the OIG to “have *timely* access to *all* records, reports, audits, reviews, documents, papers, recommendations, or other material available to [HUD] which relate to the programs and operations with respect to that which the Inspector General has responsibilities under [the] Act.” 5 U.S.C. app 3, § 6(a)(1) (emphasis added). The IG Act’s access provision applies “notwithstanding any other provision of law,” except pursuant to a law that expressly refers to and limits the access of OIG. *Id.* at § 6(b).



OIG access to all Department information.² The Evaluation determined that the Department's reliance on a poorly-scoped contract to process requests for ESI, which includes those made by OIG as well as those made in litigation, under the FOIA, and by congressional oversight committees, was causing the unacceptable delays. The OIG also noted that the consequences for a failure to respond timely to requests for ESI have serious legal, financial, and reputational implications.³

The Evaluation forecasted that the volume of ESI requests would increase. The OIG recommended that OGC conduct a capacity study to project future ESI demands and utilize that study to inform future contracting decisions affecting its ability to respond to requests for ESI. OGC concurred with the Evaluation's findings and recommendations. Since the Department completed its capacity study, the OIG has continued to highlight the delays caused by the Department's contract and e-Discovery management system.

HUD Has Not Taken Adequate Steps to Address Known Deficiencies in its Process that Continue to Delay Responses to Requests for ESI

Despite being aware of the fact that its process lacks the sufficient capacity to respond to the demand for ESI requests, the Department has not acted to improve the process or the timeliness of its ESI productions. Regarding the delays specific to OIG, the OIG has put the Department on ample notice that responses to our requests are untimely, that such delays negatively affect our work, and that the delays in OIG access fail to comply with the law. In fact, the OIG's average wait time for ESI has increased from approximately 95 calendar days in 2017 to 151 calendar days in 2018, an increase of more than 60 percent.

Moreover, 20 requests in 2018 took longer than 6 months, and in one instance, it took the Department 8 months to produce four Department employees' emails. Notably, during the OIG's evaluation of the Department's oversight of the Alexander County Housing Authority, the OIG submitted a request for five employees' emails on November 22, 2017, and waited until May 21 and June 6, 2018, before we received the requested records.

Delays in Timely Access to ESI Harm the Effectiveness of OIG Oversight Activities

The Department's lengthy delays in producing ESI hamper the OIG in carrying out its statutory mission to detect and prevent fraud, waste, and abuse. The delays impact critical investigative decisions. The Department's failure to deliver ESI in a timely manner forces our oversight staff to consider how long such requests will delay the completion of their work, as opposed to focusing solely on how useful relevant ESI may be.

² See HUD OIG Evaluation Report 2017-OE-0008, E-Discovery Management System's Capacity to Meet Customer Demands for Electronic Data (Dec. 6, 2017).

³ For example, the Department could face sanctions and money judgments if it fails to meet court deadlines to produce ESI.



Effective witness interviews depend on timely receipt of ESI. This is particularly true of e-mails, which can be evidence that provides insight into a witness's knowledge, and a means to challenge or refresh the witness's recollection. Because it is important to have documentary evidence before conducting witness interviews, the OIG has delayed scheduling or postponed certain interviews in many investigative matters while waiting for the Department to produce e-mails. In other instances, the OIG has proceeded with witness interviews without critical documentary evidence and learned later that the scope or nature of an interview would have been materially different if the Department had produced the requested ESI timely.⁴

It is important to note that the OIG often requests ESI to carry out our most significant oversight work in matters that will likely be of great interest to the public and to Congress. These matters can involve allegations of senior-official misconduct, ethics violations, insider threats, leaks of nonpublic or pre-decisional information, theft of government information, misuse of government funds, or gross mismanagement. These matters also involve significant, nationwide risks to the health and safety of HUD beneficiaries, the stability of HUD's insurance funds, and the integrity of the agency's housing finance platforms. Simply put, these matters represent the greatest risks to the Department, the American public, and the overall economy, and the delayed completion of our work while we wait for ESI exacerbates those risks.

OGC's Involvement in the Process for Providing the OIG with Requested ESI Raises Additional Concerns

Under the Department's current process, OGC reviews and approves all OIG requests for ESI. While OGC has pointed out that it has never formally rejected an OIG request for ESI, the fact that all such requests go through OGC creates a threat to the OIG's independence. Because OGC must approve all OIG requests, the potential exists for the Department to attempt to scope and direct our work.

The current process provides OGC with knowledge of which particular employees' emails the OIG wishes to review and for what time period. This compromises the independence of the OIG's oversight and law enforcement responsibilities by providing the Department insight into our investigative matters, priorities, and processes. It also provides the Department with an opportunity to slow or delay particular OIG requests for ESI based on whose emails the OIG requests or on speculation about the OIG's investigative interests.

The current process also threatens the OIG's ability to keep the identity of whistleblowers confidential, as required by IG Act. OGC's role in the process of reviewing and approving OIG requests may allow Department officials to identify confidential witnesses or whistleblowers and may reveal the contents of protected communications they have made to the OIG.

⁴ In a significant criminal investigation that the OIG worked jointly with the Department of Justice, prosecutors requested a grand jury subpoena for Department e-mails rather than continuing to wait for the same e-mails to be produced to the OIG through the Department's process and risk further detriment to the investigation.



Disclosures about OIG reviews to Department officials could jeopardize our ability to gather documentary evidence and testimony from witnesses. The OIG must also keep information about our work confidential to ensure the safety of OIG staff conducting law enforcement operations. Moreover, a conflict-of-interest may arise when the OIG requests the e-mails of OGC employees who have access to our requests and have the authority to review and approve them.

The Department Must Change Its Process to Provide the OIG with Timely Access to ESI

The Department needs to take action immediately to improve its process for producing ESI to the OIG and ensure that the OIG has timely access to Departmental records. The Department must also put in place a process that protects the confidentiality of our requests to avoid threatening our independence and to protect the identity of whistleblowers.

Given the Department's past challenges in managing this process, the OIG should have direct access to Departmental ESI to ensure the OIG can obtain ESI in a manner that does not hinder the OIG's ability to perform its oversight function. While Department officials have confirmed that this solution would be technically possible, OGC has apparently recommended against it, citing a concern for preserving executive and attorney-client privilege. Such an objection is without merit, as OIG access to the Department's records does not waive any departmental privilege.

I respectfully request a response to this memorandum outlining the actions you plan to take within 15 days.