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# MEMORANDUM

To: The Honorable Matthew Martin
Chairman, Committee on Ethics and
Government Oversight

From: Deborah Witzburg
Inspector General
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Date: February 7, 2025

Subject: Request for Information

During the January 28, 2025 meeting of the City Council Committee on Ethics and Government Oversight, questions arose in written public comment and from members of the committee about circumstances in which cooperation—or lack thereof—by City departments impacts the pace and effectiveness of Office of Inspector General (OIG) investigations. I was asked to provide through the Chair more information about those circumstances, and for suggestions for legislative changes to address these challenges. I write to provide that information and in support of OIG's proposed legislative changes, attached at Appendix A.

In that hearing, I noted three practices by the City that negatively impact the effectiveness, independence, and pace of OIG investigative work:

1. The Municipal Code of Chicago (MCC) imposes a duty upon every elected City official, employee, and department to cooperate in OIG inquiries. MCC § 2-56-090. The City's Department of Law (DOL), however, has historically asserted attorney-client privilege as a limitation on the statutory duty to cooperate and regularly withholds from OIG City records that DOL claims are privileged, in a practice which has been prohibited on the federal level. In effect, DOL has taken the position that it may unilaterally choose what City records and communications are subject to oversight by OIG, and DOL's privilege reviews prior to the production of records to OIG significantly delay investigative work.
2. Corporation Counsel asserts that DOL attorneys may attend any OIG investigative interview, at Corporation Counsel's sole discretion. The presence of Corporation Counsel or their designee in OIG investigative interviews would create the appearance and have the effect of interfering with the independence and compromising the confidentiality of OIG investigations. The presence of a City lawyer serving at the pleasure of the Mayor—or their designees—in a confidential investigative interview should be expected to compromise the

candor of witnesses and subjects, chill cooperation with OIG investigations, and intimidate complainants and whistleblowers. During my time as Inspector General, OIG has not permitted DOL attorneys in the room during investigative interviews. DOL's demands to attend interviews have caused the delay and cancellation of numerous interviews in OIG investigations, substantially compromising the meaningful investigation of allegations of serious misconduct.

3. Corporation Counsel is empowered to approve OIG requests to enforce subpoenas OIG issues in its investigative work. MCC § 2-56-30(h)(2). The MCC requires that Corporation Counsel's approval not be "unreasonably withheld, delayed or conditioned," but DOL has previously taken the position that DOL may condition OIG's ability to enforce a subpoena upon the disclosure of certain information, including the identity of the person under investigation by OIG. This has resulted in delays to OIG's investigations and may allow DOL to disempower OIG to investigate certain subjects of its choosing.

The throughline of these concerns is the appearance—and at times reality—that DOL selectively acts in opposition to OIG's investigative work when OIG's work may result in embarrassment or political consequences to City leaders. This is not a hypothetical concern; OIG's recent Advisory Concerning Gifts Accepted on Behalf of the City highlights just one recent instance of DOL interceding on behalf of City leadership in opposition to an OIG investigation.[1] In that matter, DOL asserted on behalf of the Mayor's Office that OIG was not allowed physical access to inspect a "Gift Room" that purportedly contained gifts—including Hugo Boss cufflinks; Givenchy, Gucci, and Kate Spade handbags; a personalized Mont Blanc pen; and size 14 men's shoes—that successive mayors had allegedly accepted on behalf of the City. DOL's assertion that OIG should be prevented from physically accessing the Gift Room was unambiguously contrary to the statutory requirement that every City official, employee, and department must cooperate in OIG investigations and make City premises available to OIG "as soon as practicable," where DOL made no showing as to why immediate access to City property was not practicable. MCC § 2-56-090.

DOL's selective interference with OIG's investigative work is further demonstrated by Corporation Counsel's insistence that DOL attorneys may attend any OIG interview at Corporation Counsel's sole discretion. Despite Corporation Counsel's wide-ranging assertion that DOL may attend *any* OIG investigative interview, DOL has not demanded to attend OIG interviews of, for example, rank and file police officers, laborers, motor truck drivers, or plumbers. Rather, DOL has demanded to attend investigative interviews involving senior members of the Mayor's Office, senior mayoral appointees, DOL employees, and individuals involved in matters that may result in embarrassment to City leaders. Here, too, DOL's practice creates at a minimum the appearance that the City's lawyers are acting to protect certain individuals of their choosing.

DOL has demanded to attend OIG interviews in at least 10 investigations during my tenure. DOL's selective demands to attend investigative interviews have caused the cancellation of numerous interviews and have blocked critical avenues of investigation into matters of public concern.

DOL's conduct erodes OIG's independence, effectiveness, and timeliness. It is not, and cannot be, within Corporation Counsel's authority to unilaterally choose which City actors may be meaningfully

[1] OIG, Advisory Concerning Gifts Accepted on Behalf of the City (Jan. 29, 2025), available at https://igchicago.org/publications/advisory-concerning-gifts-accepted-on-behalf-of-the-city/.

investigated by OIG. I welcome the invitation by the Committee on Ethics and Government Oversight to offer additional information relevant to these concerns as well as statutory solutions that would buttress OIG's independence and avert ongoing interference in OIG investigative work.

# I | DOL's Assertion of Attorney-Client Privilege Against OIG Information Requests Undermines Effective Oversight and Is Contrary to National Standards and Federal Law

The MCC creates an unqualified duty on the part of the City and its officials, employees, and contractors to cooperate with OIG inquiries. Specifically, OIG's enabling ordinance provides that "[i]t shall be the duty of every elected official or appointed officer, employee, department, agency . . . to cooperate with the Inspector General in any inquiry undertaken pursuant to this chapter. Each department's premises, equipment, personnel, books, records and papers shall be made available as soon as possible." MCC § 2-56-090. Full access to City records is necessary for OIG to conduct thorough and complete investigations. In contrast, DOL's assertion of privilege and selective exclusion of City records from OIG oversight undermines accountability in City government.

The Mayor's Office, DOL, and other City departments have withheld responsive materials from OIG on the purported basis of the City's attorney-client privilege in dozens of investigations during my tenure as Inspector General. Not only have these improper assertions of privilege denied OIG access to highly relevant information across its investigative work, they have also caused extensive delays in OIG investigations, including substantial delays in OIG's receipt of non-privileged information. DOL has asserted an expansive attorney-client privilege and work-product protection extending to nearly every DOL attorney's communications, as well as many documents related to City business that involved communications with attorneys in other City departments. Yet DOL has rarely justified its position in light of the substantive limitations on the attorney-client privilege and work-product protection. Instead, DOL has simply asserted that it may withhold the great bulk of its documents and communications from OIG—along with other documents purportedly related to City legal business—without qualification.

I want to underscore that, for many months, OIG has attempted to reach some resolution on these issues with DOL. OIG is a City department and, as such, is also entitled to representation by the Corporation Counsel. MCC § 2-60-050 provides that the "corporation counsel shall, when required so to do, furnish written opinions upon subjects submitted to him by . . . the head of any department." Pursuant to that law and in an effort to fully understand the legal basis for DOL's position, I asked the Corporation Counsel to provide a written opinion on the nature of the privilege it asserted against requests for information from OIG. Specifically, I asked DOL: Under circumstances in which DOL asserts that attorney-client privilege permits certain communications to be withheld from OIG: (1) Who is DOL's client?; (2) To whom does the attorney-client privilege belong?; and (3) By whom can the attorney-client privilege be voluntarily waived?

After failing to respond to my request for nearly four months, DOL *expressly declined to provide an opinion*. Instead, DOL referred to prior correspondence—which did not answer OIG's questions—

and provided an analysis in support of the conclusion that MCC § 2-60-050 did not in fact obligate the Corporation Counsel to provide a written opinion.

Given DOL's inappropriate and unexplained effort to withhold certain City records from OIG's oversight, and to align with national standards and federal law, OIG proposes amendments to the MCC to clarify that City employees' and officials' duty to cooperate with OIG supersedes any assertion of privilege by or on behalf of the City.

## A | Inspector General Access to Attorney-Client Communications and Attorney Work Product is the Uniform Rule among Federal Inspectors General and is Expected Under National Standards Governing OIG

DOL's withholding from OIG of attorney-client communications has positioned the City as an outlier on the national landscape with respect to inspector general access to government information and records. OIG's enabling ordinance is modeled after the federal Inspector General Act of 1978, which requires that federal agencies produce otherwise privileged information in cooperation with investigations conducted by their respective inspectors general. As originally passed, the Inspector General Act entitled federal inspectors general "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under" the Act. *See* 5 U.S.C. App. 3 § 6(a) (orig. version). This represents the federal equivalent of the duty to cooperate created by MCC § 2-56-090, which entitles OIG to prompt access to "[e]ach department's premises, equipment, personnel, books, records and papers."

In 2016, Congress amended the Inspector General Act in response to a series of controversies wherein certain federal agencies unlawfully withheld material—including attorney-client communications—from their respective inspectors general. The 2016 amendments, called the Inspector General Empowerment Act ("IGEA"), clarified that the Inspector General Act meant exactly what it said: inspectors general are entitled to *all materials* possessed by their respective agencies. IGEA added clarifying language to the Inspector General Act reiterating that no materials may be withheld from an inspector general "except pursuant to any provision of law enacted by Congress that expressly—(i) refers to the Inspector General; and (ii) limits the right of access of the Inspector General[.]" 5 U.S.C. § 406(a)(1)(A). This provision clarified that the right of access provided by the Inspector General Act encompassed all materials possessed by each agency, even if they would otherwise be protected from disclosure to third parties by a common law privilege.[2]

[2] One member of Congress noted that the IGEA would make *crystal clear* that Inspectors General have the right to access any information available to the agency the IG oversees." 162 Cong. Rec. H4002-01, H4006 (Statement of Rep. Elijah Cummings) (emphasis added). Another member of Congress noted in discussing the legislation that the Chemical Safety Board denied the EPA IG "access to certain documents based on a phony attorney-client privilege claim," and that the Board did so notwithstanding "clear guidance from section 6(a) of the IG Act to provide the IG with access to all records." 162 Cong. Rec. H4002-01, H4005 (statement of Rep. Mark Meadows). "The IG Empowerment Act makes clear that section 6(a) means exactly what it says: Every inspector general shall have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials. When agencies refuse or limit IGs' access to agency records, it

Similarly, the professional standards that govern inspectors general require that inspectors general have access to otherwise privileged government communications. The Association of Inspectors General (AIG) Model Legislation for Establishment of Offices of Inspector General reflects that inspectors general shall have the "right to obtain full and unrestricted access to all records, information[,] data, reports, plans, projections, matters, contracts, memoranda, correspondence and any other materials," and specifically notes that the power "super[s]edes any claim of privilege."[3] The same principle is reflected in AIG's *Principles and Standards for Offices of Inspectors General* (Green Book), which represents definitive and widely-accepted standards for inspectors general—a fact reflected in the DOL-negotiated consent decree entered in *Illinois v. Chicago*, which requires OIG's Public Safety section to comply with the Green Book. *See* Consent Decree ¶ 557, *State of Ill. v. City of Chi.*, No 17-cv-6260 (N.D. Ill. Jan. 31, 2019) (ECF No. 703-1). Specifically, the Green Book presumes that inspectors general will have access to their organizations' privileged information; its confidentiality standards provide that OIG "should establish and follow procedures for safeguarding the identity of confidential sources and for protecting privileged and confidential information."[4] The Green Book further states that OIG "should ensure that . . . privileged or confidential information gathered by the OIG will be protected from disclosure unless the OIG determines that such disclosure is required by law or necessary to further the purposes of an OIG activity."[5]

Likewise, the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Federal Offices of Inspector General* require OIGs to "respect[] the value and ownership of privileged, sensitive, or classified information received" by the OIG.[6] In accordance with these standards, OIG has promulgated rules and regulations to protect against disclosure of privileged, confidential, or personal information. *See* City of Chicago Rules of the Office of Inspector General, Rules 4.B, 11.1, 11.8(G) (Mar. 12, 2018).

## B | The Assertion of Attorney-Client Privilege Against OIG Investigations Delays OIG's Investigative Work

When OIG seeks production of City emails via the Department of Technology and Innovation (DTI, formerly the Department of Assets, Information, and Services), DTI's productions are often accompanied by a lengthy "privilege log," which in practice lists every responsive email that includes any sender or recipient who is, or is believed to be, an attorney. DTI withholds the emails listed on the "privilege log" from OIG. OIG must then identify emails included on the "privilege log" for which it is seeking a manual review by DOL to assess whether the emails are in fact privileged—in the meantime denying OIG access to information including communications that DOL, even in its unilateral review, eventually determines to not be privileged. With respect to text messages on City

undermines the intent of Congress and frustrates our mutual interest in government transparency and efficiency." *Id.*

[3] Association of Inspectors General, *Model Legislation For the Establishment of Offices of Inspector General*, available at http://inspectorsgeneral.org/files/2011/01/IG-Model-Legislation.pdf.

[4] Association of Inspectors General, *Principles and Standards for Offices of Inspectors General (Green Book),* at 21 (July 2024), available at https://inspectorsgeneral.org/.

[5] *Id*.

[6] Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Federal Offices of Inspector General* § II.A (Aug. 2012), available at https://www.ignet.gov/sites/default/files/files/Silver%20Book%20Revision%20-%208-20-12r.pdf.

devices, the process is even more cumbersome. Because the production of text messages does not involve the coding of senders and recipients as attorneys, DOL insists that it must conduct a manual review of all text messages on City devices that are responsive to OIG's requests. DOL may take—and has taken—many months to conduct this review, severely delaying OIG investigations, including in matters where OIG has strict statutory investigative timelines. Indeed, in one such instance, OIG did not receive any responsive text messages from a Mayor's City device for over a year, in part due to DOL's privilege review.

## C | The Higher Duty of Government Attorneys Must Be Prioritized Over Remote and Speculative Risk of Waiving a Privilege as to Third Parties

For the vast majority of communications withheld from OIG over purported assertions of attorney-client privilege, DOL is the attorney and not the client—and is therefore not the holder of any privilege. Rather, the City or City departments are the clients, but DOL asserts a privilege to withhold relevant information from OIG investigations. The specific duties government attorneys owe to the public require production of information to OIG even where that information may be withheld from third parties pursuant to attorney-client privilege. There is minimal risk that a statutorily mandated production of information to OIG might waive the City's privileges vis-à-vis third parties, and unfounded speculation that the City may waive its privileges as against a third-party is not a proper or lawful basis to withhold materials from OIG. Indeed, the City's broader litigation and risk management interests are best served by thorough, effective, and independent OIG investigations.

The duties of government attorneys are different—and broader—than the duties of attorneys representing private clients. The law has long recognized that a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). This higher duty is reflected in the rules of professional conduct governing attorneys.[7]

The Appellate Court of Illinois recently explained that "[a]s public servants, government lawyers have a unique responsibility to serve the public's compelling interests in 'honest government' and 'compliance with the law' by public officials; to serve those interests, government lawyers are thus duty-bound to assist the law in 'uncovering illegality' and 'exposing wrongdoing' among those who hold public office." *People v. Trutenko*, 2024 IL App (1st) 232333, ¶ 97. "This stands in stark contrast to the duties of private counsel, whose appropriate role is to defend clients against criminal charges and protect them from public exposure." *Id*. ¶ 98. "Precisely this difference has led our

[7] The comments to Rule 1.13 of the Illinois Rules of Professional Conduct and the corresponding American Bar Association Model Rule of Professional Conduct similarly distinguish the obligations of government attorneys from attorneys representing private organizations: "[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved." *See* Comment 9 to Ill. R. Prof. Conduct 1.13; Comment 9 to American Bar Association Model Rule 1.13. Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13/.

supreme court to caution that the usual expectations of confidentiality will often have to yield to a government lawyer's overriding duties to prevent, disclose, and remedy wrongful official acts." *Id*. (citing Ill. R. Prof'l Conduct (2010) R. 1.13 cmt. 9). "This point has implications for the attorney-client privilege, for reasons that the Seventh Circuit has very aptly described: 'It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.'" *Id*. ¶ 100 (citing *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002)). So, while it is undoubtedly true that DOL attorneys owe an obligation to safeguard the City's privileged or otherwise confidential information under certain circumstances, *see* Ill. R. Prof'l Conduct 1.6, the law provides that that obligation must yield to government attorneys' higher-order duty to root out government misconduct.

Further, the City is not a separate legal entity from OIG. OIG, "an office of the municipal government," MCC § 2-56-010, is a part of the City and it thus makes little sense for DOL claim that the City's attorney-client communications are privileged from production to the City. In *Ferguson v. Patton*, the Illinois Supreme Court held that the "office of the Inspector General is not, itself, a unit of local government under Illinois law.[8] It is merely a department of the municipal government of the City of Chicago. It was established by municipal ordinance, not state statute, and has no legal status separate and apart from the City." *Ferguson v. Patton*, 2013 IL 112488, ¶ 30 (internal citations omitted). The Corporation Counsel, in turn, represents OIG, just as it does other components of the municipal corporation. *Id*. ¶ 32; MCC § 2-60-020(a)-(c) (empowering the Corporation Counsel to, *inter alia*, "conduct all law business of the City"); MCC § 2-60-050 (allowing all department heads to seek legal advice and opinions from the Corporation Counsel).

Critically, no authority supports the position that the attorney-client privilege operates to protect against a statutorily required production of documents *within* a unitary governmental entity. This is not altered by the fact that OIG and City departments occasionally take adversarial positions on certain issues.[9] The Seventh Circuit has held that the work-product doctrine protected documents exchanged between Department of Justice sections with opposing viewpoints from disclosure to third parties.[10] Because DOJ remained a unitary entity and because a DOJ official had to consider

[8] 2013 IL 112488, ¶ 37, 985 N.E.2d 1000, 1013 (Ill. 2013). In *Ferguson*, the Illinois Supreme Court affirmed the dismissal of the Inspector General's subpoena enforcement action against the Corporation Counsel because OIG is not a legal entity distinct from the City, and because the MCC does not provide OIG with the authority to file subpoena enforcement lawsuits without authorization from the Corporation Counsel. The Court did not, however, address the merits of the attorney-client privilege dispute between OIG and the Corporation Counsel—in fact, the Court vacated the circuit court and appellate court rulings to the extent they addressed the privilege issue. *Id*. ¶ 40. The appellate court likewise did not substantively address the privilege issue; it instead expressly declined to address the issue in a vacuum, without more detailed fact finding conducted by the circuit court. *See Ferguson v. Georges*, 409 Ill. App. 3d 956, 967 (2011). The vacated *Ferguson v. Georges* opinion contains little substantive discussion of the privilege issue beyond a recognition that the nonexistent record below was insufficient for the Corporation Counsel to claim privilege protections.

[9] *See Menasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846, 851-52 (7th Cir. 2013).

[10] *Id.* Indeed, with respect to materials protected by the attorney work-product doctrine, under both federal and Illinois law, disclosure of attorney work product to a third party only waives the privilege where the disclosure "substantially increase[s] the opportunity for potential adversaries to obtain the information." *Sherman v. Ryan*, 392 Ill. App. 3d 712, 737–38 (2009); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006). Production to OIG is not a disclosure to a third party, it is an exchange within the City. Nor does production to OIG meaningfully increase the risk that the City's

the sections' views and pursue a single course of action, the Seventh Circuit held that "information in the nature of attorney work product exchanged among the Department's lawyers *[was] not information exchanged among adverse parties*" and thus remained protected from disclosure to third parties.[11] Likewise, although OIG and City departments may take different and opposing stances on certain issues from time to time, ultimately, both OIG and other City departments are components of the City of Chicago.[12]

Given the higher duties of government attorneys to root out misconduct and corruption, there is little legal basis to believe that disclosure of the City's otherwise privileged materials would pose significant litigation risks to the City. The Seventh Circuit and other circuit courts have distinguished between the privileges that government entities can assert during government investigations into government misconduct on the one hand, and civil disputes with private parties on the other. *See In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002). The Court so held for precisely the reasons discussed in this response: "government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest." *Id*. at 293"; *see also Trutenko,* 2024 IL App (1st) 232333, ¶¶ 97-100 (adopting the foregoing principles). Moreover, the reasons for applying the privilege during a government investigation into government misconduct are diminished: while "[i]ndividuals and corporations are both subject to criminal liability for their transgressions," a government entity "cannot be held criminally liable by either the state itself or the federal government." *Id*. at 293-94.

It would be contrary to established legal principles for a court to hold that the City's statutorily required, internal production of privileged material during a government investigation (where the privilege is inapplicable because the entity does not face liability in that inquiry) requires disclosure in civil litigation (where the entity does face liability). This is because "[m]uch of the reasoning deployed against recognizing a governmental attorney-client privilege in grand jury proceedings supports its recognition in the civil context." *Ross v. City of Memphis*, 423 F.3d 596, 602 (6th Cir. 2005). "The civil context presents different concerns because government entities are frequently exposed to civil liability. The risk of extensive civil liability is particularly acute for municipalities, which do not enjoy sovereign immunity. Thus, in the civil context, government entities are well-served by the privilege, which allows them to investigate potential wrongdoing more fully and, equally important, pursue remedial options." *Id*. So while the specific obligations of government attorneys to the public mean that the attorney-client privilege does not attach in the context of a government investigation of government misconduct, the privilege otherwise operates as it normally would to protect against disclosure to third parties in civil litigation. Indeed, OIG can find no cases to the contrary, in which a court has made government such a disfavored litigant—compelled by law to produce privileged information in an internal investigatory context, only to lose any claim to privilege vis-à-vis external private parties by virtue of that production.[13]

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adversaries in litigation will obtain the City's attorney work product—particularly where, pursuant to MCC § 2-56-110(b), only the Corporation Counsel themselves may publish OIG investigative reports, and would therefore be in a position to prevent public release of any privileged information.

[11] *Id*. (emphasis added).

[12] *Ferguson*, 2013 IL 112488 ¶ 37.

[13] To OIG's knowledge, DOL has identified only a single case in which an entity was deemed to have waived privilege by virtue of an apparently voluntary disclosure to a state auditor, *Breuder v. Board of Trustees of*

Any concerns that producing the City's privileged material to OIG could waive privilege by placing privileged information outside of the City's "control group" under Illinois law, or by providing the information to City employees who do not have a need to know the information, would be misplaced. Such arguments would fail to grapple with the broader conception of the role of government attorneys required by Illinois and federal law. The City has a legal interest—and its attorneys have a legal duty—in rooting out corruption and misconduct, not simply in pursuing and defending litigation. *See, e.g.*, *Trutenko*, 2024 IL App (1st) 232333, ¶¶ 97-100; *Grand Jury 2000-2*, 288 F.3d at 293; Comment 9 to Ill. R. Prof. Conduct 1.13 (discussed supra). Production of privileged materials to OIG can hardly be deemed an unnecessary disclosure, given OIG's statutorily-defined power and duty to investigate misconduct in City government, MCC § 2-56-030.

Full access to records—including records privileged as against third parties—is the national standard and the federal law for inspectors general. Further clarification of the MCC is appropriate on this issue, to prevent DOL from unilaterally substituting its judgment regarding which City records may be subject to oversight and accountability.

# II | The Presence of DOL Attorneys in OIG Investigative Interviews Would Undermine OIG Independence and Legitimacy

The mere presence of DOL attorneys in OIG investigative interviews would materially compromise OIG's independence and effectiveness and the confidentiality of its work. Further, DOL's presence in investigative interviews makes it less likely that interviewees will be forthcoming and cooperative with OIG. DOL's presence in OIG investigative interviews is contrary to national standards for offices of inspector general set forth by the Association of Inspectors General, and DOL attorneys have not been allowed in OIG investigative interviews during my time as Inspector General.[14]

Given DOL's selective and persistent interference in OIG investigations, OIG proposes amendments to the MCC to clarify that DOL and other City attorneys may not attend confidential OIG investigative interviews.

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*Community College District No. 502*, 2021 WL 1165089 (N.D. Ill. 2021). But *Breuder* itself demonstrates the weakness of DOL's legal position: the Court in *Breuder* did not hold that even a voluntary disclosure to the state auditor necessarily waived privilege—only that privilege had been waived because the information was disclosed "without any assurance or agreement that the advice would remain confidential." *Id*. at *6. The assurance that information produced to OIG would remain confidential is found in the MCC itself; § 2-56-110(a) provides that "all investigatory files and reports of the office of inspector general shall be confidential and shall not be divulged to any person or agency, except to the United States Attorney, the Illinois Attorney General or the State's Attorney of Cook County, or as otherwise provided in this chapter or Chapter 2-156."

[14] Association of Inspectors General, *Principles and Standards for Offices of Inspectors General (Green Book)* (July 2024), available at https://inspectorsgeneral.org/.

## A | DOL's Presence in OIG Investigative Interviews Would Interfere with and Compromise OIG's Investigative Work

The hallmark and defining characteristic of OIG work is that it is independent and protected from political influence, and the confidentiality of OIG's investigative work is essential to protecting both the perception and reality that OIG's investigations are free from improper influence. Ongoing OIG investigations are confidential from other parts of City government, including the employee's department, City Hall, and DOL. DOL's presence in OIG interviews would destroy any expectation of confidentiality between OIG and interviewees, and it would create the impression that OIG's investigations are shaped by the interests of other City departments or political actors. Where DOL has recently and repeatedly acted on behalf of political actors and in opposition to OIG, DOL's presence alone is obstructive and compromising because it creates the specter and risks the reality of undue influence on OIG's work to benefit those political actors.

The presence of DOL attorneys in an OIG investigative interview is especially troubling considering the supervisory relationship between the Mayor and the Corporation Counsel. The Mayor is the City's "chief executive" and by law "supervise[s] the conduct of all the officers of the [C]ity" and has the "authority to act . . . in the enforcement of any ordinance of the city." MCC §§ 2-4-010, -020, -030; *see also* 65 ILCS 5/3.1-15-10 ("The chief executive officer of a city shall be a mayor."). The Corporation Counsel, meanwhile, is appointed by the Mayor and "conduct[s] all the law business of the city." MCC § 2-60-020(a). As a practical matter, this creates a situation where the Corporation Counsel is often answering to the Mayor, both as the Corporation Counsel's direct supervisor, and as the City officer who determines much of the direction of the "law business of the city." The closeness of this relationship creates the impression that the Corporation Counsel functions as the Mayor's lawyer. As a result, the presence of the Corporation Counsel or their designee in OIG interviews creates the appearance that—and threatens the reality that—the Mayor's Office is engaging in efforts to compromise and interfere with OIG investigations. At a minimum, DOL's presence at OIG investigative interviews inherently chills information sharing with OIG. Interviewees may reasonably fear that DOL attorneys will report what information the witness provided to OIG to the Mayor's Office or to other high-ranking City officials who are in a position to retaliate against the interviewee. The result is that some witnesses will be less forthcoming and less willing to share information with OIG in the presence of DOL attorneys. The chilling effect created by DOL presence at OIG investigative interviews would profoundly affect OIG's effectiveness and timeliness in identifying misconduct and abuse in City government.

## B | DOL Presence in OIG Investigative Interviews Would Contravene National Standards

OIG is a member of the Association of Inspectors General (AIG), which sets standards for offices of inspector general via its *Principles and Standards for Offices of Inspectors General* (Green Book). The Green Book represents a definitive and nationally accepted set of standards for offices of inspector general. Notably, OIG's Public Safety section is required to comply with the Green Book in accordance with the *Illinois v. Chicago* consent decree. *See* Consent Decree ¶ 557, *State of Ill. v. City of Chi.*, No 17-cv-6260 (N.D. Ill. Jan. 31, 2019) (ECF No. 703-1). Additionally, AIG conducts a triennial audit of OIG to ensure that OIG maintains compliance with Green Book standards.[15]

[15] *Our Office – OIG Peer Review*, City of Chicago Office of Inspector General, https://igchicago.org/about-the-office/our-office/#oig_peer_review.

One of the quality standards described in the Green Book is "Independence." This standard prohibits "restrict[ions]" or "interfere[nce]" with "the OIGs ability to form independent and objective opinions and conclusions" including, "[i]nterference or undue influence in the OIGs . . . approach to be used." Green Book at 10. AIG has stated unequivocally that "[m]anagement's demand for information . . . regarding on-going . . . investigations . . . would be considered interference hindering IG independence."[16] Such demands "could result in the public's loss of confidence in an independent and impartial IG." *AIG White Paper* at 2. That is, DOL's demands to attend OIG investigative interviews are contrary to national standards governing the works of inspectors general and meaningfully interfere with OIG's investigative work.

## C | DOL's Selective Demands to Attend Investigative Interviews in High-Profile Matters Give the Appearance of Efforts to Protect Political Interests

Further, DOL's demands to attend OIG investigative interviews of their choosing present the appearance that DOL is acting in the individual interests of certain City actors. This appearance—that DOL is protecting certain individual political interests rather than the City's broader interests—is underscored by the fact that DOL does not regularly attempt to attend interviews in police misconduct investigations. Police misconduct is the source of hundreds of millions of dollars in liability risk to the City. The City has paid out over $290 million in judgments and settlements in lawsuits related to the Chicago Police Department (CPD) in 2021-23 alone.[17] Despite this immense source of liability and risk, it is not the regular practice of DOL to demand that DOL attorneys attend investigative interviews conducted by CPD's Bureau of Internal Affairs or the Civilian Office of Police Accountability into the same police misconduct that might underly those settlements and judgements. Instead, DOL demands to attend OIG interviews involving senior members of the Mayor's Office, senior mayoral appointees, DOL employees, and individuals involved in matters that may result in embarrassment to City leaders.

Notably, DOL has identified only three examples in which it demanded to attend and actually attended OIG investigative interviews under the administration of previous inspectors general: an OIG investigation into the actions taken by sworn Chicago Police Department (CPD) personnel after a senior member of CPD leadership was found sleeping at the wheel of an idling CPD vehicle; an OIG investigation regarding City employees' handling of the demolition of an industrial smokestack; and an OIG investigation into the City's handling of the aftermath of CPD's search of the home of Anjanette Young. These matters all received substantial media attention and risked

[16] *See* Association of Inspectors General, *Position Paper: Role of the Inspector General – Management's Oversight Role of an Office of Inspector General* at 2, Dec. 2022, http://inspectorsgeneral.org/files/2022/12/IG-Independence-Mgt-Oversight.Approved.10.11.22.pdf [hereinafter *AIG White Paper*].

[17] City of Chi. Dep't of Law, *City of Chicago's Report on Chicago Police Department 2021 Litigation* at 7 & tbl. 2, Dec. 29, 2022, https://www.chicago.gov/content/dam/city/sites/public-safety-and-violenc-reduction/pdfs/2021-Annual-Litigation-Report-and-Exhibits.pdf; City of Chi. Dep't of Law, *City of Chicago's Report on 2022 Chicago Police Department Litigation* at 7 & fig. 3, Nov. 2023, https://www.chicago.gov/content/dam/city/depts/dol/CPDLitigationReports/City%20of%20Chicago%20Report%20on%202022%20CPD%20Litigation.pdf; City of Chi. Dep't of Law, *City of Chicago's 2023 Report on Chicago Police Department Litigation* at 8 & fig. 3, June 2024, https://www.chicago.gov/content/dam/city/depts/dol/CPDLitigationReports/City%20of%20Chicago%20Report%20on%202023%20CPD%20Litigation.pdf.

embarrassing City officials. DOL's selective attendance of interviews in these particular investigations reinforces the appearance that DOL prioritizes matters that may reflect poorly on high-ranking City officials, particularly when DOL has not consistently demanded to attend investigative interviews in less publicized matters that may present a far greater financial risk to the City.

## D | DOL has Demanded to Attend Numerous OIG Investigative Interviews In At Least 10 OIG Investigations Since April 2022, Resulting in the Cancellation of Numerous Interviews and Blocking Critical Avenues of Investigation

DOL has demanded to attend OIG investigative interviews in at least 10 investigations during my tenure as Inspector General. The vast majority of recent investigations in which DOL sought to attend an OIG investigative interview involved conduct of senior members of the Mayor's Office or high-ranking Mayoral appointees. Notably, DOL has not regularly demanded to attend OIG investigative interviews in matters directed at the conduct of individuals or entities who are not high-ranking City officials or employees—even when the conduct OIG is investigating is also the subject of parallel litigation against the City.

The following are examples of recent instances in which DOL has demanded to attend an OIG investigative interview. Although these investigations represent a relatively narrow portion of OIG's overall investigative work, the impact of DOL's interference is particularly acute because these investigations relate to the conduct of individuals and entities with significant authority and influence and are matters of important public concern. To be clear, in my tenure as Inspector General, OIG has not proceeded with an investigative interview when DOL is present. DOL's demands to attend investigative interviews has caused the cancellation of numerous interviews, blocking critical avenues of investigation:

- OIG opened an investigation related to a prominent Host Community Agreement seeking to assess, among other things: (1) whether the award of the Host Community Agreement was tainted by any improper influences; (2) whether the City followed applicable laws, regulations, and best practices in awarding the Host Community Agreement; and (3) whether City officials directed the awardee of the Host Community Agreement to enter into a lucrative lease with a third party based on improper influences. DOL repeatedly demanded that it be present at OIG interviews of multiple high-ranking Mayor's Office employees, multiple current and former City department heads, and a City Council employee.
- OIG opened an investigation into whether a now-former elected official violated their fiduciary duty, misused City property, and solicited political contributions from City employees in violation of the Governmental Ethics Ordinance (GEO). DOL and the former elected official demanded that DOL be present at the interview of the elected official.
- OIG opened an investigation into allegations that a Cabinet-level Mayor's Office employee misused City time and resources in violation of the GEO. DOL demanded to be present at the OIG interview of an Administrative Assistant in the Mayor's Office.

- OIG opened an investigation into whether a Mayor or another City employee improperly directed the removal of an individual from a City Council meeting. OIG sought to interview a City Council employee as a subject of its investigation. DOL demanded that a DOL attorney be present at the subject interview.

Additionally, DOL has demanded to attend OIG investigative interviews in four additional OIG investigations that remain ongoing. These investigations relate to allegations of potential bribery, an allegation of retaliation via the withholding of City services, and multiple instances of alleged retaliation against individuals who made protected reports to OIG. DOL's demands to attend these interviews—including in cases in which individuals had identified fears of retaliation for protected reporting—is, put simply, egregiously obstructive.

# III | Corporation Counsel's Role in Deciding Which OIG Subpoenas Will Be Enforced Undermines OIG Independence

The MCC authorizes OIG to issue administrative subpoenas to further its investigative work. MCC § 2-56-30(h). OIG's subpoena authority is essential to OIG's ability to root out misconduct in City government. While City officials, employees, and contractors owe a broad duty to cooperate with OIG, MCC § 2-56-090, OIG has legal authority to issue and enforce subpoenas because OIG investigations often necessitate gathering information held by individuals and entities with no statutory duty to cooperate with OIG. OIG's subpoena authority enables it to obtain critical evidence from individuals who otherwise would have no obligation to cooperate with OIG. The importance of subpoena authority to OIG's investigative work cannot be overstated.

The MCC grants OIG the authority to issue subpoenas in investigations related "to misconduct within the programs and operation of the city government by" a broad group of actors, including "all elected officers and appointed officers of the city government in the performance of their official duties." *See* MCC §§ 2-56-030(h), 2-56-040, 2-56-050(a). OIG regularly issues subpoenas in the course of its investigative work. For example, OIG often issues subpoenas to banks, mobile providers, and other entities outside of the City government for records crucial to OIG investigations. OIG also regularly issues subpoenas to former City employees and officials, who no longer have a statutory duty to cooperate with OIG. These subpoenas may require recipients to appear for an interview with OIG investigators, and/or to provide documents or records.

When an individual fails to comply with an OIG subpoena, the subpoena is enforced via the filing of a lawsuit to obtain a court order requiring compliance with the subpoena. The Inspector General is empowered to "work with the Law Department to retain counsel to enforce . . . subpoenas," and the Inspector General may request that the Corporation Counsel designate OIG attorneys as Special Assistant Corporation Counsel for the purpose of subpoena enforcement. MCC § 2-56-030(h)(2)(i). The Corporation Counsel's approval of the Inspector General's requests "shall not be unreasonably withheld, delayed or conditioned." *Id*.

DOL has read the MCC, as written, to permit Corporation Counsel to decide which OIG subpoenas may be enforced. OIG does not object to notifying Corporation Counsel when an OIG subpoena must be enforced, because Corporation Counsel is responsible under the MCC for the legal business of the City. But further clarification of the MCC is necessary and appropriate to prevent

selective decisions to disable certain OIG investigations at the discretion of the Corporation Counsel. DOL has previously taken the position that it is entitled to confidential information about ongoing investigations prior to appointing OIG attorneys as Special Assistant Corporation Counsel for purposes of enforcing an OIG subpoena. To be clear, OIG declined to provide confidential information, including the identity of the subject of the OIG investigation at issue, but DOL's demands for this information resulted in significant delay to the initiation of an enforcement action.

OIG proposes amendments to the MCC to protect OIG's ability to enforce its lawfully issued subpoenas without selective interference or delay by DOL. OIG notes that the MCC does not permit selective approval by DOL in the subpoena enforcement powers afforded to the Civilian Office of Police Accountability, which may retain counsel to enforce subpoenas without seeking Corporation Counsel approval for each enforcement action pursuant to MCC § 2-78-120(q); OIG has modeled its proposed amendments after the existing language in that section.

# IV | Conclusion

I am grateful for the thoughtful engagement of the Committee on Ethics and Government Oversight with these concerns. It is perhaps more important than ever that Chicagoans can trust their City government, and I believe that OIG's proposed legislative amendments would empower and protect OIG in the service of its mission.

# Appendix A: Proposed Legislative Changes

Proposed new text is underlined; proposed eliminated text is struck through. Omitted sections are ones to which no changes are proposed.

CHAPTER 2-56
OFFICE OF INSPECTOR GENERAL

**2-56-030 Inspector General – Powers and duties.**

In addition to other powers conferred herein, the Inspector General shall have the following powers and duties:

(a) To receive and register complaints and information concerning misconduct, inefficiency and waste within the city government;

(b) To investigate the performance of governmental officers, employees, functions and programs, either in response to complaints or on the Inspector General's own initiative, in order to detect and prevent misconduct, inefficiency and waste within the programs and operations of the city government;

(c) To promote economy, efficiency, effectiveness and integrity in the administration of the programs and operations of the city government by reviewing programs, identifying any inefficiencies, waste and potential for misconduct therein, and recommending to the Mayor and/or the City Council policies and methods for the elimination of inefficiencies and waste, and the prevention of misconduct;

(d) To report to the ultimate jurisdictional authority concerning results of investigations, audits and program reviews undertaken by the Office of Inspector General;

(e) To request information related to an investigation, audit or program review from any employee, elected or appointed officer, department, agency, contractor, subcontractor, agent or licensee of the city, and every applicant for certification of eligibility for a city contract or program;

(f) To conduct public hearings, at the Inspector General's discretion, in the course of any activity conducted pursuant to this chapter;

(g) To administer oaths and to examine witnesses under oath;

(h) (1) To issue subpoenas to compel the attendance of witnesses for purposes of examination and the production of documents and other items for inspection and/or duplication. Issuance of subpoenas shall be subject to the restrictions contained in Section 2-56-040; and

(2) To work with the Law Department to defend against subpoenas and

(3) To retain counsel to enforce ~~and defend against~~ subpoenas issued pursuant to Section 2-56-040, provided:

(i) such counsel are, at the exclusive option and request of the Inspector General, either: (A) Office of Inspector General attorneys whom the Corporation Counsel shall promptly designate~~s~~ upon the inspector general's request as Special Assistants Corporation Counsel for the limited purposes stated in this paragraph (h)(3~~2~~), or (B) outside counsel~~,~~ provided: ~~acceptable to the Inspector General, retained for said limited purposes by the Law Department. Corporation Counsel approval of the Inspector General's requests made under this paragraph (h)(2) shall not be unreasonably withheld, delayed or conditioned~~

(ii) any such outside counsel are selected from a pool of no fewer than five firms previously approved by the Corporation Counsel after consultation with the inspector general and are retained pursuant to the standard terms of engagement then used by the Corporation Counsel, including any limitations on fees or costs; ~~and~~

(iii) the costs of such representation are paid from the appropriations of the Office of Inspector

General; and.

(iv) the inspector general provides the Corporation Counsel with notice of the engagement, including the firm selected and a copy of the engagement agreement.

Nothing in this provision shall be construed to alter the exclusive authority of the Corporation Counsel to either defend and supervise the defense of claims against the City and/or individual City defendants, or to provide the Inspector General or his Office with the authority to settle monetary or other claims against the City and/or individual City defendants.

(i) To exercise any powers or duties granted to the Inspector General specified in this Code with respect to any sister agency, as that term is defined in Section 1-23-010, pursuant to an intergovernmental agreement that the City may enter into with such sister agency as authorized by the City Council, and as such power or duty may be modified by such agreement;

(j) For the purpose of assisting in the investigation and prosecution of matters within the jurisdiction of the Inspector General as specified in this chapter, to engage in activities that are both authorized by and carried out under the direction of the Illinois Attorney General, the Cook County State's Attorney, the United States Department of Justice and other agencies authorized to investigate and prosecute violations of criminal law. The Inspector General shall undertake such training and certification as necessary and appropriate to engage in such activities. Provided, however, employees of the Office of Inspector General shall not, in the performance of their official duties under the Code: (i) arrest, commit for examination or detain in custody any person, or (ii) carry a firearm or other weapon;

(k) To promulgate rules for the conduct of investigations and public hearings consistent with the requirements of due process of law and equal protection under the law;

(l) To select, subject to the approval of the City Council, and supervise the Deputy Inspector General for Public Safety established by Sections 2-56-200 through 2-56-280 of this Chapter; and

(m) To receive and address complaints of sexual harassment in violation of Chapter 2-156 in accordance with Section 2-56-050.

(Prior code § 19-3; Added Coun. J. 10-4-89, p. 5726; Amend Coun. J. 10-8-14, p. 92142, § 1; Amend Coun. J. 3-18-15, p. 103772, § 1; Amend Coun. J. 2-10-16, p. 19348, § 1; Amend Coun. J. 10-5-16, p. 34471, § 5; Amend Coun. J. 11-8-17, p. 58447, § 6; Amend Coun. J. 7-24-19, p. 2394, § 1; Amend Coun. J. 11-7-22, p. 54984, § 3)

**2-56-050 Conduct of city officers, employees and other entities.**

(a) The powers and duties of the inspector general shall extend to the conduct of the following: (1) all elected officers and appointed officers of the city government in the performance of their official duties; (2) all city employees in the performance of their official duties; (3) lobbyists engaged in the lobbying of elected or appointed city officers or employees; (4) all contractors and subcontractors in the providing of goods or services to the city, the city council, any city council committee or bureau or other service agency of the city council pursuant to a contract; (5) persons seeking contracts or certification of eligibility for contracts with the city, the city council, any city council committee or bureau or other service agency of the city council; (6) persons seeking certification of eligibility for participation in any city program; and (7) any corporation, trust, or other entity established by the City pursuant to an ordinance adopted by the City Council on October 11, 2017 and in accordance with Division 13 of Article 8 of the Illinois Municipal Code, codified at 65 ILCS 5/8-13-5, et seq., for the limited purpose of issuing obligations for the benefit of the City. Nothing in this section shall preclude the inspector general from referring a complaint or information to the appropriate local, state or federal inspector general, the appropriate sister agency, or the appropriate federal, state or local law enforcement authorities.

(b) (1) Notwithstanding any other provision in this chapter to the contrary, if the office of the inspector general receives a complaint alleging a violation of Chapter 2-156 against any elected or appointed city officer, city employee or any other person subject to Chapter 2-156, the inspector

general, after reviewing the complaint, may only: (i) decline to open an investigation if he determines that the complaint lacks foundation or does not relate to a violation of Chapter 2-156; or (ii) refer the matter to the appropriate authority if he determines that the potential violation is minor and can be resolved internally as a personnel matter; or (iii) open an investigation. The board of ethics shall promulgate, in consultation with the investigating authorities, rules setting forth the criteria to determine whether a potential violation of Chapter 2-156 is minor.

(2) Notwithstanding any other provision in this chapter to the contrary, at any point during an investigation that the inspector general conducts on matters pertaining to violations of Chapter 2-156, the inspector general may only: (i) dismiss the matter and close the investigation based on a finding that the alleged violation is not sustained; or (ii) refer the matter to the appropriate law enforcement authority, if he reasonably believes that the alleged misconduct would violate a criminal statute; or (iii) request a probable cause finding in accordance with Section 2-156-385.

(3) The inspector general shall conclude his investigation of any violation of Chapter 2-156 under his jurisdiction no later than two years from the date of initiating the investigation; provided, however, that any time period during which the person under investigation has taken affirmative action to conceal evidence or delay the investigation, shall not count towards the two-year period. Notwithstanding any tolling or suspension of time applied, governmental ethics investigations by the inspector general under this Chapter are subject to an absolute four-year time limit from the date of initiation.

(c) Before the inspector general interviews a person subject to investigation or a subpoena in relation to a complaint under his jurisdiction, he shall inform the person of that person's right to be represented by counsel at the interview. <u>That person shall be entitled to personal representation in their individual capacity only. In any interview conducted by the Office of Inspector General in the course of an investigation, attorneys representing the City or retained or employed by the City shall not be permitted to attend except at the inspector general's discretion.</u>

(Prior code § 19-5; Added Coun. J. 10-4-89, p. 5726; Amend Coun. J. 5-12-10, p. 92409, § 3; Amend Coun. J. 2-13-13, p. 46730, § 3; Amend Coun. J. 11-18-15, p. 14398, § 2; Amend Coun. J. 2-10-16, p. 19348, § 1; Amend Coun. J. 10-11-17, p. 55903, § 7; Amend Coun. J. 7-24-19, p. 2394, § 1)

**2-56-090 Duty to cooperate.**

It shall be the duty of every elected or appointed officer, employee, department, agency, lobbyist engaged in the lobbying of elected or appointed City officers or employees, contractor, subcontractor, agent, or licensee of the City, and every applicant for certification of eligibility for a City contract or program, to cooperate with the inspector general in any inquiry undertaken pursuant to this chapter. Each department's premises, equipment, personnel, books, records and papers shall be made available as soon as practicable to the inspector general. Every City contract and every bid, proposal, application or solicitation for a City contract, and every application for certification of eligibility for a City contract or program shall contain a statement that the person understands and will abide by all provisions of this chapter. <u>The duty of every elected or appointed officer, employee, department, and agency to cooperate with the inspector general shall supersede any claim of privilege asserted by or on behalf of the City or its departments or agencies.</u>

(Prior code § 19-9; Added Coun. J. 10-4-89, p. 5726; Amend Coun. J. 5-12-10, p. 92409, § 8; Amend Coun. J. 2-10-16, p. 19348, § 1; Amend Coun. J. 11-7-22, p. 54948, Art. I, § 6)