

UNCLASSIFIED

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

APR 29 2011

The Honorable Saxby Chambliss
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Madam Chairman and Vice Chairman Chambliss:

(U) The enclosed documents respond to congressional direction in the Fiscal Year 2010 Intelligence Authorization Act, P.L. 111-259, Section 348, subsection (a)(1) and (c)(1) which reads:

(U) "(a) DNI DIRECTIVE GOVERNING ACCESS. –

(1) The Director of National Intelligence, in consultation with the Comptroller General of the United States, shall issue a written directive governing the access of the Comptroller General to information in the possession of an element of the intelligence community.

(c) SUBMISSION TO CONGRESS. –

(1) SUBMISSION OF DIRECTIVE. –The directive issued under subsection (a)(1) shall be submitted to Congress by the Director of National Intelligence, together with any comments of the Comptroller General of the United States, no later than May 1, 2011."

(U) Originals of this letter are being sent to the leadership of the committees with intelligence oversight responsibilities. If you have any questions, please contact Lillian Jones at (703) 275-2485 in the Office of Legislative Affairs.

Sincerely,



Kathleen Turner
Director of Legislative Affairs

Enclosures:

1. Intelligence Community Directive (ICD 114)
2. Comptroller General's Comments

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INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 114



COMPTROLLER GENERAL ACCESS TO INTELLIGENCE COMMUNITY INFORMATION (EFFECTIVE: 30 JUNE 2011)

A. AUTHORITY: The National Security Act of 1947, as amended; Executive Order (EO) 12333, as amended, and other applicable provisions of law.

B. PURPOSE

1. This Intelligence Community (IC) Directive addresses the requirement in the Intelligence Authorization Act of 2010 (Public Law 111-259, section 348) to establish policy for access to information in the possession of an IC element by the Comptroller General through the Government Accountability Office (GAO).

2. This Directive provides guidance to the IC elements that is consistent with both the National Security Act of 1947, which provides the oversight structure for intelligence activities, and Chapter 7 of Title 31, which provides GAO the jurisdiction and authority to conduct audits and reviews of government programs and activities.

C. APPLICABILITY

1. This Directive applies to the IC, as defined by the National Security Act of 1947, as amended, and to such other elements of any other department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence (DNI) and the head of the department or agency concerned, as an element of the IC.

2. This Directive shall apply to requests by the Comptroller General for information in the possession of an IC element that is related to intelligence activities and programs. Nothing in this Directive is intended to diminish the scope of support that IC elements have provided to GAO. For IC elements within departments, this Directive complements departmental policies governing GAO access to departmental information to the greatest extent possible. Departmental policies shall have primacy except for requests for national intelligence information related to activities and programs funded wholly or in part by the National Intelligence Program (NIP).

3. Nothing in this Directive shall be construed to authorize the Comptroller General or GAO to audit or examine records and expenditures made under the authority of 22 U.S Code 2396(a)(8), 10 U.S Code 127, 7231, or 50 U.S Code 403j(b).

D. POLICY

1. It is IC policy to cooperate with the Comptroller General, through the GAO, to the fullest extent possible, and to provide timely responses to requests for information.

2. To the extent consistent with national security and the protection of intelligence sources and methods, IC elements shall provide GAO access to information that relates to matters that are the subject of announced GAO reviews.

3. IC element heads are responsible for decisions regarding GAO access to information consistent with the guidelines set forth in this Directive. Those decisions apply only to information or documents originated by that particular IC element.

4. IC elements shall evaluate GAO requests for information on a case-by-case basis.

a. Generally, IC elements shall cooperate with GAO audits or reviews and make information available to appropriately cleared GAO personnel. Finished, disseminated national intelligence information relevant to a GAO review, information relating to the administration of a US government-wide program or activity, and publicly available information shall generally be provided to GAO.

b. Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support a GAO audit or review of core national intelligence capabilities and activities, which include intelligence collection operations, intelligence analyses and analytical techniques, counterintelligence operations, and intelligence funding. IC elements may on a case-by-case basis provide information in response to any GAO requests not related to GAO audits or reviews of core national intelligence capabilities and activities. Access determinations for all such requests shall be made in a manner consistent with this Directive and applicable Departmental directives.

c. When making access determinations, IC elements shall also consider whether the information is subject to statutory restrictions or executive branch confidentiality interests. Information on intelligence sources and methods, and information related to covert action shall not be provided.

5. IC elements shall not categorically deny GAO access to information, nor shall they withhold information solely because the information relates to a program that is funded by the NIP.

a. IC elements shall carefully consider requests for information based on dialogue with GAO and in a manner consistent with this Directive.

b. IC elements shall work with GAO to explore alternative means to accommodate a request for access to specific information if it is determined that GAO should not have access to the specific information requested.

6. Information provided to GAO shall be made available in a manner consistent with the obligation to protect intelligence sources and methods. Access to information shall be tailored after discussion with GAO to address specific objectives of the particular review. Accordingly,

a. Access by GAO personnel to information held by IC elements shall be consistent with principles of eligibility for access to classified national security information and need-to-know as outlined in EOs 12968 and 13526;

b. Consistent with Section D above, GAO may be afforded access to classified or other sensitive information only after GAO:

(1) Identifies the individuals who will have access to such information and documents; and

(2) Verifies that:

(a) the individuals being granted access possess the appropriate security clearance, or have obtained a limited security approval and have signed an applicable non-disclosure agreement;

(b) if information is to be retained by GAO it has secure facilities accredited to receive and store such information and holds such information, in accordance with classification, dissemination controls, and other special handling requirements;

(c) it has acknowledged and agreed to abide by the classification, dissemination controls, and other special handling requirements of any provided document or information; and

(d) its retention and dissemination of intelligence information shall comply with EO 12333, part 2, as it pertains to US persons information.

7. IC element responses to GAO products.

a. If GAO provides an IC element an opportunity to comment on a GAO product, the IC element is strongly encouraged to provide GAO with a timely response.

b. When a GAO report contains a recommendation concerning an IC element or intelligence activities, the concerned element shall submit a written statement addressing the recommendations within 60 calendar days of the date of the report to the appropriate House and Senate committees in the same manner as provided by 31 US Code 720. A copy of such statement shall also be provided to the ODNI Office of Legislative Affairs (OLA).

E. ROLES AND RESPONSIBILITIES: To ensure that this Directive is fully implemented, each IC element head shall:

1. Engage in dialogue with GAO, as appropriate;

2. Maintain or develop written procedures that detail the element's process for responding to GAO reviews. These procedures shall include at a minimum the following:

a. A presumption of cooperation including a process for exploring alternative means of accommodating GAO requests, to the extent possible, and within a reasonable time;

b. Designation of an appropriate initial point of contact in the element for coordinating GAO reviews. This point of contact shall be responsible for ensuring that GAO is informed of the classification and sensitivity of any information provided as well as any special handling instructions, as appropriate;

c. A process to assess GAO requests for information that provides for access determinations to be made at the lowest possible level consistent with organizational needs;

- d. A requirement that the element respond to GAO requests for access to information within a reasonable timeframe to include notification to GAO of any delays;
- e. A review process whereby an access issue that is not resolved at the lowest possible level may be elevated within an IC element in an attempt to facilitate resolution;
- f. A process for documenting formal denials of GAO requests for information; and,
- g. A method of alerting GAO to the confidentiality obligations and penalties at 31 US Code 716(e) and Section 348(b) of Public Law 111-259.

3. Provide the ODNI Office of Legislative Affairs (OLA) a copy of the procedures issued pursuant to Section E.2.

4. Promptly notify the ODNI OLA of GAO requests for engagement with an IC element and subsequently of IC element decisions on access. ODNI notification shall not delay IC element responses to GAO requests.

5. Determine that information made available to GAO is responsive to the GAO review for which the information or record is requested and is supported by a written GAO request that clearly identifies the purpose of the request.

6. Upon receipt of any request for access to information that may affect the joint equities of other IC elements, coordinate responses with other affected offices and elements of the IC.

7. Ensure that any GAO request for access to another agency's information is referred to that agency or that information responsive to such a request is made available to GAO only after obtaining the documented consent of that agency.

8. If after following procedures developed pursuant to Section E.2, the IC element determines that a GAO request for information cannot be accommodated, the IC element shall promptly advise GAO of the denial of a request for information with a written justification and provide a copy to the ODNI OLA.

F. EFFECTIVE DATE: This ICD becomes effective on June 30, 2011.



Director of National Intelligence

29 April 2011

Date



GAO

Accountability • Integrity • Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

April 28, 2011

The Honorable James R. Clapper, Jr.
Director of National Intelligence

Subject: *GAO Comments on Intelligence Community Directive Number 114:
Comptroller General Access to Intelligence Community Information*

Dear Director Clapper:

In accordance with the Intelligence Authorization Act for Fiscal Year 2010, this letter provides GAO's comments on Intelligence Community Directive (ICD) Number 114: Comptroller General Access to Intelligence Community Information.¹ The statutory requirement to develop a directive on this subject was designed to address the historic challenges that GAO has experienced in gaining access to information in the Intelligence Community (IC), and we believe that the directive provides a starting point for addressing those challenges. The directive contains a number of provisions to promote constructive interaction between GAO and elements of the IC, such as by establishing a presumption of cooperation with GAO. We do, however, have concerns with how several terms in the directive could be interpreted, since they are framed as areas where information would generally not be available to GAO for certain audits or reviews. Consequently, it is crucial that these terms and the overall directive be carefully implemented and monitored to ensure that GAO is able to obtain the information it needs to assist Congress in its oversight responsibilities, including responding to requests from the committees on armed services, justice, homeland security, foreign affairs, and appropriations, as well as the congressional intelligence committees.

Fundamentally, GAO has broad statutory authority to evaluate agency programs and to investigate matters related to the receipt, disbursement, and use of public money under 31 U.S.C. §§ 712 and 717, and to access agency records under 31 U.S.C. § 716. These statutes and others provide GAO with the necessary authority to perform audits and evaluations of IC activities.² GAO is required by statute to protect the

¹ Pub. L. No. 111-259, § 348, 124 Stat. 2654, 2700 (2010) (requiring the Director of National Intelligence, in consultation with the Comptroller General of the United States, to issue a written directive governing the access of the Comptroller General to information in the possession of an element of the intelligence community, and to submit the directive to Congress, together with any comments of the Comptroller General, no later than May 1, 2011).

²See, e.g., Letter from Gene L. Dodaro, Acting Comptroller General of the United States, to the Honorable Dianne Feinstein, Chairman, and the Honorable Christopher S. Bond, Vice Chairman, Select Committee on Intelligence, U.S. Senate, and to the Honorable Silvestre Reyes, Chairman, and the Honorable Peter Hoekstra, Ranking Republican, Permanent Select Committee on Intelligence,

confidentiality of information, and GAO has processes in place to protect the most highly sensitive and classified information possessed by the government.³ Within GAO's authority, specific safeguards exist to reflect the particularly sensitive nature of certain intelligence activities and programs.⁴

Recognizing GAO's access needs as well as the sensitive nature of certain information in the possession of IC elements, the directive contains a number of provisions designed to establish a consistent process for interaction between the IC and GAO. For example, the directive establishes a presumption of cooperation with GAO, including a process for exploring alternative means of accommodating GAO requests for particularly sensitive information; requires timely responses to GAO requests; requires resolution of access disputes at the lowest possible organizational level; and requires communication with GAO, including notification of any delays in responding to requests for information. These tenets are also required to be included in each IC element's own procedures for responding to GAO reviews. In addition, IC elements are directed to follow specific policies in interacting with GAO. For example, an important provision in the directive makes clear that information should not be denied to GAO solely because it relates to a program that is funded by the National Intelligence Program (NIP), and it states that IC elements shall not categorically deny GAO access to information.

The key area in the directive that gives us concern is the provision that conditions GAO's access to certain information on whether GAO is conducting an "audit or review" of "core national intelligence capabilities and activities." This provision, while providing a possible framework for case-by-case reviews of GAO requests for sensitive information in the IC, will require careful implementation. The language, as set forth in section D.4.b., states:

"Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support a GAO audit or review of core national intelligence capabilities and activities, which include intelligence collection operations, intelligence analyses and analytical techniques, counterintelligence operations, and intelligence funding. IC elements may on a case-by-case basis provide information in response to any GAO requests not related to GAO audits or reviews of core national intelligence capabilities and activities."

U.S. House of Representatives (Mar. 18, 2010)(submitted in support of the proposed Intelligence Authorization Act for Fiscal Year 2010). See also Letter from David M. Walker, Comptroller General of the United States, to the Honorable John D. Rockefeller IV, Chairman, and the Honorable Christopher S. Bond, Vice Chairman, Select Committee on Intelligence, U.S. Senate (Mar. 1, 2007)(submitted in support of the proposed Intelligence Community Audit Act of 2007).

³ Pursuant to 31 U.S.C. § 716(e), GAO is required to maintain the same level of confidentiality for an agency record as is required of the head of the agency from which it was obtained, and unauthorized disclosures are subject to the same statutory penalties.

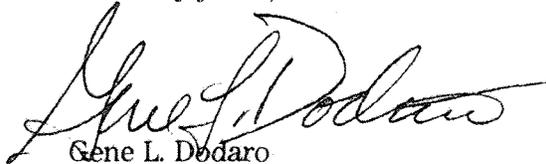
⁴ These include narrow statutory limitations on our financial audits of certain "unvouchered" accounts, 31 U.S.C. § 3524(d), and on our authority to file a civil action to compel access to certain foreign intelligence and counterintelligence information, 31 U.S.C. § 716(d)(1)(A).

Given historical experience, we are concerned that agencies might interpret the language regarding “core” national intelligence capabilities and activities to apply to a broader range of audits and reviews than ODNI intends.⁵ In fact, agencies have in the past denied GAO access to requested information based on a very expansive view of what “intelligence” entails. Therefore, the construct of “core” national intelligence capabilities and activities is going to require very careful implementation and close monitoring by ODNI, GAO, and the Congress to guard against an inappropriately expansive reading of that language by the IC elements implementing the guidance.⁶ In light of these concerns, we urge ODNI to take the lead in developing, with input from GAO, a practical process that will guide and provide oversight to the IC elements as they engage in case-by-case determinations under this provision.

In conclusion, GAO believes ICD 114 is a starting point in improving GAO’s access to information in the possession of elements of the IC. There are positive aspects of the directive, including its focus on establishing a presumption of cooperation with GAO, and promoting accommodation, timeliness, and communication. However, the concept of “core” national intelligence capabilities and activities and other language in the directive, if interpreted broadly, could significantly hinder GAO’s ability to conduct related work that we are routinely requested by the Congress to do. Therefore, careful implementation and close monitoring will be needed by ODNI, GAO, and the Congress. It is imperative that ODNI work with GAO in this process and that the IC elements engage with us as they develop individual agency procedures to implement the directive.

We appreciate the time and effort that you and your staff have put into the development of this directive. We look forward to this continuing dialogue with ODNI and the IC elements, and to working with the Congress to assure that GAO obtains the information it needs to fully support congressional oversight in this important area.

Sincerely yours,



Gene L. Dodaro
Comptroller General
of the United States

⁵ The Director of National Intelligence addressed the issue generally in a question-and-answer session at a public forum, expressing the view that GAO should not conduct audits that concern “the core essence of intelligence—that is, evaluating sources and methods, critiquing national intelligence estimates, doing this sort of thing, which I think strikes at the very essence of what the intelligence committees were established to do” Bipartisan Policy Center, Domestic Intelligence Conference (Oct. 6, 2010).

⁶ Another provision of the directive states that GAO shall not be provided “information on intelligence sources and methods.” We traditionally do not require access to such information to conduct our reviews. In the past agencies have sometimes taken an overly broad view of the concept of sources and methods even where GAO is reviewing basic management functions. Therefore, the interpretation of this provision would also need to be monitored carefully.