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Office of the General Counsel

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August 9, 2000

The Honorable James Walsh
Chairman
The Honorable Alan Mollohan
Ranking Minority Member
Subcommittee on VA, HUD, and
Independent Agencies
Committee on Appropriations
House of Representatives

Subject: Operation Safe Home

This responds to your inquiry of March 30, 2000, concerning the gun buyback program administered by the Department of Housing and Urban Development's (HUD) Office of Inspector General (OIG) under Operation Safe Home. You asked whether in fact the OIG has used Operation Safe Home funds for that purpose. You also asked whether the OIG has the legal authority to use funds appropriated for Operation Safe Home for gun buyback programs. By letter dated April 7, 2000, we asked the HUD OIG for an explanation of its authority to administer a gun buyback program as part of Operation Safe Home and for information regarding the amount of funds obligated and expended for gun buybacks. The OIG responded by letters dated May 1 and 23, 2000, and met with us on May 23, 2000 to discuss these issues.

The OIG informed us that it has used $30,000 of Operation Safe Home appropriations to finance a gun buyback program in association with the Washington, D.C. Metropolitan Police Department (MPD). For the reasons discussed below, we conclude that on balance the OIG has the authority to use funds appropriated for Operation Safe Home to fund a gun buyback program in the District of Columbia. Apart from the legal issue addressed in this opinion, we have concerns about the impact of the OIG's responsibilities for the Operation Safe Home program on the office's independence to perform audit and investigative functions.

BACKGROUND

Operation Safe Home began in February 1994 as an anti-crime initiative by the Secretary of HUD, the HUD OIG, the Attorney General, the Secretary of the Treasury and the National Drug Control Policy Director. The initiative focused on auditing and

investigating activities that undermine HUD programs and the federal investment in public housing. Since fiscal year 1996, Congress has appropriated funds as a set-aside in HUD's Public Housing Drug Elimination Grants Program (PHDEG) appropriation for:

> "efforts to combat violent crime in public and assisted housing under the Operation Safe Home program administered by the Inspector General of the Department of Housing and Urban Development."

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000 (VA, HUD Appropriations Act), Pub. L. No.106-74, 113 Stat. 1047,1058 (1999) (appropriating $10 million).[1] The funds appropriated for efforts to combat violent crime under Operation Safe Home are maintained in the PHDEG account under the OIG's control. The funds earmarked in the PHDEG account remain available until expended.[2] It is the availability of this appropriation to fund gun buybacks that is at issue.

As described by the OIG, "[t]he goal of Operation Safe Home is to stop major abuses in HUD programs that result in unacceptable living conditions for the millions of needy people who look to HUD for help." OIG Semiannual Report to the Congress for the period ending March 31, 1994. Operation Safe Home consists of audits and investigations carried out by the HUD OIG to reduce three major types of criminal activity undermining HUD programs: (1) violent crime in public housing, (2) fraud in public housing, and (3) equity skimming in multifamily insured housing. The issues we are presented with involve the first category of activity, namely, Operation Safe Home's investigation of violent crime in public housing.

OIG conducts Operation Safe Home investigations in coordination with the Department of Justice (DOJ), the Department of Treasury (Treasury), and related agencies such as, the Federal Bureau of Investigation (FBI), the Drug Enforcement

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[1] VA, HUD Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-257, 1321-271 (1996) (appropriating $2.5 million); VA, HUD Appropriations Act, 1997, Pub. L. No. 104-204, 110 Stat. 2874, 2886 (1996) (appropriating $5 million); VA, HUD Appropriations Act, 1998, Pub. L. No.105-65, 111 Stat. 1344, 1353, (1997) (appropriating $10 million); and VA, HUD Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461, 2472-2473 (1998) (appropriating $10 million).

[2] Beginning in fiscal year 1997, Congress also has provided funds "to the Office of Inspector General for Operation Safe Home" in addition to those earmarked in the PHDEG appropriation for the OIG's use for efforts to combat violent crime. See e.g., VA, HUD Appropriations Act 1997, Pub. L. No. 104-204, 110 Stat. 2874, 2886, 2892 (1996). These additional Operation Safe Home funds are transferred from the PHDEG account to the OIG's salaries and expenses account. Id. OIG uses these funds to cover additional law enforcement positions for Operation Safe Home. These funds have not been used to fund gun buybacks, nor does OIG contend that they are available for such purpose.

Agency (DEA), and the Bureau of Alcohol, Tobacco and Firearms (ATF). Based upon allegations of violent and drug-related crime in public and assisted housing, OIG opens cases or investigations in collaboration with law enforcement task forces. The task forces are comprised of federal, state and local law enforcement agencies that investigate and prosecute violent crime in public and assisted housing. To conduct the investigations, OIG uses special agents, employed as criminal investigators, who are "uniquely equipped to serve as linchpins" in these task forces because of their law enforcement credentials and knowledge of public and assisted housing operations and personnel. Letter to Chairman, Senate Committee on Banking, Housing and Urban Affairs, from HUD Inspector General, June 26, 1997. Their tasks include executing search warrants, conducting criminal investigations and undercover operations, arresting criminal suspects, seizing drugs and firearms, and referring cases for criminal prosecution. See e.g., OIG Semiannual Report to the Congress for the period ending March 31, 1994; OIG Semiannual Report to the Congress for the period ending September 30, 1999. In addition, the OIG facilitates the relocation of witnesses to violent crime in public housing to other public or assisted housing to ensure their safety.[3] Id.

The OIG and the MPD entered into a Memorandum of Understanding (MOU) dated August 28, 1998 that outlines the law enforcement strategy to combat violent crimes, firearms and drug trafficking in and around Washington, D.C. public housing. The MOU provides that OIG would allocate funds under a cooperative agreement for certain approved reimbursable expenses including evidence and informant costs. In 1998, OIG opened two Operation Safe Home cases in the District of Columbia with the Washington, D.C. Metropolitan Police Department (MPD) reserving $25,000 and $50,000, respectively, in Operation Safe Home funds for operational costs of the two cases. From August 9-13, 1999, the MPD organized a gun buyback program in the District of Columbia in the Police District Headquarters, 6th District to reduce the availability of guns and develop leads and evidence for criminal investigations in public housing. While the gun buyback program was not carried out in public housing, there are several public housing complexes in the 6th District and the MPD delivered flyers advertising the program in those public housing complexes. Under the MPD gun buyback program, individuals were paid $100 for each gun they turned in to the police. Individuals received amnesty for any criminal violations relating to illegal possession of guns turned in to the police. The OIG provided, and MPD used, $30,000 from Operation Safe Home funds for the MPD's firearm buy-back program.

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[3] You also asked whether the OIG is authorized to administer a gun buyback program pursuant to 42 U.S.C. § 1437f(o)(16), which authorizes aid for low-income families by providing assistance payments for existing housing. Pursuant to this section, the Secretary of HUD, in consultation with the IG, shall provide funds for relocation of witnesses to crime in connection with efforts to combat crime in public housing. The funds used are not included in the OIG's budget and are not under OIG's control. The OIG explained that it has not used this section as authority for funding a gun buyback, nor would they contend that these funds would be available for this purpose.

ANALYSIS

The issue in this case is whether funds appropriated for Operation Safe Home are available for gun buybacks. OIG contends that they are. In the OIG's opinion, although the appropriation does not specify the purposes for which Operation Safe Home funds are available, both the OIG and Congress have a common understanding of those purposes by virtue of the explanations contained in the OIG's budget justifications. OIG's May 1, 2000 letter, 4-5. The OIG points out that its budget justifications have described the intended use of Operation Safe Home as follows:

"These funds are currently used to share in operational costs for task force efforts focused in public housing . . .[and] help defray the costs of police overtime, the purchase of contraband evidence, and other operational expenses, as well as "seeding" some post enforcement initiatives. None of this funding was provided in the form of a "grant" that would be controlled by a law enforcement entity, but is being used to help fund those operations in which OIG remains an active partner."

Congressional Justifications for 1998 Estimates, HUD, cited in OIG's May 1, 2000 letter, 4-5.

Under 31 U.S.C. § 1301(a), appropriated funds may be used only for authorized purposes. To determine the range of authorized purposes we will typically analyze both the statutes appropriating funds for as well as the statutes authorizing the underlying program or activity. Here, Operation Safe Home does not have a separate authorizing statute that defines its purpose or delineates authorized activities. The Operation Safe Home appropriation set-aside, itself, not only funds the program, but also provides the only expression of legislative intent concerning the program's parameters. Accordingly, other than the admittedly broad language of the set-aside, namely that the funds are available for "efforts to combat violent crime in public and assisted housing under the Operation Safe Home program," there is little statutory language limiting OIG's discretion.[4]

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[4] Our analysis is guided by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron requires that we first ask "whether Congress has directly spoken to the precise question at issue." Id. at 842. If Congress has spoken to the question, then we "must give effect to the unambiguously expressed intent of Congress." Id. at 843. Where Congress has not spoken directly to the issue, we must defer to the agency's construction of the statute so long as it is permissible. Id.; see also Immigration and Naturalization Service v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); Auer v. Robbins, 519 U.S. 452, 457 (1997). An agency's construction is permissible if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Rust v. Sullivan, 500 U.S. 173, 183 (1991). In determining whether a construction is permissible, the court does not have to conclude that the agency's construction is the only one it

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OIG rightly points out that neither the language nor the committee reports of the Operation Safe Home appropriation provides any definitional guidance. Thus, to understand Operation Safe Home's purpose and activities, we refer to other sources to help supply meaning to the language of the appropriations set-aside. See 2B Sutherland Statutes and Statutory Construction §§ 48.01 and 49.01 (5th ed. 1992) (Extrinsic aids of statutory construction include information about circumstances and events existing at or after time when a statute goes into effect and judgments and responses of authorities involved in the ongoing operation of a statute.). In this case we refer to OIG materials provided to Congress describing Operation Safe Home, such as the budget justifications, OIG semiannual reports, and letters to congressional committees. We conclude that the OIG's discretion in carrying out Operation Safe Home as described in budget justifications and other materials is broad and its rationale for the gun buybacks as the acquisition of contraband evidence is consistent with such authority.[5]

The Operation Safe Home initiative is an OIG coordinated investigation of criminal activities that undermine the government's investment in public housing. OIG has described Operation Safe Home as "a label given to certain key OIG priorities for OIG audit and investigative work." Letter to Ranking Member Senate Subcommittee on Housing and Transportation, Committee on Banking, Housing, and Urban Affairs, June 28, 1999. Since 1996, when the Congress began specifically appropriating funds for Operation Safe Home, OIG has used Operation Safe Home funds to support task force operations for investigating violent crime in public and assisted housing. OIG has identified the parameters of Operation Safe Home and the types of operational costs funded by the set-aside in its budget justifications. Where budget estimates include a specific purpose, which is not otherwise prohibited, the appropriation act is legally available for the expenditure even though the appropriation act does not make specific reference to it. 35 Comp. Gen. 306, 308 (1955); 28 Comp. Gen. 296, 298 (1948); B-146672, November 8, 1961. In this case, OIG's budget justifications identify operational costs such as police overtime, the purchase of contraband evidence, equipment and supplies for investigative purposes, and travel for Operation Safe Home activities.[6] Congressional Justifications for 1999 Estimates, HUD, reprinted in

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could have adopted or the one the court itself would have reached. Id.; Chevron, 467 U.S. at 843.

[5] We previously concluded that the structure and language of the PHDEG program statute limited HUD's discretion to fund gun buybacks. B-285066, May 19, 2000. Unlike the general grant of authority to the OIG in this case, HUD's authority was limited to making grants as specified by the PHDEG program statute. HUD's rationale for funding gun buybacks did not conform to the list of eligible grant activities specified in the statute.

[6] OIG advises that while it did not have a policy expressly prohibiting funding of gun buyback programs with Operation Safe Home funds, it did have a policy forbidding use of Operation Safe Home funds in any arrangement that constituted or could be

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Hearings Before the Subcomm. On VA, HUD and Independent Agencies of the House Comm. On Appropriations, 105th Cong. 2nd Sess. Part 6, p. 519 (1998) (Budget Justifications 1999). These are also the types of costs identified by OIG in requests for funding for specific task forces. See OIG Memorandum Request for "Operation Safe Home" Funding "Operation Safe Home MPD Public Housing Division/OIG Task Force" Case File: HM10-571, August 3, 1998.

We have recognized the purchase of evidence as a necessary expense for an agency with law enforcement responsibilities. See 27 Comp. Gen. 516 (1948); B-186365, March 8, 1977. As noted in OIG semiannual reports, the purchase of contraband evidence is a commonly accepted investigatory technique used to help prosecute illegal activities. The OIG semiannual reports are replete with examples of OIG special agents posing as dealers or buyers of contraband in order to investigate illegal drug and firearms dealing, arrest the offenders and pursue criminal prosecution of those offenders. See e.g., OIG Semiannual Report to the Congress for the Period Ending March 31, 1998 (describing purchase of contraband evidence, i.e., drugs and guns, in Operation Safe Home investigations of drug and gun trafficking and violent crime in Arizona, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Mississippi, Kansas, New Jersey, New York, Ohio, Tennessee, Virginia and Washington).

OIG contends that gun buybacks are eligible for Operation Safe Home funding as the purchase of contraband evidence. In this regard, the OIG makes two arguments. The first argument, which we find to be without merit, is that the gun buyback obtained evidence of violations of the District of Columbia's handgun registration and possession laws. The second argument, which we find persuasive, is that the gun buyback involved the purchase and use of contraband evidence to further criminal investigations.[7] We address each of OIG's arguments in turn.

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construed as a grant. After Operation Safe Home funds were used for the gun buyback program conducted by the MPD in 1999, the HUD IG specifically instructed OIG staff that no further gun buyback programs would be funded. OIG's May 1, 2000 letter, 1, 5.; OIG's May 23, 2000 letter, 1. We note that the funding of the gun buyback could be construed as a grant. A grant is defined as "[a] federal financial assistance award making payment in cash or in kind for a specified purpose." A Glossary of Terms Used in the Federal Budget Process, Exposure Draft, GAO/AFMD-2.1.1, 49, January 1993. Under 31 U.S.C. § 6304, an agency shall use a grant agreement as the legal instrument between the United States Government and a local government when "substantial involvement is not expected between the executive agency and the . . . local government . . . when carrying out the activity contemplated in the agreement."

[7] As a final argument OIG also noted that HUD had determined that PHDEG funds were available for gun buyback programs. We have since analyzed the availability of PHDEG funds to finance HUD's gun buybacks in B-285066, May 19, 2000. In our May 2000 letter to you, we concluded that HUD does not have the authority to administer gun buyback programs under the PHDEG program and should report to the President

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With respect to the District of Columbia's handgun and registration laws, the OIG notes that the law requires all firearms to be registered and possession of an unregistered firearm is a criminal offense. D.C. Code Ann. §§ 6-2311, 6-2376. Since 1976, with a few exceptions, the District of Columbia has prohibited the registration of handguns. D.C. Code. Ann. § 6-2312(a)(4). OIG argues that in funding the MPD gun buyback, it was engaging in the purchase of contraband evidence of violations of the District of Columbia firearm registration law. Since the MPD promised amnesty from prosecution for illegal possession of firearms to anyone turning in a gun, this argument is without merit.

The OIG and the MPD also contend that guns can represent or lead to evidence of crimes other than illegal possession, such as use of guns for violent crime and illegal gun trafficking. The MPD explained that "law enforcement does have a vested interest in the types of guns recovered, their origins, and whether the guns were used to commit . . . crimes." Washington Metropolitan Police Department Gun Buy-back/Amnesty Program, Comprehensive Report (MPD Comprehensive Report) vii, August 9-13 and 23-24, 1999. While we are not expressing an opinion on whether this was the most efficient or economical manner in which to purchase contraband evidence, we are satisfied that the OIG and the MPD utilized the gun buyback program to obtain contraband evidence to investigate and prosecute crime.

For the gun buyback program at issue here, the MPD took several steps to investigate whether the guns purchased were involved in other crimes. When conducting the gun buyback program, MPD officials talked to participants in order to obtain tips and follow up on leads for crimes involving guns and illegal gun trafficking. The guns were identified and tested by ATF using its firearms trafficking database, On-Line Lead, and the National Tracing Center (NTC), to match the guns to crimes and suspects. MPD Comprehensive Report, iv. The ATF's Regional Crime Gun Center (RCGC) used the results of these tests to work with other law enforcement agencies to identify the sources of illegal firearms and develop strategies to stop the flow of illegal firearms. MPD Comprehensive Report, iv. The results of the identification and testing were provided to the MPD to investigate and prosecute cases where the guns were used to commit violent crime or for illegal gun trafficking. The OIG has informally advised us that as a result of the gun buyback program, MPD received and investigated tips that led to the seizure of other firearms and closed several open criminal cases. OIG Report of Investigation, HM10-504, November 9, 1999.

Apart from the legal issue addressed in this opinion, we have an additional concern that merits comment. Although Congress has authorized the IG to conduct an Operation Safe Home "program", we are concerned about the impact the IG's exercise of such authority may have on the IG's personal and organizational

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and the Congress in accordance with 31 U.S.C. § 1351, regarding the $2.5 million of PHDEG appropriations that HUD has obligated for that purpose. Id. Thus, any reliance that the OIG attempts to draw from HUD's PHDEG program is misplaced.

independence. Clearly, both the Inspector General Act of 1978, as amended[8], and applicable auditing standards[9] emphasize the critical importance of auditor independence to the performance of the audit and investigative functions. Throughout the IG Act, Congress emphasized the importance of the independence of IGs. For example, section 2 states that the offices of the IGs are established "[i]n order to create independent and objective units . . .to conduct and supervise audits and investigations relating to the programs and operations of [those departments]." In keeping with the IG's role as an objective, independent official, section 3 of the IG Act prohibits the head of a department from preventing the IG from initiating, carrying out or completing any audit or investigation. Section 9 of the IG Act also prohibits a department from transferring to an IG "program operating responsibilities." This reflects, we believe, an understanding that absent personal and organizational independence, the auditor's ability to objectively and critically assess agency programs and activities will suffer. We have previously pointed out that the Postal Service IG was not in a position to audit Postal Service law enforcement operations in accordance with generally accepted government auditing standards because of the Inspector General's law enforcement responsibilities. Inspectors General, A Comparison of Certain Activities of the Postal IG and other IGs, GAO/AIMD-96-150, p. 4 (1996).

Here, Congress has authorized the IG to carry out a "program" to combat violent crime in public and assisted housing. Clearly, the OIG's independence to assess law enforcement activities at public and assisted housing by HUD, its grantees and contractors is subject to question given its "programmatic" responsibilities. Accordingly, we think the IG and the Congress should consider whether the long-term involvement of the IG in such activities is worth the impairment of the IG's audit and investigative independence.

CONCLUSION

Given the general authority provided the OIG to combat violent crime under the Operation Safe Home appropriation set-aside, for the reasons discussed above, we conclude that the Operation Safe Home appropriation set-aside is available to fund gun buybacks.

We trust that this responds to your request. Should you have any questions, please contact Mr. Thomas Armstrong or Ms. Edda Emmanuelli Perez of my staff at 512-5644.

/s/Robert P. Murphy
General Counsel

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[8] Pub. L. 95-452, 92 Stat. 1101 (1978) (codified at 5 U.S.C. App. 3).

[9] Government Auditing Standards, 1994 Revision, June 1994, section 3.11, page 22.