

The Inspector General System

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Introduction

Imagine yourself as the Chief of Administrative Law at the 55th Division. In this capacity, you routinely advise the Inspector General (IG) on family support matters, and occasional ethics issues. Like most other judge advocates (JAs), you have received no formal instruction on the IG system, and have never reviewed *Army Regulation 20-1, Inspector General Activities and Procedures*.² The Division IG calls you at 1630 hours on a Friday. He has just received another complaint from the Chief of Staff's driver. A few weeks ago, the driver complained to the IG that the Chief of Staff directed him to pick up 55th Division Association membership lists and dues from the Brigade S1s during his lunch hour. After that complaint, the Chief of Staff gave the driver a reprimand and sent him back to his former unit. The IG needs your advice quickly. The Chief of Staff was just selected for promotion to Brigadier General and he will leave for his new assignment soon. How should the IG handle the new complaint? What advice will you give the IG?

Before you advise the IG, you must first understand what IGs do, and what they do not do. You must know how IGs develop allegations and how IG records may be used. The purpose of this article is to provide judge advocates with a basic understanding of the IG system.

What Does the IG Do?

The Inspector General (TIG) is assigned to the Office of the Secretary of the Army.³ As directed by the Secretary or the Chief of Staff, TIG inquires into and reports upon the "discipline, efficiency, and economy of the Army."⁴ The Department of the Army Inspector General (DAIG) office primarily accomplishes this mission through the work of three divisions: Inspections, Assistance, and Investigations.⁵

The Inspections Division conducts Army-wide inspections and reports to the Army Chief of Staff. In recent years, the Inspection Division has inspected or reviewed soldier readiness programs, risk management programs, anti-terrorism and force protection, extremist group activities, homosexual conduct policy implementation, and the events that occurred near the village of No Gun Ri during the Korean War.⁶ The Assistance Division provides oversight over all inquiries or investigations concerning non-senior officials (colonel and below), including military whistleblower reprisal investigations. The Investigations Division conducts all IG inquiries and investigations into allegations against senior officials (i.e., promotable colonels, general officers, and senior executive service employees).⁷ Commanders and IGs must report all allegations of impropriety or misconduct against senior officials, including criminal misconduct, to the DAIG Investigations Division within two days of receiving such allegations.⁸

1. Before assignment as Deputy Legal Advisor to The Inspector General, the author was assigned to the Investigations Branch, Administrative Law Division, Office of The Judge Advocate General. Investigations Branch attorneys are co-located with the United States Army Inspector General Agency (DAIG), Investigations Division, and provide advice concerning senior official investigations.

2. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002) [hereinafter AR 20-1].

3. 10 U.S.C. § 3014 (2000).

4. *Id.* § 3020; see also AR 20-1, *supra* note 2, para. 1-4a(1) ("The Inspector General will—Inquire into and periodically report on the discipline, efficiency, economy, morale, training, and readiness throughout the Army, to the Secretary of the Army (SA) and the Chief of Staff, Army (CSA).").

5. U.S. Army Inspector General Agency, *IG Systems*, at http://www.public.ignet.army.mil/IG_systems.htm (last visited Feb. 12, 2003).

6. U.S. Dep't of Army, Inspector General, *No Gun Ri Review* (Jan. 2001), at <http://www.army.mil/nogunri/> (last visited Feb. 5, 2003).

7. With one exception, Investigation Division Reports of Investigation (ROI) are not available for public review in their entirety. An investigation of allegations made against senior Corps of Engineers personnel concerning a Mississippi River construction study is available at the Office of Special Counsel Reading Room. U.S. Dep't of Army, Inspector General, *ROI Case 00-019*, at <http://www.osc.gov/armyroi.htm> (last visited Feb. 12, 2003).

8. AR 20-1, *supra* note 2, para. 8-3i(1) ("As a matter of Army policy, when such allegations are suspected against a senior official . . . , the commander or command shall halt any inquiry or investigation . . . against the senior official and report and all such allegations directly to DAIG's Investigations Division for determination of further action.").

Detailed IGs are assigned to units commanded by general officers. They serve as extensions of their commanders' eyes, ears, voices, and consciences.⁹ They are "confidential advisers and fact-finders to their commander[s]."¹⁰ At the MACOM and subordinate command levels, IGs conduct inquiries and investigations into alleged violations of policy, regulation, and law. They may inquire into allegations of mismanagement, unethical behavior, and fraud.¹¹ The Joint Ethics Regulation (JER) specifically tasks IGs with the investigation of ethics matters.¹²

Complaints made under the Military Whistleblower Protection Act (MWPA)¹³ are also under the jurisdiction of the IG.¹⁴ The MWPA prohibits taking or threatening to take retaliatory personnel actions against soldiers for communicating with members of Congress or IGs. It also prohibits retaliatory actions against soldiers for communications alleging violations of law or regulations made to law enforcement officials, the chain of command, equal opportunity officers, and other designated persons.¹⁵ The DOD has issued guidance implementing the MWPA and tasked the Department of Defense Inspector General (DOD-IG) with the investigation and oversight of all whistleblower allegations.¹⁶ The DOD-IG must approve all reprisal investigation reports.¹⁷ Army guidance concerning the MWPA is found in *Army Regulation 600-20, Army Command Policy*.¹⁸

Under the MWPA, soldiers have the right to allege violations of law or regulation, including sexual harassment and unlawful discrimination, mismanagement, fraud, waste, and

abuse of authority. There is no limit to the number of times a soldier may complain.¹⁹ Some commanders do not understand the extent of the MWPA's protections. In some cases, Army lawyers may have also improperly advised their commanders about the MWPA. If, due to ignorance or poor judgment, a lawyer improperly recommends a retaliatory personnel action, such as a letter of reprimand, the lawyer will be considered a Responsible Management Official.²⁰ Such improper advice may result in a substantiated reprisal allegation against both the commander and the legal advisor. Army lawyers and commanders must understand that adverse actions may not be taken against whistleblowers for making complaints, except for complaints that contain *knowingly* false statements.²¹

What the IG Does Not Do

Army Regulation 20-1 carefully circumscribes the role of the IG. Restrictions on IG duties and activities are designed to reduce conflicts of interest and maintain impartiality. Inspectors general do not make command policy, recommend adverse personnel actions, or do anything that may jeopardize their ability to function as fair and impartial fact-finders.²² Inspectors general are like baseball umpires who call balls and strikes, without concern for the final score of a game.

Army Regulation 20-1 also identifies several specific matters that are generally not appropriate for IG intervention.²³ First, when IGs receive allegations of a criminal nature they

9. *Id.* para. 1-6a.

10. *Id.* para. 1-7.

11. *Id.* para. 8-3a.

12. U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION § 1-413a (Aug. 1993).

13. 10 U.S.C. § 1034 (2000); AR 20-1, *supra* note 2, para. 1-11.

14. The Inspector General (TIG) has withheld the authority to investigate soldier allegations of reprisals to MACOM and higher-level IGs. AR 20-1, *supra* note 2, para. 8-9c.

15. 10 U.S.C. § 1034b ("Prohibition of Retaliatory Personnel Actions—(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing [a protected communication].").

16. U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION § 5.1 (23 June 2000).

17. *Id.* § 5.1.5; AR 20-1, *supra* note 2, para. 8-9c(5).

18. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 5-8, 5-12 (13 May 2002) [hereinafter AR 600-20].

19. 10 U.S.C. § 1034(b)-(c).

20. U.S. DEP'T OF DEFENSE, INSPECTOR GENERAL GUIDE 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS para. 2.5 (6 Feb. 1996). Responsible management officials include "[t]he official(s) who influenced or recommended to the deciding official that he/she take, withhold, or threaten the action." *Id.*

21. AR 600-20, *supra* note 18, para. 5-8d. Some instances of substantiated allegations of reprisal have resulted in letters of reprimand from the Vice Chief of Staff of the Army for senior officials and for their Staff Judge Advocates. A substantiated reprisal allegation may prevent promotion to general officer rank. Interview with Hank Finley, Investigator, U.S. Dep't of Army, Office of the Inspector General, in Arlington, Va. (July 24, 2003)

22. AR 20-1, *supra* note 2, para. 2-6b.

must refer them to the Criminal Investigation Command (CID) or the Provost Marshal.²⁴ Inspectors general normally do not inquire into criminal misconduct. They may, however, inquire into “military offenses,” such as violations of orders and regulations, dereliction of duty, and conduct unbecoming an officer.²⁵ Second, IGs should not intervene in situations that have other means of redress or remedy until the complainant has exhausted all administrative remedies, including appeal procedures.²⁶ In such cases, IG involvement will be limited to a due process review.²⁷ This means that if the complainant received all process provided under applicable law and regulation for the matter, the IG will not review the underlying command or agency determination. The following areas are generally not appropriate for IG intervention: courts-martial, nonjudicial punishment, evaluation reports, involuntary separation actions, reports of survey, reprimands, claims, and complaints made under Article 138, Uniform Code of Military Justice.²⁸ Inspector general intervention is also inappropriate for civilian employee grievances, appeals of adverse employee actions, Equal Employment Opportunity (EEO) complaints, and other matters that affect employment.²⁹ If procedures exist within a regulation or system for correcting errors, improprieties, or injustices, IGs must allow all such procedures to run

their course before intervening. Third, IGs do not normally investigate allegations of professional misconduct made against Army lawyers, whether civilian or military.³⁰ When an IG receives a complaint alleging professional misconduct by an Army lawyer, he will immediately forward the complaint to the DAIG Legal Advisor without taking any action on the matter. After verifying that an allegation of professional responsibility has been made,³¹ the DAIG Legal Advisor will forward the allegation to the senior counsel having jurisdiction over the subject lawyer.³² In some cases, such as allegations of reprisals in violation of the MWPA, the IG investigates and then forwards the results to the appropriate senior counsel for action under professional responsibility regulations. Allegations of professional misconduct involving judge advocates under the supervision of The Judge Advocate General are forwarded to the Standards of Conduct Office (SOCO).³³ The DAIG Legal Advisor does not assess the credibility of allegations before forwarding them to supervisory counsel. The DAIG Legal Advisor also forwards all allegations of mismanagement³⁴ made against supervisory lawyers within the Judge Advocate Legal Service to SOCO.³⁵

23. *Id.* para. 4-4f.

24. *Id.* para. 8-10c(4)(a).

25. *Id.* paras. 4-4f(1)(a), 8-3b.

26. *Id.* para. 4-4f-k.

27. *Id.* para. 4-4f(2).

28. *Id.* para. 4-4j. This list of issues that do not fall with the IG purview because other avenues of redress are available is not exclusive. *Id.*

29. *Id.* para. 4-4k.

30. *Id.* para. 8-3b(5).

31. *Army Regulation 20-1* does not define “professional misconduct” or distinguish it from “personal misconduct,” which may be investigated by an IG. *See generally id.* Supervisory lawyers must report violations of the Army Rules of Professional Conduct and allegations that raise a “substantial question as to a lawyer’s honesty, trustworthiness, or fitness as a lawyer” to the Standards of Conduct Office (SOCO). U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 7-2b (30 Sept. 1996) [hereinafter AR 27-1]. Although it is not a supervisory legal office, the DAIG legal office forwards all allegations that fall within the guidance of AR 27-1 to SOCO. *See id.* para. 7-2b.

32. Senior counsel include the Army General Counsel, The Judge Advocate General, Command Counsel of Army Material Command, and the Chief Counsel of the U.S. Army Corps of Engineers. AR 20-1, *supra* note 2, para. 8-3b(5).

33. *Id.* The DAIG Legal Advisor receives about twenty IG complaints alleging professional misconduct against judge advocates annually. Interview with Janice Teasley, Information Release Specialist, U.S. Dep’t of Army, Office of the Inspector General, in Arlington, Va. (July 15, 2003).

34. *See* AR 27-1, *supra* note 31, para. 8-2a.

Mismanagement involves any action or omission, either intentional or negligent, that adversely affects the efficient and effective delivery of legal services, any misuse of government resources (personnel and material), or any activity contrary to operating principles established by Army regulations or TJAG policy memoranda. Mismanagement does not include mere disagreements over management “styles,” or isolated instances of matters which have their own clear course of appeal and resolutions (for example, an OER or NCOER appeal), or which are purely discretionary (for example, an award recommendation).

Id.

35. AR 20-1, *supra* note 2, para. 8-3b(6).

IG Allegations

The most important aspect of IG investigations that judge advocates must understand is the development of IG allegations. There are no published lists of IG “offenses,” and there are no model specifications for IG allegations. Nonetheless, there are four elements to every IG allegation: (1) identifying the subjects; (2) determining whether the actions were improper; (3) determining what actions the subjects took; and (4) identifying the standard the actions violated.³⁶

The first three elements are simple. The “who” of an IG allegation must be an individual.³⁷ The “chain of command” or the unit cannot be the subject of an IG investigation. Next, the alleged behavior must be improper, but it need not be criminal and no specific intent to violate a standard is required. Simple mistakes or negligence may form the basis of an IG allegation. Moreover, the behavior in question does not need to be stated with the specificity of a charge and specification under the UCMJ. For example, there is no requirement to state the place, date, and time in an IG allegation.³⁸

The “standard” requirement requires more explanation. An IG “standard” is any policy, law, or regulation that Army personnel are required to follow. There are three categories of IG standards: (1) non-punitive violations of regulatory guidance; (2) punitive violations of law (UCMJ, federal, state, and local) and regulation; and (3) violations of established policy and SOP.³⁹ Inspectors general frequently use a variety of non-puni-

tive regulatory guidance from diverse sources as standards. These sources may include the Office of Government Ethics; the DOD; Headquarters, Department of the Army; or local installation regulations. *Army Regulation 600-100*, which requires leaders to treat subordinates with “dignity, respect, fairness, and consistency,” is a good example of nonpunitive regulatory guidance that may serve as an appropriate IG standard.⁴⁰ Violations of law or punitive regulations may also serve as standards, but if adverse action appears certain, an IG office would not usually conduct an inquiry.⁴¹ Because of the IG’s ability to be discreet and maintain confidentiality, commanders often direct IGs to inquire into allegations of a sensitive nature involving leaders, such as improper relationships.⁴² Established policies and SOPs, such as pamphlets, field manuals, and unit policy letters, may serve as IG standards.⁴³ Inspectors general often seek legal advice from their servicing judge advocates when they are developing standards for allegations. Judge advocates must think broadly when advising IGs concerning standards because of the plethora of applicable laws, regulations, and policies.

IG Records

The Inspector General closely controls IG records. This tight control is necessary because the “[u]nauthorized use or release of IG records can seriously compromise the IG’s effectiveness as a trusted adviser to the commander.”⁴⁴ Inspector general records include: reports of inquiry, investigation, or

36. *Id.* para. 4-4c. The regulation summarizes these questions as follows:

- (1) Who?—The complaint involves an individual rather than an organization.
- (2) Improperly?—The subject or suspect is alleged to have committed an improper action.
- (3) Did or did not do what?—There is a behavior being described as improper.
- (4) In violation of what standard?—There is a policy, regulation or law allegedly violated.

Id.

37. Potential subjects include soldiers and Department of the Army civilian employees. They do not include family members, contractors, and other civilians with no Army affiliation. U.S. DEP’T OF ARMY, INSPECTOR GENERAL AGENCY, TRAINING DIVISION IG SCHOOL, THE ASSISTANCE AND INVESTIGATIONS GUIDE § II, para. 2-4c (21 May 2001).

38. *See generally* AR 20-1, *supra* note 2.

39. *Id.* para. 4-4d.

40. U.S. DEP’T OF ARMY, REG. 600-100, ARMY LEADERSHIP para. 2-1a(13) (17 Sept. 1993). For example, a complaint that a commander habitually used profanity while screaming at subordinate soldiers might result in an allegation such as this one: “Captain X improperly failed to treat subordinate soldiers with dignity and respect by screaming profanities at them, in violation of *Army Regulation 600-100, Army Leadership, Paragraph 2a(13)*.”

41. AR 20-1, *supra* note 2, para. 8-3b. If adverse action appears certain, an IG inquiry is not advisable because IG records may not be used for adverse action without TIG approval. The Inspector General may only approve such a use of IG records if a follow-on investigation would be unduly burdensome, futile, or disruptive. *Id.* para. 3-3. If the alleged misconduct is not suitable for investigation by military police or Criminal Investigation Command (CID) personnel, the SJA may recommend an investigation. *See generally* U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

42. Interview with Terry Freeze, Investigator, U.S. Dep’t of Army, Office of the Inspector General, at Arlington, Va. (July 15, 2003). For example, a complaint that a sergeant major hugged one of his junior NCOs might result in an allegation such as this one: “Sergeant Major Y improperly fraternized with a subordinate noncommissioned officer (NCO) by hugging her in violation of *Army Regulation 600-20, Army Command Policy, Paragraph 4-14*.”

43. A complaint that an NCO held an inspection on a training holiday might result in an allegation such as this one: “Sergeant Z improperly conducted an inspection of his subordinates’ uniforms during a training holiday, in violation of *55th Division Policy Letter #46, Training Holiday Guidance*.”

inspection; testimonies, correspondence, and documents received from witnesses and persons seeking IG assistance; and IG Worldwide Network (IGNET) data processing files.⁴⁵ All IG records are the property of the Secretary of the Army, who has delegated release authority to TIG.⁴⁶ The Inspector General has further delegated records release authority to the Deputy TIG, the DAIG legal advisor, and the deputy legal advisor.⁴⁷ With the exception of inspection records, local IGs may not release IG records, even for official use.⁴⁸ Inspectors general are authorized to release limited information concerning potential allegations, witnesses, and evidence to follow-on investigators without first seeking approval from the DAIG Records Release Office.⁴⁹

Persons within the Department of the Army, such as labor counselors and trial counsel, may obtain IG records for official use only (FOUO) by providing detailed written requests to their local detailed IGs or directly to the DAIG Records Release Office. A FOUO request must clearly state the reasons for the request and the contemplated uses of the IG records.⁵⁰ It is

important to note, however, that “IG records may not be used as the basis for adverse action without authorization from TIG.”⁵¹ A request must state why a follow-on investigation, such as a commander’s inquiry or an investigation conducted under the provisions of *AR 15-6*, would be unduly burdensome, unduly disruptive, or futile.⁵²

Whenever the Army conducts personnel suitability or background screening on individuals selected for promotion or other favorable personnel actions, it reviews IG records databases. The DAIG, CID, Central Clearance Facility (CCF), Total Army Personnel Command (PERSCOM), and other agencies conduct the background screenings. The DAIG screens its databases for the following actions: General Officer nominations, promotions, reassignments,⁵³ and retirements;⁵⁴ promotions to colonel, including judge advocates;⁵⁵ brigade and battalion command assignments; command sergeant major selections; drill sergeant and recruiting duty assignments;⁵⁶ and senior executive service (SES) selections, performance awards, and retirements.⁵⁷

44. AR 20-1, *supra* note 2, para. 3-1b.

45. *Id.* para. 3-1c.

46. *Id.* para. 3-1a.

47. *Id.* para. 3-1e; Memorandum, The Inspector General, U.S. Army, to Deputy Legal Advisor, Legal Advisor, and Deputy The Inspector General, subject: Delegation of Authority (16 Oct. 2002) [hereinafter Delegation Memo] (on file with DAIG legal office).

48. AR 20-1, *supra* note 2, para. 3-6b.

49. *See id.* para. 3-6i.

i. Release of IG records or information to DA investigators: DA investigators include personnel (that is, Investigating Officers, Report of Survey Officers, CID, and MP investigators) performing law enforcement or other investigations under Army regulations and outside IG channels. These personnel are entitled to IG information described below when it is relevant to an authorized investigation. They will not be provided additional information without approval of TIG or higher authority.

(1) An IG may orally brief the investigator on the nature of the allegations or matters the IG office examined, being careful not to be judgmental about the allegations or to reveal any IG findings, opinions, conclusions, or recommendations.

(2) An IG may release documentary evidence that is readily available to any DA investigator and that was not received by the IG in confidence. This includes finance and personnel records, travel vouchers, motel and restaurant receipts, and so forth. “Readily available” includes documents that would be readily available from the source but have been lost, destroyed, retired, or altered after being obtained by the IG.

(3) An IG may identify by name those witnesses who have information relevant to the investigation and explain how they are relevant with a brief oral synopsis of their testimony. Where possible, the IG will not reveal which witness is the complainant Written statements, transcripts, and recorded tapes taken by the IG will not be released.

Id.

50. AR 20-1, *supra* note 2, para. 3-6d. Those requesting IG records should forward their requests to: Records Release Office, SAIG-ZXR, 2511 Jefferson Davis Highway, Arlington, Virginia 22202-3912. *Id.* Requesters may also fax their requests to (703) 607-5865.

51. The Inspector General has not delegated authority to release records for adverse use. *See supra* note 4; Delegation Memo, *supra* note 47.

52. AR 20-1, *supra* note 2, para. 3-3a; *see generally* U.S. DEP’T OF ARMY, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

53. U.S. DEP’T OF DEFENSE, DIR. 1320.4, MILITARY OFFICER ACTIONS REQUIRING APPROVAL OF THE SECRETARY OF DEFENSE OR THE PRESIDENT, OR CONFIRMATION OF THE SENATE (14 Mar. 1995); U.S. DEP’T OF ARMY, ARMY REG. 600-8-29, OFFICER PROMOTIONS para. 1-15b (30 Nov. 1994) [hereinafter AR 600-8-29].

54. Memorandum, Secretary of Defense, to Secretaries of the Army, Navy, and Air Force, Under Secretary of Defense (Personnel & Readiness), General Counsel, and Inspector General, subject: Processing Retirement Applications of Officers in the Grades of O-7 and O-8 (9 Oct. 1998) (on file with author).

55. AR 600-8-29, *supra* note 53, para. 1-15a. *Army Regulation 600-8-29* applies to active duty list promotions only. *See id.* At this time there are no background screening requirements for non-active duty list promotions.

Upon receipt of a request for a background screening, the DAIG reviews its databases for reports containing substantiated or ongoing allegations. The DAIG reviews the reports for accuracy, compliance with agency procedures, verification that the subject was previously notified of the unfavorable information, and legal sufficiency. It then prepares a brief summary, usually one page in length, and forwards it to the requesting agency. If a promotion review board is convened, the General Officer Management Office or the U.S. Army Personnel Command will inform the officer and provide him a copy of the DAIG summary report. The officer may also submit comments or information to the review board.⁵⁸

The DAIG usually processes requests for records for personal use under the Freedom of Information Act (FOIA).⁵⁹ The DAIG may deny Privacy Act requests by the subjects of IG investigations under the Privacy Act's law enforcement exemption.⁶⁰ Records requests from individuals, defense counsel, and legal assistance attorneys, for the purpose of preparing rebuttals to administrative personnel actions, evaluation report appeals, and petitions to the Army Board for Correction of Military Records, are not treated as "for official use only" requests.

These requests are also processed under the FOIA.⁶¹ Records released to complainants and subjects under the FOIA are generally released only in part, after redaction of information under Exemption 7 of the FOIA.⁶²

The Judge Advocate's Role in the IG System

The judge advocate's role in the IG system is growing because of the steadily increasing importance and volume of background screenings, and because of regulatory changes. Summary reports of substantiated allegations forwarded to the U.S. Army Personnel Command (PERSCOM) directly impact the careers of field grade officers and noncommissioned officers. To accommodate new background screening requirements, the IG recently amended the retention periods for IG investigations and inquiries involving non-senior officials from three years to thirty years.⁶³ Substantiated allegations from the early years of a soldier's career will now be available for background screenings decades later, when a soldier is considered for promotion to colonel, command and leadership assignments, drill

56. The DAIG conducts background screening for brigade and battalion command assignments, command sergeant major selections, and drill sergeant and recruiting duty assignments in accordance with PERSCOM policies and agreements between PERSCOM and DAIG. Interview with Lieutenant Colonel John Peeler, Executive Officer, Assistance Division, U.S. Dep't of Army, Office of the Inspector General, at Arlington, Va. (July 15, 2003) [hereinafter Peeler Interview].

57. Memorandum, Assistant Secretary of the Army (Manpower and Reserve Affairs), to Principal Officials of Headquarters, Department of the Army and Major Commands, subject: Adverse Information Screening for Senior Executive Service (3 Oct. 2000) (on file with author).

58. AR 600-8-29, *supra* note 53, para. 8-6. Inspector general records and other derogatory information that is not filed in the Official Military Personnel File are not forwarded to selection boards. The DAIG only provides them to review boards after the review board referral authority determines that "the information is substantiated, relevant, and might reasonably and materially affect a promotion recommendation." *Id.*

59. AR 20-1, *supra* note 2, para. 3-7a.

60. See Privacy Act of 1974, 5 U.S.C. 552a(k)(2), (5) (2000). The Privacy Act permits agency heads to exempt systems of records from the access provisions of the Privacy Act when the system of records consists of investigatory material compiled for law enforcement purposes and investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment and military service. See *id.* The systems notice for Army IG inquiries and investigations exempts materials compiled for law enforcement or for the determination of the suitability for employment and military service from the access provisions of the Privacy Act. If an individual is denied a right, privilege, or benefit, to which he or she would otherwise be entitled, the individual will be granted access to IG materials except those that would reveal the identity of a confidential source. Privacy Act of 1974; System of Records, 67 Fed. Reg. 1447-48 (Jan. 11, 2002).

61. AR 20-1, *supra* note 2, paras. 3-6g, 3-7c.

62. The FOIA exempts the following matters from release:

Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(A) could reasonably be expected to interfere with enforcement proceedings;

...

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) could reasonably be expected to disclose the identity of a confidential source.

5 U.S.C. § 552(b)(7).

63. U.S. DEP'T OF ARMY, REG. 25-400-2, THE MODERN ARMY RECORDKEEPING SYSTEM (MARKS) tbl.9 (1 Oct. 2001) (File Category 20: Assistance, inspections, investigations, and follow-up, File No. 20-1h). The IG only maintains records of unsubstantiated allegations for three years and does not forward these records to PERSCOM for background screening. *Id.*; see Peeler Interview, *supra* note 56.

Conclusion

sergeant duties, or recruiting duties. Along with the increased record retention period, a new requirement for written legal review of IG reports was instituted in April 2001. This requirement applies to all reports of investigation, whether or not the allegations were substantiated, and all reports of investigative inquiry with substantiated allegations.⁶⁴ In addition to ensuring that findings are supported by facts, judge advocates conducting legal reviews must also verify that investigators followed IG procedures during their investigations. In particular, Army lawyers must ensure that allegations are properly drafted, that subjects have been notified and offered an opportunity to comment, that IG offices properly maintain the confidentiality of complainants and witnesses, and that no improper retaliatory actions are taken against complainants.

Army lawyers should also note that they may be required to serve as witnesses in IG investigations. Discussions between SJAs and commanders are often crucial to the resolution of IG complaints against senior officials. Because the Army is the SJA's client, communications between a commander and an SJA may be disclosed to the commander's superiors and to IG investigators appointed by the commander's superiors.⁶⁵ Staff judge advocates may not serve as personal legal advisors to commanders who come under investigation without the approval of The Judge Advocate General.⁶⁶

With this background information in mind, what advice do you give the IG concerning the driver's complaint that the 55th Division Chief of Staff reprimanded him for disloyalty and reassigned him for making a complaint to the IG? Based upon your knowledge of *AR 20-1*, you know that IGs are confidential and impartial fact-finders for their commanders, and that they are able to handle highly sensitive complaints like this one discreetly. You are now able to assist the IG in drafting a four-part IG allegation, using the MWPA as the standard. You realize that the outcome of the investigation could be recorded in an IG database for thirty years, and reported during personnel suitability screenings. You know that neither you nor the SJA should provide personal legal advice to the Chief of Staff because the Army is your client. You are ready to advise the IG. Remembering that the DAIG Investigations Division handles all complaints involving senior officials, and that the Chief of Staff is now promotable to brigadier general, you advise the IG to send the complaint to the Investigations Division at DAIG and take no further action.

64. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 8-4b(6), c(3) (16 Apr. 2001). The previous version of *AR 20-1* contained no legal review requirements for IG investigations or inquiries. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 8-4b(6), c(3) (15 Mar. 1994).

65. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.13 (1 May 1992).

66. *AR 27-1*, *supra* note 31, para. 5-2a; *see also* Lieutenant Colonel Craig Meredith, *The Army as Client*, at <https://jagcnet.army.mil/JAGCNETIntranet/Databases/Administrative+Law/professi.nsf> (last visited Feb. 5, 2003) (posted to Administrative Law, Ethics: Attorney Professional Responsibility database Nov. 2002).