



U.S. Department of Justice
Justice Management Division
Office of Records Management Policy

Washington, D.C. 20530

04 FEB 2011

Paul M. Wester, Jr.
Director
Modern Records Program
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Mr. Wester,

This further responds to your February 24, 2010 letter to the Department of Justice expressing your concern about the possibility that Department of Justice emails had been deleted. Your concern was based on an Office of Professional Responsibility (OPR) report regarding Office of Legal Counsel (OLC) memoranda relating to enhanced interrogation techniques.¹ The Department sent you a letter on March 25, 2010, stating that Acting Deputy Attorney General Gary Grindler (Acting DAG) had directed the Assistant Attorney General for Administration to work with Department information technology experts to review what may have happened to the emails referenced in the OPR report. The letter informed you that we would provide a report pursuant to 36 C.F.R. § 1230.14 if we determined that an unauthorized destruction of records had occurred.

The Department has completed this review. We have concluded that the Department has satisfied its obligations under the Federal Records Act to make and preserve records that adequately document how OLC came to the conclusions laid out in the enhanced interrogation memoranda. Regarding the emails, the Department was able to locate additional emails on backup tapes and a server that were not examined during the course of

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The July 29, 2009 OPR report is entitled *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*. The discussion of the OLC emails appears on page 5, footnote 3, and states in part: "we were told that most of Yoo's email records had been deleted and were not recoverable. Philbin's email records from July 2002 through August 2002 . . . had also been deleted and were not recoverable."

OPR's investigation. That said, we have not, and cannot, determine whether an unauthorized destruction of records occurred. However, we are providing NARA this report of our efforts and findings related to your concerns. We also include information on Departmental efforts to strengthen the records management program in OLC.

Adequate Documentation of OLC Decisions

The Department has the statutory obligation to ensure that it makes and preserves records that contain "adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. § 3101. The Federal Records Act defines records as "all papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics" that are "evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government." 44 U.S.C. § 3301.

We reviewed OLC's official files related to the enhanced interrogation opinions that were the subject of the OPR investigation and have concluded that they provide adequate and proper documentation of the Department's actions and decisions as required by the Federal Records Act. The OLC opinions represent the formal, articulated, and memorialized position of the Department at the time. In addition, the supporting files contain multiple drafts of the opinions and include evidence of rewrites and comments, as well as printed emails related to the drafts. The OLC practice was to pass drafts of the opinion among those working on it and collect comments either electronically through "track changes" functions in the word processing program or as handwritten comments on the drafts. Thus, the collection of drafts and final opinions represents the collective position of those in the Department who were responsible for drafting the final opinion. The Department's files of the opinions, including drafts, provide adequate and proper documentation of the legal position of the Department and the input into those opinions at the time the opinions were drafted. This satisfies the statutory obligation of the Department to provide adequate and proper documentation of its policies and decisions with respect to the conclusions provided in the opinions.

Search for Yoo and Philbin Emails

In addition to ensuring that decisions are adequately documented, agencies must also establish safeguards to prevent the unauthorized destruction of records and report any such destruction to NARA. 44 U.S.C. §§ 3105 and 3106. Therefore, in light of the concerns raised about the emails discussed in the OPR report, the Justice Management Division (JMD), under the direction of the Assistant Attorney General for Administration (AAG/A), looked at the records policies in place for OLC at the time and conducted a far-ranging search of archives and backup tapes that could possibly have contained email folders for either John Yoo or Patrick Philbin. The following is a synopsis of what JMD found.

At the time John Yoo and Patrick Philbin worked for OLC (2001-2003), the AAG/A had issued memoranda advising Department employees of their recordkeeping responsibilities.

A July 31, 2001 memorandum instructed employees in leadership offices such as OLC to retain emails that qualified as federal records and to delete nonrecord emails.

When an OLC employee left the Department, the emails in the employee's account at that time were copied to an OLC shared directory (the G drive), as well as to a JMD archive server that was accessible only to the JMD system administrators. We understand that OPR was given access to the approximately 500 emails that were in Yoo's account when he departed and that had been copied to a JMD archive server. At the time of the OPR investigation, Philbin was still working at the Department (in the Office of the Deputy Attorney General) and searched his own emails. We understand that Philbin identified and reported to OPR the gap period in his emails.

JMD searched backup tapes from the relevant time period for emails in the Yoo and Philbin accounts.² Since backup tapes are not recordkeeping systems and are retained only for disaster recovery purposes, JMD's policy was periodically to overwrite them such that in the normal course they would not have been retained longer than one year. However, JMD found 11 backup tapes from the time period that contained emails from Yoo's account and 14 tapes that contained emails from Philbin's account. JMD also found emails from Philbin's account on a JMD server. JMD provided all of the recovered emails to a review team established by the Department to conduct a substantive review of the email for purposes unrelated to NARA's inquiry. The review team identified 15,151 unique items (emails and attachments) from all sources. These consisted of emails from Yoo's account for his entire tenure at OLC and emails from Philbin's account for the gap period identified by OPR.

JMD has determined that certain emails of Yoo and Philbin were available only on backup tapes, and other emails could not be retrieved at all.³ However, in light of the fact that over seven years have passed since Yoo left the Department and Philbin left OLC, it is impossible for us to determine whether technical issues caused the loss of the emails or whether they were deleted by an individual. Nonetheless, given your concerns and the above circumstances, the Department will retain all recovered emails related to your inquiry for the same retention period established in the records schedule for OLC opinion files.

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JMD also determined that during the 2002-03 time period employees in OLC did not have classified email accounts, nor did they have access to such email accounts. Thus, there were no electronically created or captured classified emails related to these opinions.

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Of course, there is no requirement that non-record emails be retained, and therefore we did not expect to find all of Yoo's or Philbin's emails.

Recordkeeping Modernization Efforts

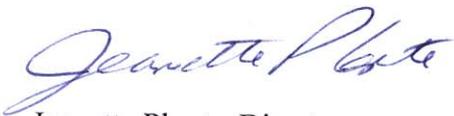
The Department has been engaged in significant efforts to evaluate and modernize its recordkeeping programs over the last several years. In 2006 the Office of Records Management Policy (ORMP) was established and a Departmental Order was developed and implemented that sets out high level policy and recordkeeping direction for all components. Specifically with respect to OLC, ORMP has: conducted inventories of paper and electronic information; developed file plans; revised and implemented schedules where appropriate; and undertaken a business process analysis aimed at supporting efficient and effective recordkeeping. Furthermore, ORMP continues to assist OLC as it implements a scanning project for opinions to enable their transfer to NARA and develops a training manual for staff that updates existing OLC manuals. Finally, we have advised OLC Leadership that they should keep all business-related emails, regardless of content, and the Department will retain them in accordance with OLC records retention schedules.

Conclusion

The Department has determined that OLC has retained “adequate and proper documentation” of the conclusions in the memoranda relating to enhanced interrogation techniques. While we also found that certain OLC emails from the time period of these memoranda were available only on backup tapes, we have not, and cannot, especially given the passage of time, determine whether an unauthorized destruction of records occurred. In an abundance of caution we are keeping the emails recovered during this inquiry for the same retention period established in the records schedule for OLC opinion files. Finally, we continue our efforts to improve our recordkeeping program throughout the Department, including leadership offices such as OLC.

If you have any further concerns or questions, please contact me at 202-514-3528 or jeanette.plante@usdoj.gov.

Very truly yours,



Jeanette Plante, Director
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Justice Management Division