



UNITED STATES DEPARTMENT OF COMMERCE  
The Inspector General  
Washington, D.C. 20230

April 2, 2010

MEMORANDUM FOR: Dr. Jane Lubchenco  
Under Secretary of Commerce  
for Oceans and Atmosphere

FROM:

*Todd J. Zinser*  
Todd J. Zinser

SUBJECT:

OIG Investigation #PPC-SP-10-0260-P, Re: Destruction of  
OLE Documents During an Ongoing OIG Review

Presented for your information, and any action deemed appropriate, are the results of our investigation in the above-captioned matter. Our investigation was predicated upon an anonymous OIG Hotline complaint in November 2009 alleging that Dale Jones, Director of the Office for Law Enforcement (OLE) within NOAA's National Marine Fisheries Service (NMFS), held a "shredding party" on November 20, 2009, which occurred "during the middle of the investigation by the Office of Inspector General." The investigation to which the complaint referred was the nationwide review of OLE you requested, which was predicated upon concerns raised by Members of Congress about reports of heavy-handed and unfair enforcement activities, particularly in NOAA's Northeast Region. We were subsequently contacted by a confidential source who registered concerns similar to those in the anonymous complaint.

Our investigation included sworn, audio-recorded interviews of Director Jones (SES), Deputy Director Mark Spurrier (ZA5), Assistant Directors Mark Paterni and Todd DuBois (ZA5), Administrative Officer JoAnn McLean (ZA4), and Staff Assistant Michelle Dufay (ZS4)<sup>1</sup>. We also interviewed other OLE staff, as well as John Oliver, who is Director Jones' supervisor and Deputy Assistant Administrator for Fisheries.

### Results in Brief

We determined that in October 2009, Director Jones approved the shredding of OLE headquarters documents, office-wide, which was carried out when a truck from a mobile document destruction company arrived on November 20, 2009, and spent an hour shredding multiple large bags of documents on the street outside OLE headquarters. From what we were able to determine, about six of OLE headquarters' 40 employees participated, with Director Jones contributing the majority of documents shredded, consisting of the contents of 140-plus files from his office, which he estimated to be 75-80% of his total files. Such office-wide document destruction was not a routine function for OLE; rather, the Director and Deputy Director told us this was the first such exercise in their ten-plus years with OLE.

ZA5 is equivalent to GS-15, ZA4 is equivalent to GS-14, and ZS4 is equivalent to GS-7.

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We found that Director Jones, along with certain senior and administrative staff, undertook this document destruction without regard to the careful, deliberate management of records required by federal regulation and Department of Commerce (DOC) policy. Such non-compliance is particularly troubling given OLE's obligation to ensure the proper management of its own records—especially as a federal law enforcement agency that enforces recordkeeping violations by the fishing industry it regulates. Moreover, the shredding occurred in the face of OIG's ongoing review of OLE, which required OLE to provide us with numerous records, and also during ongoing litigation. As such, the shredding implicates an appearance of impeding both the OIG review and the litigation. OLE's senior management had an obligation to ensure retention of the agency's records while under OIG review,<sup>2</sup> as well as during the pendency of litigation. We note that we did not find sufficient evidence to establish that the shredding was intended to obstruct our ongoing review of OLE, although it posed an adverse impact to our ongoing review.

The shredding was done without the responsible OLE officials vetting it with their superiors in NMFS and NOAA, consulting NMFS' designated Records Management Official or NOAA's Office of General Counsel, or informing OIG in advance. Any or all of these would have been prudent steps that could have prevented the shredding. In hindsight, Director Jones and Assistant Director DuBois expressed regret for not recognizing the problems with the shredding before it was carried out. Deputy Director Spurrier admitted that a reason he chose not to shred anything was because he recognized it posed an appearance issue given OIG's ongoing review of OLE; however, he said he did not think to alert the Director to this risk, which he now regrets.

Assistant Director Paterni, while advising in retrospect that such shredding would not occur again given the same set of circumstances, refused to answer the question of whether he should have recognized at the time that the shredding was problematic, commenting that records management was not his area of responsibility. The Director, Deputy Director, and Assistant Director DuBois each answered this question in the affirmative. Assistant Director Paterni's refusal was made despite a Department of Commerce (DOC) directive requiring employees to be fully cooperative and forthcoming with the OIG.<sup>3</sup>

## Findings

Director Jones and members of his senior and immediate staff told us the plan for shredding originated with Ms. Dufay in October 2009 after she remembered Director Jones mentioning to her a year or so earlier that he someday wanted her to handle a project to get rid of old documents

<sup>2</sup> Section 6(a)(1) of the Inspector General Act of 1978, as amended, provides that each Inspector General, in carrying out the provisions of the Act, is authorized "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 this Act." [emphasis added]

<sup>3</sup> Department of Commerce Administrative Order (DAO) 207-10 states, "Employees and officials shall cooperate fully with OIG and provide the information or assistance that is necessary for OIG to fulfill its obligations under the Inspector General Act."

that had accumulated in his office. Ms. Dufay told us this recollection was prompted by her retrieving an office travel file in response to a Freedom of Information Act (FOIA) request and realizing that there were numerous old travel files that could probably be destroyed. She and Assistant Director Paterni then coordinated arrangements for office-wide shredding, and Ms. Dufay sent an email to all OLE headquarters' staff on October 27, 2009, inviting them to take advantage of professional shredding if they had a substantial amount of material. Over three weeks elapsed between the invitation to shred and when the scheduled shredding truck arrived on November 20, 2009.<sup>4</sup>

Neither Assistant Director Paterni, Assistant Director DuBois, nor Ms. McLean participated in the shredding. Assistant Director Paterni told us he was too busy at the time to gather documents for shredding, despite having instructed Ms. Dufay that "she must...let the entire office know this was going to happen, and give everyone an opportunity because...I wanted to make sure that we were efficient...in spending the money." Assistant Director DuBois said he did not have any documents to be shredded at the time, while Ms. McLean was out on sudden, extended sick leave beginning November 16, 2009, and had not yet assembled any documents. The Assistant Directors told us it did not occur to them that the shredding could be problematic in relation to OIG's review.

Deputy Director Spurrier, an attorney, also did not participate in the shredding. As shown below, the Deputy Director's account of his knowledge and actions regarding the shredding changed, markedly, during and between our interviews with him:

- When interviewed, Deputy Director Spurrier initially told us that he did not shred because he did not have time to assemble documents, but would have if he had the time since he did not see an issue with it. He added that he would probably do so now because he still did not think it would be improper.
- Later during this interview, Deputy Director Spurrier admitted that a reason he chose not to shred anything was because he recognized it posed an appearance issue given OIG's ongoing review of OLE. Despite this recognition, he told us he did not think to alert Director Jones or anyone else to this risk, which, in hindsight, he regrets.
- Over two weeks following our interview, Deputy Director Spurrier sent an unsolicited email message to our lead investigator in this matter retracting his above admission. In this email he stated, "[When interviewed] we discussed whether or not I made this decision [not to shred] based on facts that included the current OIG investigation and then did not share my concerns with others prior to the shredding. This was not the case. If I would have recognized this action would have been perceived as it has, I would have spoken up."
- When reinterviewed the next day, again under oath, Deputy Director Spurrier told us that his admission during his prior sworn interview was correct and the email was inaccurate. His explanation for the email assertion was that in reflecting on this matter in the time following

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<sup>4</sup> Assistant Director Paterni, purchasing official for OLE headquarters, procured the mobile document destruction services directly using the office credit card, at a cost of \$206.

our interview, without having a copy of the interview transcript, he experienced an incorrect recollection.

Director Jones admitted that he did not review and apply required records disposition schedule criteria in deciding which of his own file documents to shred; consequently, he could not definitively say whether any documents that were destroyed were required to have been retained. He also could not rule out that some shredded documents may have been pertinent to OIG's review, but said he did not believe any would have been relevant.

After we initially addressed the hotline complaint with Director Jones, on December 14, 2009, he sent us an email in which he stated, "...I would never have imagined that anyone would seriously suspect that this [shredding] activity was in any way inappropriate, regardless of the ongoing review by your office...Nothing that would have been relevant to the matters subject to the ongoing review by your office was disposed of..." When we interviewed him on March 5, 2010, and asked how he knew that none of the files he shredded were of potential relevance to OIG's review, the Director advised that it was a presumption that, in hindsight, he should not have made.

While providing us a topical listing of the 140-plus files he shredded and the approximately 42 files he retained (which he prepared after-the-fact in December 2009), the Director could not describe shredded documents in detail, telling us he simply looked over his files, not page-by-page, and made his own judgments on what to shred and what to retain. He estimated that he spent a total of about three hours over several days assembling documents for shredding. The Director's list includes multiple shredded files of his that, on their face, would have been relevant to our review (e.g., "Funds", "GCEL Case Guidance", "Operating Plans-NOAA", "Purchasing", "Reports", "Seizures", "Travel," and "Workforce Analysis".)

The Director, Deputy Director, Assistant Directors, and Ms. Dufay acknowledged that OLE staff was not provided policy guidance or limitations on what they could and could not shred. The only instructions staff received were the shredding contractor's "Do's & Don'ts" for shredding (e.g., paper clips are acceptable, rubber bands are not.) They could not definitively tell us who all in headquarters participated in the shredding, and did not know what all had been shredded—telling us determinations for shredding were left to individual discretion, relying on staff to follow retention/destruction requirements.

As carried out, the shredding was non-compliant with a federal records management regulation (36 C.F.R. § 1220), along with DOC and NOAA policy (Departmental Administrative Orders 205-1 and 205-3, and NOAA Administrative Order 205-1). These directives expressly require the retention and safeguarding of agency records, and prohibit destruction of records without following approved disposition schedule criteria. Key pertinent provisions are excerpted below:

- 36 C.F.R. § 1220.32(e) prescribes that, "Records, regardless of format, are protected in a safe and secure environment and removal or **destruction is carried out only as authorized in records schedules.**" [emphasis added]

- DAO 205-1, Section 4.04 requires that, “All records of the Department shall be listed and described in an approved records schedule and **shall be disposed of only as authorized by that schedule.**” [emphasis added]
- DAO 205-3, Section 5.02 requires that, “All offices and employees shall cause to be made and preserved records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Department, and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Department’s activities. **No records shall be removed except as authorized by this Order.**” [emphasis added]
- DAO 205-3, Section 5.11 requires that, “Records authorized for disposal under an approved Records Disposition Schedule or List **may be removed only in accordance with the procedures set forth in...DAO 205-1...**” [emphasis added]
- NAO 205-1,<sup>5</sup> Section 5.08 identifies, “NOAA’s Records Disposition Handbook – document listing NOAA’s records disposition schedules. **These authorities are mandatory in NOAA.**” [emphasis added]
- NOAA’s *Records Disposition Handbook* provides disposition schedules specifying required retention periods (e.g., two years, five years, permanent) for the various types of records maintained by NOAA organizations such as OLE.

In addition to not complying with the above-referenced records disposition regulation and policy, the shredding implicates an appearance that it was done to conceal information from the OIG. As noted above, Deputy Director Spurrier recognized this appearance problem in advance of the shredding, yet did not intervene. Director Jones and other officials also acknowledged that the shredding posed such an appearance issue, as did other OLE staff with whom we spoke. Compounding this appearance problem is that beyond the invitation to shred being extended to all headquarters employees through Ms. Dufay’s initial and reminder emails, it could also have had the effect of signaling to OLE’s field staffs that shredding was acceptable during OIG’s ongoing review of OLE. This appearance issue, along with that posed in relation to pending litigation, implicates the following provision of the Standards of Ethical Conduct:

- 5 C.F.R. § 2635.101(b)(14) provides that, “Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”

We also investigated whether there may have been a violation of 18 U.S.C. 1516 – Obstruction of a Federal Audit. Proof of such criminal violation requires evidence of intent to obstruct. Director Jones and the other OLE managers we interviewed adamantly denied any intent to obstruct OIG’s

<sup>5</sup> NAO 205-1, dated May 30, 1997, was in effect at the time of the shredding. It has since been superseded by revision dated January 19, 2010.

review of OLE. Absent additional information, there is not sufficient evidence at this time to establish that the shredding was intended to impede our efforts. Notwithstanding, the shredding necessarily limited our access to OLE records, thus posing an adverse impact to our ongoing review.

Director Jones told us he was surprised the shredding raised any concerns because there was no attempt to be "clandestine" with it, and, at the time, he simply did not think of it in relation to the ongoing OIG review. The Director told us he now regrets not having considered this and not ensuring adherence to the records disposition requirements, expressing that it discredits him and OLE. When we asked Director Jones about his December 14, 2009, email response after we first addressed the shredding issue with him, he stated:

"[W]hen you raised it that day [in December 2009], I told you then, I was shocked. And I should not have been. And when I sat in that hearing the other day [March 3, 2010] and listened to the Chairwoman describe that and the way she took it and the way it was characterized, I mean, I felt terrible because, you know, like she said, you're a law enforcement official, why didn't you think of that. I don't know. I mean, I've been doing this for 32 years."

He further stated, "[I]t was just something that...I see now was poor judgment and I certainly would never, ever have done it...given the consequences here. And I think it's put some great jeopardy on me..." Beyond subjecting the agency and themselves to liability, because the Director, Deputy Director, and Assistant Directors did not provide employees with guidance on the rules and regulations for document destruction, this also exposed staff to potential personal liability for non-compliance with the applicable regulation and policy—despite the shredding being a function sanctioned by OLE management.

Both Director Jones and Deputy Director Spurrier suggested to us that any staff having concern about the shredding, namely the OIG hotline complainant, had a duty to raise it before the shredding took place. In our view, this is misplaced responsibility; the fact is that the Director, Deputy Director, and Assistant Directors had over three weeks to recognize that the scheduled shredding was ill-advised from both the standpoint that it was non-compliant with applicable regulation and policy, and because it implicated an adverse appearance in light of the ongoing OIG review of OLE. It is also the case that, by law and DOC policy, employees have the right to contact the OIG and blow the whistle on suspected fraud, waste, and abuse, without fear of reprisal and they are not required to first address their concerns internally with agency management.

We also interviewed the Director's supervisors in NMFS at the time of the shredding: John Oliver, Deputy Assistant Administrator for Fisheries, and James Balsiger, former Acting Assistant Administrator. They each said they had no advance knowledge of the shredding. However, Mr. Oliver recalled that in about December 2009 or January 2010, either Director Jones or Deputy Director Spurrier called and advised him, in general terms only, that OLE got around to purging some old files, and they were letting him know just in case this was reported in the press, in light of all the "noise" surrounding OLE at the time, particularly in the Northeast.

Mr. Oliver told us because he did not connect it to OIG's review at the time, and did not recall the advisement making reference to any complaint or being raised by OIG, he did not apprise any NMFS or NOAA officials above him. He also said he assumed OLE followed proper records management protocols in purging the files. Director Jones told us he thought he advised Mr. Oliver that OIG had raised the issue, but said he could not be sure.

Mr. Balsiger, who had relocated to Alaska, confirmed that he was not advised of the shredding in advance, telling us he first learned of it through a media report following the March 3, 2010, Congressional hearing. Mr. Balsiger aptly stated during our interview, "Shredding is so final; once a document is shredded, it's gone." As Director Jones, Deputy Director Spurrier, and Assistant Directors Paterni and DuBois have acknowledged, it is not possible to know definitively what all documents were destroyed in the shredding.

**Recommendations**

1. Federal law enforcement officers are held to a high standard of conduct. OLE's own disciplinary policy, issued by Director Jones in 2008, states that "because law enforcement employees occupy positions of special trust and responsibility, they must maintain the highest standards of conduct." In our view, the Under Secretary should not have to remind NOAA's senior law enforcement officials of the need to cooperate with OIG and other investigations, and retain all relevant documents and follow records disposition requirements. As OLE's and NOAA's top law enforcement officer, the Director is most accountable for the regulation and policy non-compliance shown by these findings, along with the adverse appearance implicated. Accordingly, we recommend that you consider appropriate administrative action for Director Jones, as well as for Deputy Director Spurrier and Assistant Directors Paterni and DuBois, based on their respective levels of involvement and responsibility.
2. Significantly, the only person we spoke to within OLE headquarters who thought to check the rules and regulations on record disposition, prior to the shredding, was a GS-7 equivalent support staff employee. Based on this and our other findings, we recommend that NOAA reinforce with its management and overall workforce the importance of adhering to records retention/destruction requirements.
3. Because our findings show non-compliance with a government-wide records disposition regulation promulgated by the National Archives and Records Administration (NARA), we recommend that you determine whether notification to NARA is required, and make such notification as appropriate.
4. Given litigation involving OLE enforcement matters was pending at the time of the shredding, we recommend that you determine whether these findings present any issues in relation to any current discovery order or any active litigation hold on NOAA records, and address them as appropriate.

The appendices to this memorandum contain summaries of the evidence for our findings in this matter, presented by accountable official and regulations/policies implicated. Referenced therein

are our interviews and other pertinent documentation, which are contained in the separate packet of attachments to this memorandum, consisting of over 450 pages.

Please apprise us within 60 days of any actions taken or planned with respect to our findings and recommendation in this matter. If you have any questions, or if we can be of further assistance, please do not hesitate to call me at (202) 482-4661.