

U.S. Department of Labor

Office of Inspector General—Office of Audit

**OFFICE OF THE ASSISTANT SECRETARY
FOR ADMINISTRATION AND MANAGEMENT**



THE DEPARTMENT OF LABOR'S RECORDS MANAGEMENT PROGRAM CONTROLS NEED STRENGTHENING

**Date Issued: September 15, 2008
Report Number: 03-08-001-07-001**

BRIEFLY...

Highlights of Report Number: 03-08-001-07-001, to the Assistant Secretary for Administration and Management.

WHY READ THE REPORT

The Office of Inspector General (OIG) performed an audit of the U.S. Department of Labor's (DOL) Records Management program.

The National Archives and Records Administration (NARA) oversees records management at all Federal agencies. NARA requires Federal agencies to institute adequate records management controls over the maintenance, use, and disposition of records.

In DOL, the Assistant Secretary for Administration and Management is responsible for managing the Department's records and providing overall policy direction for the Department's Records Management program. The DOL Records Management program consists of records creation, maintenance and use, and disposition to achieve adequate and proper documentation of the policies and transactions of the Department.

WHY OIG DID THE AUDIT

The purpose of our audit was to answer the following questions:

1. Does DOL have sufficient controls to ensure that Federal records are preserved in accordance with Federal regulations?
2. Does DOL have sufficient controls to preserve e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests?

READ THE FULL REPORT

To view the report, including the scope, methodology, and the Deputy Assistant Secretary for Operations' response, go to:

<http://www.oig.dol.gov/public/reports/oa/2008/03-08-001-07-001>

September 2008

The Department of Labor's Records Management Program Controls Need Strengthening

WHAT OIG FOUND

DOL could not demonstrate that controls are sufficient to ensure Federal records are preserved in accordance with Federal regulations. DOL did not: (1) conduct comprehensive periodic evaluations of its Records Management program; (2) provide records management training to all staff; and (3) effectively manage the quantity of transitory records or documents that have no legal retention requirements. The lack of sufficiency in conducting these practices results in DOL being unable to ensure that its employees were entering all Federal records into the appropriate recordkeeping system. DOL proposed to implement a new policy on deleting backup media containing e-mail and electronic files that are transitory records or documents that have no legal retention requirements. However, DOL should delay implementing the policy until it can demonstrate compliance with NARA and Department records management regulations.

We also found that DOL did not have an effective recordkeeping and document management system to manage its e-mail and electronic files in response to legal holds, litigation discovery, and other requests. DOL may be at risk of not being able to address these requests in a timely and complete manner.

WHAT OIG RECOMMENDED

We recommended that the Assistant Secretary for Administration and Management implement an effective evaluation process of its Records Management program. Additionally, DOL should delay implementing its new policy on deleting backup media until the evaluation process is operating. We also recommended that Agency Heads be required to implement program specific recordkeeping procedures on the maintenance and disposition of transitory records and documents. Finally, we recommended that DOL conduct a cost-benefit analysis on establishing a system which provides the capabilities to centrally, efficiently, and effectively manage and access e-mails that are Federal records.

The Deputy Assistant Secretary for Operations generally agreed with the recommendations.

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Executive Summary

The Federal Records Act of 1950 requires that the head of each Federal agency establish and maintain an active records management program. The National Archives and Records Administration (NARA) has oversight responsibilities of Federal records management programs. In the U.S. Department of Labor (DOL), the Assistant Secretary for Administration and Management is responsible for managing the Department's records and providing overall policy direction for the Department's Records Management program. The DOL Records Management program consists of records creation, maintenance and use, and disposition to achieve adequate and proper documentation of the policies and transactions of the Department.

The Office of Inspector General (OIG) conducted a performance audit of DOL's Records Management program. Our objectives were to answer the following questions:

1. Does DOL have sufficient controls to ensure that Federal records are preserved in accordance with Federal regulations?
2. Does DOL have sufficient controls to preserve e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests?

Results

1. DOL could not demonstrate that controls are sufficient to ensure Federal records are preserved in accordance with Federal regulations. While DOL established records management policies and procedures, all procedures were not followed, such as: (1) conducting comprehensive periodic evaluations of its Records Management program; (2) providing Department-wide records management training to all staff; and (3) effectively managing the quantity of transitory records or documents that have no legal retention requirements, separately from records covered under a Federal Records Schedule.
- DOL did not perform comprehensive evaluations of the Department's Records Management program. We found that two of the five agencies we audited had an evaluation process that included some aspects of records management; however, the results were not reported to the Department and Agency Records Officers. Also, the Department conducted limited records management reviews; however, the reviews did not include evaluations of creation, maintenance and use of records, recordkeeping requirements, records inventories, file plans, and disposition schedules.
- DOL did not provide records management training to all employees. Some employees relied either on the orientation instructions they received when they were

hired, or on-the-job training to determine what papers, e-mails, and electronic documents to enter into the appropriate recordkeeping system. Department Officials stated that they provided training to agency records officers, managers, supervisors, and some National Office employees. DOL took corrective action and on June 2, 2008, implemented mandatory on-line records management training for all employees and contractors.

- DOL agencies did not follow Department guidance for disposing of hard copy or electronic transitory records or documents that have no legal retention requirements every 90 days or sooner. Although these documents and files may not be considered long-term Federal records, they may be subject to Freedom of Information Act (FOIA), discovery, investigative, and Congressional requests and cannot be destroyed if they are relevant and exist at the time. Therefore, DOL could incur time and cost for maintaining these records, which would be avoided if the records are disposed of within the guidelines.

In December 2006, DOL proposed to implement a new Department-wide Uniform E-Mail and Electronic Document Backup Retention Policy, which would reduce the amount of transitory records or documents that have no legal retention requirements by setting a 6-month period for maintaining the backup media for deleted e-mails and electronic files, after which time they would be unavailable. While the new retention policy seems reasonable and would provide added guidance on disposition of e-mail and electronic files that are transitory records or have no legal retention requirements under the Federal Records Act, the implementation of the policy should be delayed until DOL can demonstrate compliance with NARA and Department records management regulations. In June 2007, DOL postponed implementing the new Department-wide Uniform E-Mail and Electronic Document Backup Retention Policy after OIG raised concerns about how the lack of providing records management training to all employees could result in the premature deletion of e-mails and electronic records that are required to be filed and maintained in accordance with the appropriate records schedule. However, in addition to the training, DOL needs to ensure comprehensive periodic evaluations of its Records Management program are conducted before the policy is implemented.

We found that DOL Records Management officials were aware of the NARA and Department regulations and as such took some action to perform limited periodic reviews, conduct training, and dispose of transitory records or documents that have no legal retention requirements. However, the lack of sufficiency in conducting these practices results in DOL being unable to ensure that its employees were entering all Federal records into the appropriate recordkeeping system, and maintaining, using and disposing of them as NARA and DOL requires.

2. DOL did not have an effective recordkeeping and document management system to manage its e-mail and electronic files in response to FOIA and other requests. DOL may be at risk of not being able to address in a timely and complete manner e-mail and electronic file needs required as a result of legal holds orders and litigation discovery.

DOL depends on the collaboration of its SOL lawyers and Department program officials to preserve Federal records and “non-record” materials, in the form of e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests. However, the DOL did not have effective controls over the recordkeeping and maintenance of e-mails and electronic documents in order to efficiently access them when needed. Specifically, DOL could not demonstrate an efficient and effective organization and management of electronic data capable to produce it in a timely and complete manner, when needed, from legal hold orders, litigation discovery proceedings and FOIA and other requests. As a result, in FYs 2007 and 2008, DOL had to spend significant time and funds to search and retrieve relevant documents in order to respond to major Congressional requests. We were told the DOL Office of the Assistant Secretary for Administration and Management (OASAM) initiated the development of an electronic recordkeeping and document management system to address the need for an effective and efficient management tool but due to budgetary considerations suspended the project.

Recommendations

We recommended that the Assistant Secretary for Administration and Management:

1. Implement an effective evaluation process so DOL can demonstrate that its agencies are in compliance with relevant Records Management laws, regulations, and procedures.
2. Periodically prepare a written summary on DOL’s evaluation activities and report whether DOL is in compliance with NARA and DOL records management requirements.
3. Require Agency Heads to implement NARA and Departmental guidance by creating program specific recordkeeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents that have no legal retention requirements under the Federal Records Act.
4. Before implementing the new retention policy, ensure that the Department’s evaluation of DOL’s Records Management program demonstrates compliance with NARA and DOL records management regulations.
5. Conduct a cost-benefit analysis on establishing an electronic recordkeeping and document management system, or a similar system, which provides the capabilities to centrally, efficiently and effectively manage and access e-mails that are Federal records and addresses the unnecessary retention of e-mails that are transitory records or non-records.

This report did not recommend corrective action on employee training because we addressed it in our September 2007 Management Letter to the Assistant Secretary for Administration and Management and the training was implemented.

Agency Response

The Deputy Assistant Secretary for Operations responded that the Department will standardize as a regular part of its Records Management program the periodic evaluations cited in NARA regulations 36 CFR part 1220.42. The framework for the periodic evaluations will be derived from NARA's self-evaluation guide for Federal agencies. The periodic evaluations will be scheduled so that all DOL agencies will be covered during a 5-year cycle on an ongoing basis, beginning in the first quarter of FY 2009. The Department will prepare a written summary as each evaluation is completed.

On August 18, 2008, the Assistant Secretary for Administration and Management issued a memorandum to Agency Heads, to create program-specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents.

Concerning the recommendation to ensure that DOL can demonstrate compliance with NARA regulations and DOL records management requirements before implementing the new retention policy, the Deputy Assistant Secretary for Operations responded that there is now a demonstrated assurance that the Department's Records Management program is in compliance with the NARA and DOL requirements. This can be based in the substantial efforts the Department has undertaken since 2004 to improve its Records Management program, the absence of any NARA identified instances of non-compliance in DOL's Records Management program, the retirement of more than 140,000 cubic feet of Federal records (both paper and electronic media) to NARA's Federal Records Centers, adopting OIG recommendations 1 through 3, and providing annual mandatory records management training to all DOL employees. Additionally, the retention policy will be guided by recent opinion from the Solicitor of Labor. The retention policy will be re-issued before the end of FY 2008.

The Deputy Assistant Secretary for Operations responded that DOL is aware of the potential benefits of electronic recordkeeping and document management systems and the Office of the Chief Information Officer will update its cost-benefit analysis.

OIG Conclusion

Recommendations 1, 2, 4, and 5 are resolved and recommendation 3 is closed. The Deputy Assistant Secretary for Operations' response to recommendation 4 provides an alternative corrective action. We agree with the Deputy Assistant Secretary's proposed corrective action. However, the recommendation will not be closed until recommendations 1 and 2 are implemented.

U.S. Department of Labor

Office of Inspector General
Washington, DC 20210



September 15, 2008

Assistant Inspector General's Report

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The OIG conducted a performance audit of DOL's Records Management program. Our objectives were to answer the following questions.

1. Does DOL have sufficient controls to ensure that Federal records are preserved in accordance with Federal regulations?
2. Does DOL have sufficient controls to preserve e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests?

To accomplish our audit, we reviewed DOL's Department-wide Records Management program policies and procedures and interviewed the DOL Records Officer. We also reviewed policies, procedures, and practices at five DOL agencies and interviewed their Records Officers and a sample of program managers and employees. The five agencies and programs were the Employment Standards Administration (ESA), Wage and Hour Division; the Occupational Safety and Health Administration (OSHA), Safety and Health Inspection; the Mine Safety and Health Administration (MSHA), Metal and Nonmetal Inspection; the Bureau of Labor Statistics (BLS), Quarterly Employment Statistics; and the Employment and Training Administration (ETA), Trade Adjustment Assistance. Additionally, we conducted interviews with officials from the Solicitor of Labor (SOL).

We conducted our audit in accordance with generally accepted government auditing standards for performance audits. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Our objectives, scope, methodology, and criteria are detailed in Appendix B.

Objective 1 – Does DOL have sufficient controls to ensure that Federal records were preserved in accordance with Federal regulations?

Results and Findings – DOL could not demonstrate controls are sufficient to ensure Federal records are preserved in accordance with Federal regulations.

While DOL established records management policies and procedures, all procedures were not followed, such as: (1) conducting comprehensive periodic evaluations of its Records Management program; (2) providing Department-wide records management training to all staff; and (3) effectively managing the quantity of transitory records and documents that have no legal retention requirements under the Federal Records Act, separately from records covered under a Federal Records Schedule. We found that DOL Records Management officials were aware of the NARA regulations and Department requirements and as such took some action to perform limited periodic reviews, conduct training, and dispose of transitory records or documents that have no legal retention requirements. However, the lack of sufficiency in conducting these practices results in DOL being unable to ensure that its employees were entering all Federal records into the appropriate recordkeeping system, and maintaining, using and disposing of them as NARA and DOL requires.

Since FY 2004, DOL had taken steps to improve its Records Management Program and communicated to all Agency Heads the importance of records management. Examples of these steps included:

- The Solicitor of Labor (SOL) issued guidance on Federal records, including specific instructions on how to handle electronic records.
- DOL updated the Records Management Handbook.
- DOL trained all its agency records officers, and administrative and information technology (IT) staff on their records management responsibilities.
- DOL offered records management training to managers and supervisors in which more than 200 employees were trained.
- The DOL Records Officer participated in work groups with NARA and the e-Rulemaking E-Government Initiative.
- The DOL Enterprise Architecture Program Manager participated in the Records Management Service Component Working Group of the Electronic Records Management e-Government Initiative.
- BLS, ESA's Office of Workers' Compensation Programs and the Wage and Hour Division, OSHA, ETA, and MSHA initiated action to update their records schedules, including electronic records.

These initiatives primarily targeted improvement of agency-wide rather than employee-level records management. In order to ensure compliance with Federal (e.g., NARA and DOL) requirements related to records management, the Department needs to

evaluate its Records Management Program, conduct mandatory training of all employees on records management, and ensure that agencies dispose of their Federal records according to a NARA-approved records schedule.

The Office of Management and Budget (OMB) Circular No. A-123, Management's Responsibility for Internal Control, dated December 21, 2004, requires managers to develop and maintain effective internal controls. Effective internal controls provide assurance that significant weaknesses in the design or operation of internal controls that could adversely affect the agency's ability to meet its objectives would be prevented or detected in a timely manner.

DOL Did Not Conduct Comprehensive Periodic Evaluations of its Records Management Program.

DOL could not demonstrate that its Records Management Program complied with NARA and its own requirements. While the Department did conduct limited record management reviews, the reviews did not include comprehensive evaluations of the creation, maintenance and use of records, recordkeeping requirements, records inventories, file plans, and disposition schedules. Therefore, DOL could not demonstrate that all Federal records are entered into the appropriate recordkeeping system, and are properly maintained, used and disposed.

Federal regulations require that each agency periodically evaluate its records management programs for compliance with relevant laws and regulations and for effectiveness. Title 36 of the Code of Federal Regulations (CFR) Part 1220.42 states:

Each agency must periodically evaluate its records management programs relating to records creation and recordkeeping requirements, maintenance and use of records, and records disposition. These evaluations shall include periodic monitoring of staff determinations of the record status of documentary materials in all media, and implementation of these decisions. These evaluations should determine compliance with NARA regulations in this subchapter, including requirements for storage of agency records and records storage facilities in 36 CFR Part 1228, subparts I and K, and assess the effectiveness of the agency's records management program.

According to the Department of Labor Manual Series (DLMS) -1, Chapter 413, the Department Records Officer is responsible for performing periodic reviews in DOL.

The Department's Records Officer explained that DOL's evaluation process for records management consisted of agencies conducting an ongoing review of their records

schedules¹. In this process, agencies reviewed records created or received as a result of program activities and compared them to existing records schedules. The reviews included compliance with current business and records management program requirements. The DOL Records Officer stated there were no written reports of these reviews, but cited the increasing storage of DOL records at NARA's Federal Records Centers as evidence that agencies were complying with their records schedule requirements. This process is not effective because it did not require agencies to incorporate records management into their internal control monitoring and it lacked sufficient oversight by the Department and Agency Records Officers.

Due to the large number and variety of records and recordkeeping systems throughout DOL, the Department's Records Officer had to rely on internal controls at the agency level to ensure record management systems and practices complied with NARA regulations and DOL requirements. Internal controls at the agency level were also important because DOL relied on its employees to identify and move hard copy documents, e-mail, and electronic files that are Federal records to the appropriate recordkeeping system. It is important that DOL have the ability to demonstrate that this occurred.

The five agencies we reviewed had a supervisory review process over program activities that included compliance with agency documentation requirements. However, only OSHA and MSHA implemented an internal control program that included evaluating some records management activities at the program level and reporting the results to appropriate agency program officials, but not the Agency Records Officer. OSHA established the Management Accountability Program as one component of its internal control system. The Management Accountability Program consisted of reviews conducted by OSHA Regional Office staff of its area offices; the area offices were responsible for performing and documenting safety and health inspections. The reviews covered inspection case file documentation and records disposition, and the process required the reviewers to prepare written reports of results, along with any corrective action for deficiencies found. The written reports were provided to the OSHA National Office's Director of Evaluations and Analysis. MSHA had a similar process. However, the OSHA and MSHA Records Officers informed us they did not receive copies of these reviews.

DOL Did Not Provide Department-wide Records Management Training to All Employees.

Not all employees received records management training. Some employees relied either on the orientation instructions they received when they were hired, or on-the-job training to determine what papers, e-mails, and electronic documents to enter into the appropriate recordkeeping system. Department Officials stated that they only provided training to agency records officers, managers, supervisors, and some National Office

¹ A records schedule governs specified series of records common to several or all agencies or administrative units of a corporate body. The records schedule provides disposition authority for temporary administrative records common to several or all agencies of the Federal Government.

employees; however, the Department had not provided training to all employees on their responsibilities and techniques for the implementation of recordkeeping requirements, and on the distinction between records and non-record materials, regardless of the type of media. All 12 agency employees we interviewed explained that when they were hired, they received formal or on-the-job training on their job duties and responsibilities, but not on records management. The employees said they relied on this initial training to determine what papers, e-mails, and electronic documents to enter into the appropriate recordkeeping system.

As a result, there is a risk that DOL employees are not aware of their responsibility to identify which documents are Federal records and process them according to Department and Agency requirements. This is especially critical for e-mails and electronic files. If employees are not able to identify Federal records, there is the additional risk that e-mails and electronic files are deleted before being appropriately filed in the agency's recordkeeping system.² Records management training is one of the key internal controls necessary to mitigate this risk.

Federal regulations and the DLMS contain provisions to ensure that Federal employees are aware of their records management responsibilities. They include:

- Title 36 CFR, Part 1222.20 (b) (5), requires that each Federal agency ensure that it provides adequate training to all personnel on policies, responsibilities, and techniques for the implementation of recordkeeping requirements, and the distinction between records and non-record materials, regardless of media, including those materials created by individuals using computers to send or receive e-mail.
- Title 36 CFR, Part 1222.34 (g), requires agencies to take appropriate action to ensure that all staff are capable of identifying Federal records. For electronic mail systems, agencies shall ensure that all staff are informed of the potential record status of messages, transmittal and receipt data, directories, and distribution lists.
- DLMS-1 Chapter 413, section E(3) requires employee records management training.

In September 2007,³ the OIG recommended that the Assistant Secretary for Administration and Management develop and implement annual records management training of all DOL managers and employees. Such training would help ensure adequate and proper documentation of the policies and transactions of the Department's public business. In response to OIG, the Assistant Secretary for

² DOL's Handbook, section entitled "E-mail and Electronic Document Backup Media Retention Policy - Frequently Asked Questions," dated May 23, 2007.

³ Management Letter No. 03-07-004-07-001, September 24, 2007, to the Assistant Secretary for Administration and Management.

Administration and Management agreed to conduct annual training for all DOL employees. The online mandatory training on record management began on June 2, 2008.

DOL Did Not Effectively Manage the Quantity of Transitory Records or Documents That Have No Legal Retention Requirements Under the Federal Records Act.

DOL did not ensure the efficient, prompt and orderly reduction in the quantity of transitory records and documents that had no legal retention requirements under the Federal Records Act.⁴ We found that the agencies we reviewed were not following DOL guidance for disposing or deleting these types of records every 90 days or sooner. This occurred because agencies did not have specific procedures on maintaining and disposing of these records according to DOL guidance. Although these documents and files may not be considered long-term Federal records, they may be subject to Freedom of Information Act (FOIA), discovery, investigative, and Congressional requests and cannot be destroyed if they are relevant and exist at the time. Therefore, DOL could incur time and cost for maintaining these records, which would be unnecessary if the records had been disposed of within the guidelines.

Title 36 CFR Part 1220.38 states:

Agencies must ensure the proper authorized disposition of their records, regardless of format or medium, so that permanent records are preserved and temporary records no longer of use to the agency are promptly deleted or disposed of in accordance with the approved schedule when their required retention period expires.

The DOL Records Management Handbook, Part 3 – Records Requiring Only Short Term Retention, states: If transitory documents are to be retained, they should be kept in a separate chronological file and deleted or destroyed every 90 days or sooner if no longer needed.

None of the five agencies we reviewed had procedures defining transitory records and instructing the employees to dispose or delete them after 90 days. Program managers and employees varied in how they handled the retention of transitory records. Broadly, we found that each March, the Assistant Secretary for Administration and Management sponsors a “DOL Spring Cleaning Week.” The Assistant Secretary sends a memorandum to agency administrative officers; it includes instructions for having employees delete unneeded data files, including e-mails and attachments. The memorandum, however, does not define transitory records or cover the 90-day deletion guidance. While all five agencies under review participated with the “DOL Spring Cleaning Week” in directing employees to determine whether the e-mails or electronic

⁴ Transitory records are documents of short-term (180 days or less) interest, including in electronic form (e.g., e-mail messages), which have minimal or no documentary or evidential value. Although these may be useful to employees in accomplishing their work, the documents are not needed as part of the long term documentation of agency activities.

documents met the legal definition of a record before deleting them, the guidance was not sufficient for instructing employees on how to manage e-mails that were of a transitory nature. Therefore, employees with no records management training, made decisions on when to dispose of records that they determined to have minimal or no documentary or evidential value.

In December 2006, DOL proposed to implement a new Department-wide Uniform E-Mail and Electronic Document Backup Retention Policy, which would assist in reducing the amount of records that have short-term retention requirements or no business value by setting a 6-month period for maintaining deleted e-mails and electronic files, after which time they would be unavailable. We concluded that the proposed retention policy was reasonable based on NARA's e-mail retention policy and would provide added guidance on disposition of e-mail and electronic files that are transitory records and documents that have no legal retention requirements under the Federal Records Act. NARA, General Records Schedule (GRS) 20⁵ gives Federal agencies the authority to adopt the print and delete method for handling e-mail. It allows for deletion of the electronic versions of e-mail on the desktop provided the recordkeeping copy is kept in either paper or electronic form, with appropriate transmission and receipt data included. DOL's policy on e-mail and electronic documents is to print and file them into the appropriate recordkeeping system.⁶ However, the implementation of the Department-wide Uniform E-Mail and Electronic Document Backup Retention Policy should be delayed until DOL can demonstrate compliance with NARA regulations and Department records management requirements. Specifically, DOL must have the ability to demonstrate that its employees file e-mails and electronic documents that are Federal records, not including transitory records, into the appropriate recordkeeping system before deleting the electronic versions of them.

After meeting with the OIG on June 21, 2007, the Assistant Secretary for Administration and Management suspended implementing the new retention policy. OIG explained that because DOL had not conducted mandatory training on records management, there was a risk that employees might unintentionally delete records that should be retained.

Recommendations

We recommend the Assistant Secretary for Administration and Management:

1. Implement an effective evaluation process so DOL can demonstrate that its agencies are in compliance with relevant Records Management laws, regulations, and procedures.

⁵ The GRS provides disposition authority for temporary administrative records common to several or all agencies of the Federal Government.

⁶ DOL's Handbook, section entitled "Email and Electronic Document Backup Media Retention Policy - Frequently Asked Questions," dated May 23, 2007.

2. Periodically prepare a written summary on DOL's evaluation activities and report on whether DOL is in compliance with NARA regulations and DOL records management requirements.
3. Require Agency Heads to implement NARA and Departmental guidance by creating program specific recordkeeping procedures that instructs all employees on the maintenance and disposition of transitory records and documents that have no legal retention requirements under the Federal Records Act.
4. Before implementing the new retention policy, ensure that the Department's evaluation of DOL's Records Management program demonstrates compliance with NARA regulations and DOL records management requirements.

We did not recommend corrective action on employee training because it was previously contained in a September 2007 Management Letter to the Assistant Secretary for Administration and Management. The Assistant Secretary for Administration and Management agreed to conduct annual training for all DOL employees. The training was implemented in the third quarter of FY 2008.

Agency Response

The Deputy Assistant Secretary for Operations responded that the Department will standardize as a regular part of its Records Management program the periodic evaluations cited in NARA regulations 36 CFR part 1220.42. The framework for the periodic evaluations will be derived from NARA's self-evaluation guide for Federal agencies. The periodic evaluations will be scheduled so that all DOL agencies will be covered during a 5-year cycle on an ongoing basis, beginning in the first quarter of FY 2009. The Department will prepare a written summary as each evaluation is completed. By the first quarter of FY2009, DOL will amend DLMS 1, Chapter 400, Records Management Program, to reflect this expanded aspect of its Records Management program.

On August 18, 2008, the Assistant Secretary for Administration and Management issued a memorandum to Agency Heads, to create program-specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents. Conformity with this guidance will be evaluated during the Department's periodic evaluations.

Concerning the recommendation to ensure that DOL can demonstrate compliance with NARA regulations and DOL records management requirements before implementing the new retention policy, the Deputy Assistant Secretary for Operations responded that there is now a demonstrated assurance that the Department's Records Management program is in compliance with the NARA and DOL requirements. This can be based in the substantial efforts the Department has undertaken since 2004 to improve its records management program, the absence of any NARA –identified instances of non-compliance in DOL's Records Management program, the retirement of more than

140,000 cubic feet of Federal records (both paper and electronic media) to NARA's Federal Records Centers, adopting OIG recommendations 1 through 3, and providing annual mandatory records management training to all DOL employees. Additionally, the retention policy will be guided by recent opinion from the Solicitor of Labor. The retention policy will be re-issued before the end of FY 2008.

OIG Conclusion

Recommendations 1, 2, and 4 are resolved and recommendation 3 is closed. The Deputy Assistant Secretary for Operations' response to recommendation 4 provides an alternative corrective action. We agree with the Deputy Assistant Secretary's proposed corrective action. However, the recommendation will not be closed until recommendations 1 and 2 are implemented.

Objective 2 – Does DOL have sufficient controls to preserve e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests?

Results and Findings – DOL Did Not have an Effective Recordkeeping and Document Management System to Manage its E-mail and Electronic Files In Response to Requests.

DOL may be at risk of not being able to address in a timely and complete manner e-mail and electronic file needs required as a result of legal hold orders and litigation discovery. DOL depends on the collaboration of its SOL lawyers and Department program officials to preserve Federal records and "non-record" materials in the form of e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests. However, the DOL did not have effective controls over the recordkeeping and maintenance of e-mails and electronic documents in order to efficiently access them when needed. Specifically, DOL could not demonstrate an efficient and effective organization and management of electronic data capable to produce it in a timely and complete manner, when needed, from legal hold orders, litigation discovery proceedings and requests. As a result, in FYs 2007 and 2008, DOL had to spend significant time and funds to search and retrieve relevant documents in order to respond to major Congressional requests. We were told the DOL OASAM initiated the development of an electronic recordkeeping and document management system to address the need for an effective and efficient management tool but due to budgetary considerations suspended the project.

Title 36 CFR Part 1234.24(b), amended February 21, 2006, provides the standards for managing electronic mail records. The agency recordkeeping system should: (1) provide for the grouping of related records into classifications according to the nature of the business purposes the records serve; (2) permit easy and timely retrieval of both individual records and files or other groupings of related records; (3) retain the records in a usable format for their required retention period as specified by a NARA-approved records schedule; (4) be accessible by individuals who have a business need for information in the system; (5) preserve the transmission and receipt data specified in

agency instructions; and (6) permit transfer of permanent records to the National Archives and Records Administration.

Part 1234.24(d) provides that agencies that maintain paper files as their recordkeeping systems shall print their electronic mail records and the related transmission and receipt data specified by the agency. It is DOL's policy to print and save the e-mail message and corresponding attachment(s) into a manual filing system or click and save the e-mail message and corresponding attachment(s) into the agency's electronic recordkeeping system.

DOL may be at risk of not being able to address in a timely and complete manner e-mail and electronic file needs required as a result of legal hold orders and litigation discovery.

DOL's litigation process is comprised of SOL counsel and program officials. Although the SOL has a management information system to track and account for legal activity within the Department, it relies on the collaborative effort between its lawyers and program officials to protect and preserve records and non-record materials when legal holds or discoveries occur.

Recent court rulings, amendments to the Federal Rules of Civil Procedure (FRCP) in 2006, and Federal records regulations have increased awareness of why effective e-mail and electronic files management is important. The 2006 amendments to the FRCP require that organizations manage their electronic data so they can produce it in a timely and complete manner, when needed, during legal discovery proceedings.

Specifically, the FRCP Rule 37(f) provides for limited protection from some spoliation (deletion of e-mail and electronic files) sanctions based on the presence of "routine, good faith" operations of information systems. A good faith and reasonable effort to implement a legal hold must be made once a preservation obligation is triggered.

Courts have imposed sanctions where e-mail was destroyed or lost at a time when a preservation obligation was in effect. The sanctions against the spoliating party can range from adverse inferences, adverse evidentiary rulings, or monetary sanctions.

These changes reflect the reality that discovery of e-mail and electronic files is now a routine, yet critical, aspect of every litigated case. E-mail and electronic file management should address preservation needs required as a result of legal holds related to current or anticipated litigation, litigation discovery, FOIA and Congressional requests, audits, investigations, and Federal records requirements.

As a result of the 2006 amendments to the FRCP, the SOL took several steps to prepare agencies on the requirements to preserve electronically stored information. The SOL:

- created a committee in April 2006 that discussed the changes to the FRCP regarding electronically stored information and ensured that SOL attorneys were aware of, and had a basic understanding of, the new rules;

- issued a memorandum in November 2006 to DOL Regional Directors, Regional Administrators, and MSHA District Managers, which explained the importance of preserving electronically stored information and provided the procedures to be followed when the need occurs; and
- provided training in October 2007 to staff in both the National and Regional Solicitors' Offices.

The DOL SOL actions in response to the FRCP amendment are merited. However, DOL needs to further minimize the cost to the DOL in meeting future needs to retrieve electronically stored information and the litigation risks against the liabilities associated with document disposal of electronic data subject to legal hold orders and litigation. To accomplish this DOL must demonstrate that it has an effective Records Management program for the preservation, retrieval and routine disposal of records.

DOL did not have sufficient controls over the organization and management of e-mails and electronic documents when accessing electronic data in response to requests.

DOL's e-mail system is managed by nine agencies. DOL agencies back up e-mail and electronic files primarily for disaster recovery and contingency planning. The use of back-up media to comply with litigation discoveries, holds, and requests did not demonstrate effective e-mail management practices because they did not provide advanced search and retrieval functions to track down e-mail in a timely and cost-effective manner. For example, DOL's response to Congressional requests in 2006 and 2007 showed how searching backup media for relevant e-mails and electronic files is costly—both in terms of time and money. Three examples highlight these costs.

On February 22, 2006, the Secretary of Labor received a request from the U.S. House of Representatives, Committee on the Judiciary for e-mail correspondence sent and received by four individuals between January 1, 2002, and February 22, 2006. DOL contracted with National Data Conversion Institute (NDCI) for tape restoration, extraction, and message filtering. Invoices showed that NDCI processed more than 6,600 tapes at a cost of approximately \$2.2 million.

On April 26, 2007, the Secretary of Labor received an e-mail record search request from the House of Representatives, Committee on Oversight and Government Reform related to political briefings given by White House officials to Federal agency officials. In response, on May 18, 2007, DOL proposed a plan that included an estimated cost for vendor services to facilitate the proposed e-mail search. The response stated that the search would take approximately 90 days and cost about \$1.2 million. After further meetings and discussions, the Committee officials agreed to reduce the e-mail search parameter. DOL provided a proposal that revised the time to 2-3 weeks and the cost to \$148,500.

As of July 2008, the Committee had not yet directed the Department to proceed with an e-mail search.

On September 24, 2007, DOL received a subpoena for a document and e-mail search from the House of Representatives, Committee on Education and Labor concerning the Crandall Canyon Mine. The request required DOL to search two e-mail systems: (1) OASAM's Employee Computer Network (ECN), which supports the Departmental Management Agencies, and DOL agency executives, including the Offices of the Secretary and Deputy Secretary; and (2) MSHA's system, which is used by its employees and the Office of the Assistant Secretary for Mine Safety and Health. DOL estimated it would cost \$3.5 million and take 20 weeks to complete. As of July 2008, MSHA was still in the process of providing the documents to the Committee, and was tracking its actual cost.

DOL Initiated the Development of an Electronic Recordkeeping and Document Management System but Suspended the Project Due to Budgetary Considerations

In September 2006, DOL proposed that OASAM establish an electronic recordkeeping and document management system. The proposed system was called the electronic Document Management/Records Management (DM/RM) system. OASAM proposed the DM/RM to be a Department-wide electronic record keeping system to manage documents or e-mails. According to OASAM, the DM/RM initiative will address the needless retention and under retention of both records and electronic information in general and will enable the Department to centrally, efficiently and effectively manage and access mission-critical information. According to Exhibit 300: Capital Asset Plan and Business Case, the justification stated:

DOL is currently experiencing needless retention and under retention of both records and electronic information in general.
DOL is retaining information that has no legal retention obligation or ongoing business value while information that may have a legal retention obligation due to the Federal Records Act and E-Discovery runs the risk of being destroyed prematurely.

As of October 2007, DOL completed the Conceptual Planning and Requirements Definition phase for DM/RM. However, DOL officials told us the implementation of the DM/RM was suspended after re-prioritizing planned capital asset acquisitions for budgetary reasons. We believe this system, or a similar system, would provide effective records management controls over the maintenance and use of records in order to efficiently access them when needed.

Recommendation

We recommend that the Assistant Secretary for Administration and Management:

5. Conduct a cost-benefit analysis on establishing an electronic recordkeeping and document management system, or a similar system which provides the capabilities to centrally, efficiently and effectively manage and access e-mails that are Federal records and addresses the unnecessary retention of e-mails that are transitory records or non-records.

Agency Response

The Deputy Assistant Secretary for Operations responded that DOL is aware of the potential benefits of electronic recordkeeping and document management systems. The Office of the Chief Information Officer will update its cost-benefit analysis of electronic recordkeeping and document management systems by the second quarter of FY 2009. The cost-benefit analysis will assess the technical maturity of electronic recordkeeping and document management systems, as well as evaluate the best architecture of such a system for DOL.

OIG Conclusion

The recommendation is resolved and will be closed when the Office of the Chief Information Officer updates the cost-benefits analysis of the proposed electronic recordkeeping and document management system.



Elliot P. Lewis

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EXHIBIT A

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Glossary

Document Management/Records Management (DM/RM) System Initiative – DOL proposed Department-wide Document Management/Records Management system to reduce costs, increase efficiencies and advance the goals of the eGov initiative, E-Records Management.

Evaluation – The selective or comprehensive inspection, audit, or review of one or more Federal agency records management programs for effectiveness and for compliance with applicable laws and regulations.

Freedom of Information Act (FOIA) – Provides for any person with the statutory right, enforcement in court, to obtain access to Government information in executive branch agency records.

General Records Schedule (GRS) – Provides disposition authorities for Records common to most or all Federal agencies.

Litigation Hold – When a party is under a duty to preserve information because of pending or reasonably anticipated litigation.

Metadata – Metadata is information about a particular data set which may describe, for example, how, when, and by whom it was received, created, accessed, and/or modified and how it is formatted. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed.

Non Records – Federally-owned informational materials that do not meet the statutory definition of records (44 United States Code 3301) or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference.

Permanent Record – Any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States.

EXHIBIT A

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Records - All books, paper, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them.

Recordkeeping System - A manual or automated system in which records are collected, organized, and categorized to facilitate their preservation, retrieval, use and disposition.

Records Management - The planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

Records Schedule - Includes (a) an SF 115, Request for Records Disposition Authority, that has been approved by NARA to authorize the disposition of Federal records; (b) a General Records Schedule (GRS) issued by NARA; or (c) a printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS.

Standard Form (SF) 115 Request for Records Disposition - Records schedule that is specific to an individual agency and has been approved by NARA to authorize the disposition of Federal records.

Temporary records - Any records which have been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records Administration. This determination may take the form of: (a) a series of records designated as disposable within a specific time frame in an agency records disposition schedule approved by NARA (Standard Form 115, Request for Records Disposition Authority); or (b) a series of records designated as disposable within a specific time frame in a General Records Schedule.

Transitory Records – NARA approved agency records of short-term (180 days or less) interest, including in electronic form, which have minimal or no documentary or evidential value. Examples of transitory e-mail and other records include: routine request for information, originating office copies of letters or transmittals that do not add any information contained in the transmitted material, quasi-official notices that do not serve as the basis for official actions.

EXHIBIT A

Page 3 of 3

Unscheduled records - Records for which NARA has not approved the final disposition. Unscheduled records are those that have not been included on a Standard Form 115, Request for Records Disposition Authority, or approved by NARA. Unscheduled records cannot be disposed of until NARA approval of disposition authority.

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Appendices

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APPENDIX A

BACKGROUND

The Federal Records Act of 1950 requires that the head of each Federal agency establish and maintain an active records management program. NARA has oversight responsibilities of Federal records management programs. NARA assists Federal agencies in the creation, preservation, and disposition of records containing documentation of the organization, function, policies, and essential transactions of the agency. In DOL, the Assistant Secretary for Administration and Management is responsible for managing the Department's records and providing overall policy direction for the Department's Records Management program. The Office of the Assistant Secretary for Administration and Management's (OASAM's) Business Operations Center is responsible for carrying out this policy.

Records management includes a three-phase life cycle for managing records from creation, maintenance and use, and through final disposition. The management life cycle includes determining what records employees should create and maintain (recordkeeping requirements), what information the records should contain (documentation standards), what records an agency has in its control (records inventories), and where they are located (file plans), and when an agency should dispose of records or transfer those of historical value to the National Archives (disposition schedules).

The DOL Records Management program consists of managerial activities involved in records creation, maintenance and use, and disposition to achieve adequate and proper documentation of the policies and transactions of the Department. The objectives of the Department's Records Management program were to:

1. Provide effective control, appropriate security, and management over the creation, maintenance and use, and disposition of all records, regardless of recording media.
2. Manage DOL records from initial creation to final disposition.
3. Ensure that the records accurately reflect the business practices, policies, and transactions of DOL.
4. Foster effective and economical Departmental recordkeeping.
5. Coordinate records management activities with other information management and DOL activities, as needed.
6. Ensure careful preservation and disposition of DOL records.
7. Prevent unauthorized access, removal and loss of records.

Federal records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by a Federal agency under law or in connection with the transaction of public business. Electronic Federal records are original records generated by a word processor, personal computer, electronic mail system or automated processing system and made or received by a Federal agency.

Federal agencies manage the creation, maintenance, and use of records in accordance with the agency's approved SF-115, Records Disposition Authority, and the GRS. A records schedule governs specified series of records common to several or all agencies or administrative units of a corporate body. The GRS provides disposition authority for temporary administrative records common to several or all agencies of the Federal Government. Agencies need to schedule their program records by completing a SF-115, Request for Records Disposition Authority. The SF-115 is used for records that are not common throughout Government and are not part of the GRS. Records scheduled on the SF-115 are typically unique to the agency's program. The process for completing the SF-115 involves inventorying and evaluating agency records, and reviewing the agency functions, recordkeeping requirements, and practices.

The Department Records Officer, assigned in OASAM's Business Operations Center, is responsible for managing the day-to-day administration and management of all matters related to DOL's Records Management program. Other key responsibilities include:

- Serving as the Department's liaison with NARA in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value.
- Advising and assisting DOL agencies in administering their agency's records management program.
- Reviewing the SF-115 "Request for Records Disposition Authority," before forwarding the record's schedule to NARA.
- Keeping abreast of new information technologies and activities as well as changes in legislation or guidelines that may affect the management of the Department's records.
- Making recommendations to improve the Department's Records Management program and Department-wide recordkeeping systems.
- Performing periodic reviews for the effectiveness and efficiency of the Department's Records Management program.

DOL Agency Heads are responsible for developing and implementing an effective Records Management program within their respective organizations that is consistent with the DLMS. They are responsible for assigning an Agency Records Officer for the management and execution of the Agency's Records Management program. Agency Heads have to ensure that the appropriate Agency staff receives adequate records management training and participates in Departmental as well as Agency training and awareness activities. At a minimum, all staff responsible for the execution of the records management program within the Agency must complete the NARA training on Basic

Records Management, Electronic Records Management and Scheduling and Disposition of Federal Records.

Agency Program Managers are responsible for overseeing the proper maintenance and management of records and providing accurate documentation of information necessary for the development of the SF-115 and the disposition of records outlined in the SF-115. They are also responsible for ensuring that adequate training is provided to personnel on policies, procedures, responsibilities and techniques for adequate recordkeeping procedures and practices. The Agency Records Officer is responsible for maintaining liaison with the Departmental Records Officer on records management activities and scheduling the disposition of the Agency's records. Additionally, the Agency Records Officer is responsible for implementing, maintaining, and managing the Agency's records management program, including the periodic review of the Agency's existing SF-115s. These reviews should be done once a year or at a minimum a complete review, which includes conducting an inventory of records in all media, should be done once every five years.

All DOL Employees (including agency heads and managers) are responsible for identifying their program functions and activities and determining what records are needed to document those activities and functions. They also are responsible for creating sufficient records to document those activities and functions and maintaining those records in a way that allows all persons who need access to find and retrieve what they need. Employees are responsible for ensuring they do not retain records authorized for destruction, keep official records separate from non-record materials, and protect records that contain sensitive but unclassified information such as Privacy Act information and confidential business information, or other types of sensitive information with appropriate safeguards.

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APPENDIX B

OBJECTIVES, SCOPE, METHODOLOGY, AND CRITERIA

Objectives

Our audit objectives were to answer the following questions.

1. Does DOL have sufficient controls to ensure that Federal records are preserved in accordance with Federal regulations?
2. Does DOL have sufficient controls to preserve e-mail and electronic documents, as a result of legal hold orders, litigation discovery, and requests?

Scope

We conducted our audit in accordance with Generally Accepted Government Auditing Standards for performance audits. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. An audit made in accordance with these standards does not guarantee the discovery of illegal acts, abuse, or all internal control weaknesses. We believe our audit provides a reasonable basis for our assessment and conclusions.

The conclusions in this report are the result of our audit in FY 2007, unless otherwise noted. Changes in management of the program, including changes in controls, laws, regulations, and other compliance requirements, could result in performance that would be different from the performance during that period.

A performance audit includes an understanding of internal controls considered significant to the audit objectives and testing compliance with significant laws, regulations, and other requirements. Our work on internal controls included obtaining and reviewing policies and procedures, and interviewing key personnel. We gained an understanding of the data flow in each audit area and documented a description of the controls. Our testing of internal controls focused only on the controls related to our objectives of assessing compliance with significant laws, regulations, and policies and procedures. We did not intend to form an opinion on the adequacy of internal controls overall, and we do not render such an opinion. Weaknesses noted in our testing are discussed in the Results and Findings section of this report.

We conducted fieldwork from August 7, 2007, through January 24, 2008, at the DOL National Office located in Washington, DC, and the following field offices:

<u>Agency</u>	<u>Field Offices</u>
ESA	Wage and Hour District Office in Philadelphia, Pennsylvania
OSHA	Area Office in Philadelphia, Pennsylvania
MSHA	Metal and Nonmetal Northeast District Office in Warrendale, Pennsylvania
BLS	Regional Office in Philadelphia, Pennsylvania

Methodology

To determine if DOL's policies, procedures, and practices complied with NARA regulations, we reviewed DOL's Department-wide Records Management program policies and procedures and compared them to NARA regulations. We interviewed the DOL Records Officers and the Director of the OASAM's Business Operations Center to gain an understanding of DOL's Records Management program.

To gain an understanding of records management practices, we judgmentally selected five DOL agencies and interviewed their agency Records Officers. We based our selection on the size of the agency (e.g., number of employees) and nature of the agency's work (e.g., potential records produced and the sensitivity of information). We used the President's FY 2007 Budget for DOL to identify the number of employees for each agency. Data from the budget documents is computer generated and used in DOL's Consolidated Financial Statements, which OIG and KPMG LLP audits found fairly reported the DOL's financial position. However, we did not assess the reliability of the budget documents for the purpose of this audit because we believe the budget documents are widely used by the Legislative and Executive branches, are supported by other evidence gathered, and are sufficiently reliable to meet the audit objectives and support our recommendations. We selected the following DOL agencies:

<u>Agency</u>	<u>Employees</u>
ESA	3,755
OSHA	2,173
MSHA	2,136
BLS	2,453
<u>ETA</u>	<u>1,232</u>
Total	11,749

At the five agencies, we interviewed the Records Officer to gain an understanding of the agency's record management practices. We also judgmentally selected a program using the SF-115 records schedule as the basis for our selection. The purpose was to obtain a variety of recordkeeping systems as described in the approved SF-115. We selected the SF-115 from a master list manually created by the DOL Records Officer. We did not perform tests to determine the accuracy of the master list. For each program, we interviewed the Program Manager, Records Liaison, and a judgmental sample of 12 employees and locations to identify and understand the program's records

management practices. We based our judgmental selection of the employees on their position, job description, and availability at the time of our visit to their office.

We selected the following programs:

<u>Agency</u>	<u>Program</u>
ESA	Wage and Hour
OSHA	Safety and Health Inspection
MSHA	Metal and Nonmetal Inspection
BLS	Quarterly Employment Statistics
ETA	Trade Adjustment Assistance

To determine if the agency documented program activities, we reviewed a non-representative random sample of 32 case files to see if they contained the minimal documentation requirements.

To determine if DOL's Federal records and non-record materials in the form of e-mail and electronic documents were protected as a result of legal hold orders, litigation discovery, and requests, we reviewed documentation and interviewed:

- SOL head officials from the Division of Management and Administrative Legal Services;
- SOL officials from the Divisions of Employment and Training Legal Services, Fair Labor Standards, Mine Safety and Health, and Occupational Safety and Health. (These divisions provide full legal services within designated legislative and program areas for the agencies we selected for audit.); and
- The heads of the SOL E-Discovery Committee. (SOL established the committee in the spring of 2006, to address the changes to the Federal Rules of Civil Procedure about electronically stored information.)

To obtain an understanding of procedures and practice for responding to Congressional requests, we interviewed the Assistant Secretary for the Office of Congressional and Intergovernmental Affairs and the Deputy Chief Information Officer. We also reviewed documents related to major Congressional requests in 2006 and 2007 to determine how much time and funds DOL spent in responding to them.

Data Reliability

To accomplish our audit objectives, we relied on the minimal use of computer generated data. To select a random non-statistical sample of case files for the agencies audited, we used a computer generated list from the agency records officer or program manager. We considered the audit risk for the completeness of the lists to be low and therefore, we did not find it necessary to perform such tests.

Criteria

We used the following criteria to perform our audit:

The Federal Records Act of 1950, as amended and codified in Title 44 of the United States Code

Title 36 CFR, Chapter XII, dated June 28, 1985, unless otherwise noted

NARA Records Handbook, 2000 Website Edition

NARA Records Management Self-Evaluation Guide, 2001 Website Edition

OMB Circular A-123, dated December 21, 2004

DLMS-1, Chapter 400, dated January 7, 2005

DOL Records Management Handbook, May 2007

Secretary's Order 2-2004, dated August 5, 2004

Freedom of Information Act / Electronic Freedom of Information Act Amendments, as amended 2002

December 2006 Amendments to the Federal Rules of Civil Procedure

APPENDIX C

ACRONYMS AND ABBREVIATIONS

BLS	Bureau of Labor Statistics
CFR	Code of Federal Regulations
DOL	U.S. Department of Labor
DLMS	Department of Labor Manual Series
DM/RM	Document Management/Records Management
ECN	Employee Computer Network
ESA	Employment Standards Administration
ETA	Employment and Training Administration
FOIA	Freedom of Information Act
FRCP	Federal Rules of Civil Procedure
GRS	General Records Schedule
MSHA	Mine Safety and Health Administration
NARA	National Archives and Records Administration
NDCI	National Data Conversion Institute
OASAM	Office of the Assistant Secretary for Administration and Management
OIG	Office of Inspector General
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
SOL	Solicitor of Labor

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APPENDIX D

AGENCY RESPONSE TO DRAFT REPORT

U.S. Department of Labor

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210



AUG 18 2008

MEMORANDUM FOR ELLIOT LEWIS

Assistant Inspector General

A handwritten signature in black ink, appearing to read "Ed Hugler".

FROM:

EDWARD C. HUGLER
Deputy Assistant Secretary for
Operations

SUBJECT:

Department of Labor Records Management Program;
Draft Audit Report No. 03-08-001-07-001

This responds to the Office of Inspector General's (OIG) August 8, 2008, Draft Audit Report concerning the Department's records management program.

By way of background, the Assistant Secretary for Administration and Management/Chief Information Officer issued a Department-wide Uniform E-Mail and Electronic Document Back-up Retention Policy on December 1, 2006. The policy established a prospective six-month schedule for retaining back-up media for deleted e-mail and electronic documents. Fashioned on the guidance and policies from the National Archives and Records Administration (NARA) and other research, the policy was to become effective July 1, 2007.

The purpose of the Uniform E-Mail and Electronic Document Back-up Retention Policy is straightforward—to stop the unnecessary expense and related problems created by storing back-up media for an extended time, in some cases indefinitely. In discussions that included the Inspector General and the Assistant Secretary for Administration and Management/Chief Information Officer, in various meetings among their respective staffs, and in the Draft Audit Report, OIG has acknowledged the valid and prudent purposes of the policy. By memorandum of August 13, 2008, the appropriateness and legal soundness of a reasonable disposal regimen for e-mail and electronic back-up media was also definitively addressed by the Solicitor of Labor. A copy of the legal opinion is attached behind TAB 1.

Nonetheless, OIG expressed concern about the possible risk that the policy could result in the inadvertent loss of Federal Records. To accommodate OIG's desire to conduct an audit of the Department's records management program to assess that possible risk, the Department suspended implementation its Uniform E-Mail and Electronic Document Back-up Retention Policy before it went into effect.

OIG's audit was initiated July 30, 2007, followed by a Management Letter issued September 24, 2007, recommending that the Office of the Assistant Secretary for Administration and Management (OASAM) develop and implement a standard process for annual training of all DOL employees in records management. OASAM accepted the recommendation by memorandum of November 21, 2007, and asked that OIG expedite the records management

AUG 25 2008

audit to facilitate timely re-institution of the policy. During the period June 2 through August 15, 2008, the Department launched mandatory annual computer based training for all DOL employees—"Records Management for Everyone." The training content is a product of NARA, the Federal subject-matter expert.

In addition, as acknowledged in the Draft Audit Report, the Department has undertaken substantial efforts to improve its records management program since 2004, including guidance and specific instructions on how to handle electronic records, issuing an updated Records Management Handbook, numerous training sessions for employees with the aid of NARA experts and updating agency records schedules, including electronic records.

Since 2006, the Assistant Secretary for Administration and Management has reported annually to the Agency Heads a summary of the DOL records management program accomplishments for the preceding fiscal year, including data about DOL records stored at Federal Records Centers in accordance with NARA-approved records disposition schedules.

Further substantiating the Department's robust records management program are the quantifiable results of the program: for the period FY 2001 through the second quarter of FY 2008 the Department has retired more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers around the country—enough to fill an Olympic-size swimming pool one and one-half times.

With the forgoing as context, the Draft Audit Report includes five additional recommendations, each of which are addressed below:

- *Recommendation 1: Implement an effective evaluation process so DOL can demonstrate that its agencies are in compliance with relevant Records Management laws, regulations, and procedures.*

The Department will standardize as a regular part of its records management program the "periodic evaluations" recommended by NARA. Specifically, NARA Regulations at 36 CFR Chapter XII, Subpart B - Records Management, Part 1220.42 Agency Internal Evaluations provide that agencies are to "...periodically evaluate its records management programs relating to records creation and record keeping requirements, maintenance and use of records, and records disposition." The basic framework for the periodic evaluations will be derived from guidance provided in the NARA self-evaluation guide for Federal agencies published by NARA in 2001, and any subsequent relevant updates.

The Department's periodic evaluations of its records management program will be scheduled so as to cover all DOL agencies during a five-year cycle on an ongoing basis, beginning in the first quarter of FY 2009. We believe that this is a practical cycle and it comports with advice given to the Department's Records Officer by NARA's appraiser for DOL. By the first quarter of FY 2009, the Department will amend DLMS 1, Chapter 400 – Records Management Program to reflect this expanded aspect of its records management program.

- *Recommendation 2: Periodically prepare a written summary on DOL's evaluation activities and report whether DOL is in compliance with NARA and DOL records management requirements.*

The Department will prepare a written summary of the “periodic evaluations” conducted as outlined in our response to *Recommendation 1* as each evaluation is completed.

- *Recommendation 3: Require Agency Heads to implement NARA and Departmental guidance by creating program specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents that have no legal retention requirements under the Federal Records Act.*

By memorandum issued August 18, 2008, from the Assistant Secretary for Administration and Management (**TAB 2**), the Department has addressed Agency Head's responsibilities to implement NARA and Departmental guidance by creating program-specific record keeping procedures that instruct all employees on the maintenance and disposition of transitory records and documents. Conformity with this guidance will be evaluated during the Department's periodic evaluations as outlined in our response to *Recommendation 1*.

- *Recommendation 4: Before implementing the new retention policy, ensure that the Department's evaluation of DOL's Records Management program demonstrated compliance with NARA and DOL records management regulations.*

Mindful of the acknowledged valid and prudent purposes of the Uniform E-Mail and Electronic Document Back-up Retention Policy—to stop the unnecessary expense and related problems created by storing back-up media for an extended time—we believe that, taken together—

- the substantial efforts undertaken by the Department to improve its records management program since 2004;
- the absence of any NARA-identified instances of non-compliance in DOL's records management program;
- the retirement of more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers around the country;
- adopting OIG's recommendations 1 through 3 above; and
- the annual on-line mandatory computer based training for all DOL employees

—there is now demonstrated assurance that DOL's Records Management program is in compliance with NARA and DOL records management regulations. The recent definitive legal opinion supporting the appropriateness of a reasonable disposal regimen for e-mail and electronic back-up media adds further credence to this conclusion.

As such, we consider this recommendation resolved and ask that it be closed. Correspondingly, the Department will proceed to re-issue before the end of FY 2008 a Department-wide Uniform E-Mail and Electronic Document Back-up Retention Policy. That policy will be guided by the recent opinion from the Solicitor of Labor, and include a

prospective six-month schedule for retaining back-up media for deleted e-mail and electronic documents.

- *Recommendation 5: Conduct a cost-benefit analysis on establishing an electronic recordkeeping and document management system, or a similar system, which provides the capabilities for storing, indexing, locating, and tracking of e-mails that are Federal records and addresses the unnecessary retention of e-mails that are transitory record or non-records.*

The Department is aware of the potential benefits of electronic recordkeeping and document management systems. At the same time we are cognizant that such a system would be a major information technology capital investment that must be thoroughly analyzed before being pursued. With this in mind, the Department, under the auspices of the Office of the Chief Information Officer, will update its cost-benefit analysis (CBA) of electronic recordkeeping and document management systems by the second quarter of FY 2009 and provide OIG with a copy. The CBA will assess the technical maturity of electronic recordkeeping and document management systems, as well as evaluate the best architecture of such a system for DOL, including deployment that is distributed or centralized.

As always, we appreciate the opportunity for input and value the OIG's contributions to the management efficiency of DOL programs. If you have any questions, please feel free to contact me.

Attachments

cc: Patrick Pizzella, ASAM/CIO
Tom Wiesner, OASAM/Deputy CIO
Al Stewart, OASAM/BOC

U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210



August 13, 2008

MEMORANDUM FOR PATRICK PIZZELLA
Assistant Secretary for Administration
and Management

FROM: GREGORY F. JACOB *Greg Jacob*
Solicitor of Labor

SUBJECT: Departmental Backup Tapes and Litigation Holds

This memorandum responds to your May 12, 2008, memorandum to me (attached as "A"), which proposed a modified implementation of the DOL backup media retention policy adopted in December 2006, but never implemented. Your memorandum concludes that:

. . . unless you express a legal objection, OASAM will proceed with plans to reinstate the Department-wide Uniform Email and Electronic Document Backup Retention Policy effective August 1, 2008. Accordingly, system backup media from December 1, 2006, through February 1, 2008, will be appropriately disposed of at that time, and every month thereafter, thereby maintaining the most recent six (6) months of backup tape.

This memorandum analyzes the legal risk presented by three possible actions: Action A – implementing reinstatement of the December 2006 policy on a prospective basis, in which backup media recycling commences six months after reinstatement of the policy; Action B – implementing reinstatement of the December 2006 policy as proposed in your memorandum, in which recycling of backup media created since December 2006 through the date six months prior to reinstatement would commence immediately; and Action C – scheduling recycling of older stores of backup media (which in the case of our option A means media more than six months old as of the date of policy implementation, and under your option B means media created prior to December 2006, which is a subject reserved by your memorandum for later consideration). Each of these possible actions is analyzed in relation to the document preservation and retention requirements arising in three major areas of the law: (1) the Federal Records Act and the National Archives and

Records Administration's (NARA) General Records Schedule; (2) Freedom of Information Act (FOIA) and Congressional oversight requests; and (3) litigation holds.

A. DOL Efforts To Develop A Department-wide Policy

We understand that the volume and age of backup media varies widely across DOL agencies. DOL currently has a common e-mail platform across nine agencies that deliver e-mail services across the Department, but as late as 2003 had 13 different e-mail systems managed by the 9 agencies. We also understand that DOL's backup tapes or other media are non-indexed, un-archived electronic files created for emergency data recovery purposes. The backup media are daily "snapshots" of what exists in an electronic information network (or "EIN") at the moment of capture. Data created and deleted during the period between "snapshots" is not captured in backups. As a result of these characteristics, backup media are not searchable without extreme hardship and great expense, and searches will not necessarily result in retrieval of documents that once existed on the EIN.¹ Because of the widely varying backup media recycling policies across the various DOL networks, the potential burden of reviewing backup media in one network may be limited to one month, while the inventory of ECN backup media is continuous from 1999, currently comprising more than 23,000 tapes. While the ECN network is not the operative network for all DOL agencies and employees, the routine cross-network communication of e-mails and documents throughout DOL potentially implicates the ECN network backup media even as regards data searches for information initially created in or destined for other DOL networks.

Over the past several years, OASAM has engaged all DOL agencies to develop a Department-wide consensus on e-mail and electronic document media retention policy. OASAM has been guided by its conclusion that any such policy must balance the need to maintain the capability to restore the Department's IT networks and data in the event of a catastrophic system disruption or failure, against the countervailing burden on the Department imposed by the growing expense of maintaining extensive backup media, especially the ECN backup media storage effort and its attendant costs.

The Department is also currently in the midst of undertaking a regimen of records and document management training for staff to further highlight the Federal Records Act and NARA requirements. This training follows earlier training cycles, and the 2004 issuance of formal guidance to DOL staff from the Solicitor and the ASAM (attached to your memo of May 12th). It has also been undertaken in response to concerns raised by a management letter from DOL's Office of Inspector General (OIG). DOL's OIG has raised concerns regarding the overall DOL records management control program. SOL

¹ The cost of searching the entire 23,000 tape ECN backup media collection would be fiscally crippling. It takes approximately 11 hours to search one tape. That fact, multiplied by the quantity of old media and the work-hours needed to search the collection, yields a potential cost of \$6,325,000 for the successful recovery of just one electronic item. Further, and as real-world proof of this hazard, the Department was recently required to expend millions to recover a few electronic documents pursuant to a Congressional request in 2006. Thus, to maintain such a large cache of useless but nonetheless searchable data is, from both a legal and business view, imprudent.

understands OIG's concerns, and suggests that the current status quo regarding the patchwork of DOL backup media retention policies should be coordinated and improved.

B. "Backup" Media and the Duty to Preserve

Before addressing the level of risk associated with each of the three action options posed in this memorandum, we address the basic question of the role of backup media in the data preservation context regarding the three major legal areas noted – Federal Records Act requirements, FOIA and Congressional requests, and litigation holds.

1. Federal Records:

As stated in the July 8, 2004, Solicitor of Labor memo to agency heads regarding "Legal Guidance on Retention and Disposition of Federal Records" (appended to Attachment A), backup media should not contain Federal Records that are required to be retained under the Federal Records Act (FRA) or records retention schedules. Rather, documents identified for retention are to be appropriately filed or stored in paper or electronic form.

Turning to NARA document retention requirements, NARA's guidance stipulates that "[b]ackup tapes maintained for potential system restoration in the event of a system failure or other unintentional loss of data . . . [should be] [d]elete[d]/destroy[ed] . . . when no longer needed for system restoration." See NARA General Records Schedule (GRS) 24(4)(a)(1-2)) (full backup tapes are eligible for destruction once the second subsequent backup tape has been verified as successful, and incremental backup tapes are eligible for destruction once superseded by a full backup). Thus the NARA General Records Schedule permits deletion or destruction of both incremental and full backup media, with incremental backups recycled once a full backup is made, and full backups once the "second subsequent backup" is made. These backup retention requirements are not tied to any specific time frame, and a 6 month retention period would be completely appropriate.

From this it is clear that: a) backup media are not a DOL system for maintaining "records" as defined by relevant Federal statutory and NARA requirements; and b) statutory and NARA requirements do not contemplate the use of backup media to archive records. There is no "legal" requirement that backup media be maintained as a Federal record repository. Therefore, in view of the on-going DOL records management training, and the long-standing applicability of NARA's record schedule, SOL concludes that the risk of destruction of Federal records in DOL does not warrant the maintenance of backup media beyond the prospective six months being recommended.

2. FOIA and Congressional Oversight:

FOIA and Congressional oversight requests raise only very limited concerns regarding back up media. In both instances, a reasonable search must be conducted for existing responsive documents once a request is received. There is no "anticipatory" requirement

for preservation of documents in case a FOIA or Congressional request is later filed. The significant costs associated with searching undifferentiated backup media will generally make a search of such media for responsive FOIA documents unreasonable. A similar analysis could be applied regarding Congressional requests, although individual Congressmembers who want information from the Department and who do not themselves bear any of the costs for searching for it may disagree with respect to particular cases in which they are interested. The risk that an existing FOIA request or Congressional inquiry will be in some way "violated" by instituting a regular schedule of backup media recycling is remote, however, and does not support the open-ended maintenance of backup media.²

3. Litigation Holds

There is no duty to preserve backup media just because the media includes data that could at some point theoretically be subject to a litigation hold. Litigation holds require the preservation and retention of any material that fits within the parameters of a particular hold, regardless of whether that material comprises a "Federal Record" and regardless of whether it would be releasable under a FOIA request. Once a litigation hold is in existence, the duty to preserve in response to a litigation hold extends to retrievable "electronically stored information" (or ESI). In addition to "litigation holds" that may be caused by an order of a court or other tribunal, there is a well-established duty on parties to potential litigation (including government agencies) to preserve relevant evidence that may be subject to discovery. The duty attaches not just once suit is filed, but whenever a party knows or should know that evidence may be relevant to *reasonably anticipated* litigation (*see generally* "Electronic Discovery and the Preservation Obligation," Department of Justice, July 2007, attached as "B"). For civil enforcement personnel in an agency such as DOL, arguably, the duty to preserve in reasonable expectation of litigation may arise as early as the start of an inspection, audit or investigation, e.g., by OSHA, MSHA or EBSA.

DOL agencies currently back up e-mail and electronic files for disaster recovery and contingency planning. However, some DOL documentation regarding the rationale for maintaining backup media also references using it to recover specific material inadvertently destroyed. Reference to authoritative discussions of backup media suggests that this is not an appropriate rationale for preserving backup media, since the retrieval of specific data from the imbedded mass of undifferentiated material in backup media is enormously complex, time-consuming and expensive.³ Best practices in the records management field discourage the use of backup media as a source for recovering specific materials. As discussed in relation to the Federal Records Act, NARA guidance only calls for maintaining backup media until "no longer needed for system restoration." As

² Until an existing subpoena from the House Committee on Education and Labor regarding OLMS records is resolved, relevant backup media for the period covered by the subpoena (January 2001 through April 2002) must be retained.

³ See footnote 1 above.

your May 12th memo states, “[t]he Department’s backup media (tapes/disks) are not intended, nor are they sanctioned by NARA to be a recordkeeping system.”

Further, according to the Sedona Conference—the legal community’s premier “think tank” on ESI and e-discovery issues:

Effective e-mail management practices should provide advanced search and retrieval functions to track down e-mail in a timely and cost effective manner to support legal discovery and other requests. Back-up media are intended to restore saved data in the event of a failure or disaster while archives protect data so that it can be accessed when needed. Back-ups lack any sort of indexing. Because back-ups capture a snapshot of data, e-mails and electronic files generated between back-ups will be lost. . . . The use of back-up media to comply with litigation discoveries, holds, and requests, does not demonstrate effective e-mail management practices because they do not provide advanced search and retrieval functions to track down e-mail in a timely and cost effective manner.

See The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, and see The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy.

Should DOL be found by a court to have “spoliated” or otherwise destroyed data subject to a pending litigation hold, the Department, responsible officials and/or the attorneys directly involved in the destruction can be subject to sanctions. *See generally* Haydock, Herr and Stempel, *Fundamentals of Pretrial Litigation* at §§ 10.4.4 *et seq.* (6th Ed. Thomson West 2007). However, Rule 37(f) of the Federal Rules of Civil Procedure (known as the “safe harbor” rule) stipulates that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.” The “Safe Harbor Policy” pursuant to Fed. R. Civ. P. 37(f) issued by the Executive Office of the United States Attorneys (June 15, 2007, attached as “C”) states in part:

EOUSA’s Office of the Chief Information Officer . . . coordinates the operation of all EOUSA/USAO electronic information systems, including automated practices for maintaining and deleting ESI, such as e-mails and temporary documents, and reusing (rewriting) disaster recovery backup tapes after specified time periods. These routine practices were based on business need, cost and similar factors.

And, the Department of Justice Guide “Electronic Discovery and the Preservation Obligation” (July 2007, attached as “B”) states:

Attorneys have a professional responsibility to work with their clients so that their clients know the existence and extent of these duties [to preserve documents subject to a preservation requirement], take the necessary steps to identify and preserve potentially relevant material, and maintain it in a proper format. *See ABA Model Rules of Prof'l Conduct R. 3.4 (2002).* ESI, for example, should be preserved in its originally-created or “native” format, and should include any related metadata to ensure the integrity of the information. *See Hagenbach v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04-3109, 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006) (unreported). But see *Wyeth v. Impax Labs., Inc.*, No. 06-22, 2006 WL 3091331, at *1-2 (D. Del. Oct. 6, 2006) (finding that production of documents in their native format was unnecessary where the parties did not initially agree to production in that format and there was no particular need for metadata).

Consistent with the opinion in the seminal *Zubulake* decision (*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 [S.D.N.Y. 2003]), courts have repeatedly reaffirmed the presumption that ESI contained on backup tapes is inaccessible for purposes of searching for specific material: “Backup tapes must be restored using a process similar to that previously described [...] That makes such data inaccessible.” This is true for several reasons. Data is recorded onto tapes in a linear fashion, sometimes in multiple forward and reverse passes. Generally, tapes must be restored cover-to-cover at slow speeds before the data can be examined. Restorations often result in the production of multiple copies of the same documents. In addition, tapes handle data in blocks, which requires a great deal of memory and processor resources in the restoration process. As the court in *U.S. v. Amerigroup*, 2005 WL 3111972 (N.D. Ill.) noted in discussing the difficulties of retrieving data from backup tapes, “[...] to be sure, one can imagine the use of three dedicated servers to perform each of the six weeks of restoration work concurrently, but the end result is still eighteen weeks of man-power and eighteen weeks of use of the necessary equipment. That burden, which is undeniably substantial, exists independently of the monetary costs entailed.” In other words, generating data from tapes to determine the existence of any responsive ESI is a costly, resource-intensive undertaking.

As recent decisions have confirmed, efforts to require document/information production via the discovery of backup tape ESI is subject to a balancing analysis, which requires an examination of the following seven factors: (1) the specificity of the request; (2) the likelihood of availability of ESI from more accessible sources; (3) the failure to produce once-available ESI; (4) the likelihood of finding responsive ESI; (5) the importance of the information; (6) the nature of the issues at stake in the litigation; and (7) the resources

of the parties. To overcome the cost of restoring all data to determine if a tape contains responsive ESI, courts have employed creative workarounds. These include sampling methodologies, as in *Zubulake*, and phased restorations, as in *AAB Joint Venture v. U.S.*, 2007 WL 646157 [Fed. Cl.]). Both amount to a hit-or-miss endeavor and neither obviates the cost of restoration when samples uncover relevant ESI.

In line with the above authorities, the Department's backup media regimen should be revised so that it no longer suggests that backup media should be maintained for the purpose of permitting future retrieval of particular data otherwise lost or destroyed.⁴ Likewise, maintenance of backup media, including the massive volume of ECN backup tapes currently being indefinitely maintained, is not required for the purpose of responding to litigation holds but could, to the extent the Department continues to retain it, expose the Department for years to come to significant fiscal risks that this mass of undifferentiated backup media may be required in some circumstances to be searched for newly sought information.⁵

4. Additional Minimization of Risk

Because backup media are manifestly not normally suitable for responding to litigation holds or other retention requirements, it would be wise to couple any policy regarding the recycling of backup media that is implemented by the Department with other measures to minimize the risk of loss of data that either is or can reasonably be expected to be included in a litigation hold or other retention requirement. SOL proposes a number of actions that will further minimize the risk. First, the Department should continue its current effort to train all staff regarding effective document and record management. This effort enhances the consciousness of all employees regarding the need to properly file and maintain electronic and other information.

Second, the Department should put in place a more formal and systemic litigation hold notice and review procedure. Such a procedure will better enable staff to avoid the potential destruction of data that is subject to an actual or imminent litigation hold.

Any residual risk that data responsive to a litigation hold has been inappropriately destroyed is further minimized by the actual history of litigation holds in this Department. SOL has no knowledge of any instances in which documents subject to a litigation hold (whether from a court, administrative or other tribunal, or based on reasonable anticipation of relevance to pending or anticipated litigation) were destroyed despite the

⁴ Of course, such a policy would not prohibit the resort to backup media for any form of search, should such prove necessary.

⁵ In the unlikely event that a litigation hold or other retention requirement applies to data known currently to exist only on backup media, both SOL and the involved agency should immediately determine whether to put in place a temporary cessation of scheduled recycling of relevant backup media while a determination is made whether searching backup media is required by the court or other authority.

existence of that litigation hold.⁶ Nor has DOL been required to search backup media with any frequency. SOL is aware of just one instance in which DOL was required by a court or tribunal (including through the operation of discovery rules) to restore and review backup media to potentially recover documents – in 2001 to recover the email of a former agency head. Additionally, as noted in footnote 1, DOL has also searched backup media in response to a 2006 Congressional request, recovering just five relevant documents at a cost over \$2 million.

C. Application of the Risk Analysis

Having concluded that backup media are not appropriate resources for retention of specifically identified data, and briefly discussed the inappropriateness of using backup media as a source for responding to FOIA requests, Congressional inquiries or restoration of records, we now directly analyze the relative legal risk presented by three possible actions: Action A – implementing reinstatement of the December 2006 policy on a prospective basis, in which backup media recycling commences six months after reinstatement of the policy; Action B – implementing reinstatement of the December 2006 policy as proposed in your memorandum, in which recycling would commence immediately of backup media created since December 2006 through the date six months prior to reinstatement; and Action C – scheduling recycling of older stores of backup media (which in the case of our option A means media more than six months old as of the date of policy implementation, and under your option B means media created prior to December 2006, which is a subject reserved by your memorandum for later consideration).

1. Action A

Recycling of backup media after six months applied prospectively means that – assuming policy implementation in August 2008 – the first month of backup media to be recycled is that created in the month of August 2008 and that month's backup media will be recycled six months after the end of August 2008, which means on or after March 1, 2009. Then September 2008 backup media will be recycled on or after April 1, 2009, October 2008 backup media will be recycled on or after May 1, 2009, and so on.

⁶ DOL has been inappropriately accused in a few cases of having “spoliated” documents. However, in no such case of which SOL is aware was there a litigation hold in place. Therefore, such claims are without merit. SOL and its clients are aware of instances in which documents were properly destroyed in accordance with rules on record retention prior to the creation of a litigation hold. In these instances, there is some possibility that versions of the properly destroyed documents may nonetheless exist in some manner in backup media created for disaster recovery purposes, although SOL is not aware of any instance in which it is actually known that properly destroyed documents can be found in backup media.

⁸ We reiterate, as discussed in Section A of this memorandum, that the backup media do not contain all data created on an EIN, but only that portion captured as part of a daily “snapshot,” and that recovery of any data from backup media is costly.

This method of prospective implementation of the backup media recycling policy will ensure that: (a) as a retention fail-safe, backup media are available for a period of six months after its creation,⁸ and (b) the actual recycling of backup media will be initiated with the recycling of backup media from August 2008, which is after the completion of the Department's current records management training program. This six-month prospective recycling policy is also in line with the general NARA standard that, for purposes of disaster and system failure recovery, backup media need only be retained for a reasonable period of time.

2. Action B

Your memorandum of May 12th suggests the immediate recycling of all backup media from December 1, 2006 through six months prior to the date of implementation of the backup media recycling policy (whether the backup media is from the ECN or other networks), and the recycling each month thereafter of the backup media created six months prior. Recycling of the media from December 1, 2006 through the date six months prior to the policy's implementation (which was February 1, 2008 in the scenario identified in your May 12th memo) at this time poses an increased risk that data responsive to a litigation hold or other retention requirement may be lost.

Generally, two factors affect the risk associated with recycling particular backup media: the age of the media and the records management guidance in place when the media was created. First, the risk that a litigation hold or other retention requirement will implicate data on backup media is greatest during the period immediately following the data's creation. In the judgment and experience of the Solicitor's Office, the likelihood that an obligation will arise with respect to a particular document drops significantly by the time two years have passed since its creation. Thus, the older backup media is, the less likely it is to contain information that could become subject to a litigation hold of which we are not yet aware. Second, and on the other hand, the older the backup media is, the less records management guidance and training employees had at the time the information on the backup media was created (as discussed in Section A of this memo), and thus the more likely it is that the backup media will contain information that the Department improperly failed to retain. Also relevant here is that DOL does not yet have a formal litigation hold procedure addressing backup media (see Section B(4)). With respect to older backup media, however, destruction of documents and records that may have been improper at the time will have been cured by time's passage, since many federal records are supposed to be destroyed on a regular basis in accordance with record retention schedules. On balance, the older backup media is, the less likely it is that recycling it will prove problematic.

While the risk regarding this intermediate group of backup media (December 1, 2006 through the date six months prior to the recycling policy's implementation) is low, and the actual requirement that backup media be utilized in response to a litigation hold or other retention requirement is a relatively remote possibility, the residual risk could be further minimized by delaying the recycling of this backup media. One option for a delayed implementation might be for this 14 or so months of backup media to be recycled

on a month by month basis beginning on December 1, 2008, so that the recycling will be completed by February 1, 2010. This suggestion will provide additional time during which any potential requirement to search this media, however remote, will become more remote.

3. Action C

While your memorandum of May 12, 2008 does not address a proposed solution to the ECN backlog of backup media, SOL has concluded that the ECN “permanent” backup regimen should be addressed in any implementation of a Department-wide backup media recycling policy. Otherwise, the Department will remain in a “schizophrenic” program mode, with a reasonable recycling policy in operation, but also a decade of extant ECN backup media totaling more than 23,000 tapes, beginning from 1999, at an annual cost of \$1.1 million.

SOL has learned that the Department of Justice has a similar situation. While our understanding from Justice is that the current backup media policy for most of its divisions requires recycling after periods varying from three months to two years, the Criminal Division has all backup media from its EIN going back to 2000. Like this Department, Justice is in the process of establishing a single uniform backup media retention policy of six months while recognizing that the independence and unique work of some divisions might require deviation from that standard. We have been informed by responsible officials in Justice that they are working to ensure that the “indefinite” retention policy in their Criminal Division will be ended, and that a program for recycling of the backup media implemented as soon as possible

SOL’s approach to this issue seems to be in line with that being pursued at Justice, and incorporates the risk analysis for all backup media preservation discussed above. The chance that any litigation hold or other preservation mandate applies solely to data preserved in the oldest ECN backup media is very remote. Litigation or other retention needs and any corresponding holds regarding material created ten years ago would normally have been initiated by now. Consequently, SOL considers that the phased recycling of the oldest ECN tapes – perhaps at the rate of several months’ worth of backup tapes during each “real” month that passes or other periodic basis – presents a minimal risk of loss of any data that exists only on backup media.⁹

D. Recommended Continued Enhancement of DOL’s Data Retention Capabilities

While considering implementation of DOL’s backup media recycling policy, we do wish to point out that – as in any evolving technology context – there are further improvements in our ability to locate and retrieve all forms of ESI that DOL should continue to advance. The most effective “backup” system for locating ESI in response to a litigation hold,

⁹ See Footnote 2, *supra*, regarding the need to preserve January 2001 to April 2002 backup media until a pending subpoena is resolved.

FOIA request, or Congressional inquiry is through the development and implementation of an electronic archive.

In a draft Memorandum to all Agency Heads (attached as "D"), the Archivist of the United States describes the benefits of an archived e-mail backup system. The memorandum states:

. . . e-mail archiving applications may provide the following benefits. Each product has different features and different strengths, so this list is not exhaustive:

- Provides more efficient storage of e-mail because it is moved from a distributed network of servers, desktop applications, and other places and is then managed in one place;
- The application's repository can be electronically searched for content that may be germane to a subpoena, Freedom of Information Act request, e-discovery request, or similar purpose;
- Assists in back-up and disaster recovery.¹⁰

For the past few years, DOL has been in the process of developing an electronic Document Management/Records Management (DM/RM) system, which will work across DOL IT system boundaries to store, index, locate and keep track of both record and non-record information that is valuable to DOL. Such a system – which can archive material for the period it is maintained – is certainly an appropriate "next step" in DOL's records/non-records management system. The DM/RM initiative, however, is in temporary stasis due to the current budget confines and has no known date of deployment or project recommencement.

The fact that the Department does not have an effective e-mail and electronic files management system does not, however, require the Department to back up its ECN or any other network indefinitely. There is no legal requirement that any particular e-mails or documents be retained by the Department at all in the absence of an existing document request or retention requirement (whether as part of a litigation hold, Congressional inquiry, pending FOIA request, or records schedule requirement).

If DOL staff continues to follow "print and file" procedures for federal records, there will not be a need to search backup media for FRA purposes. Confidence that the Department

¹⁰ "Archiving" is defined in the Archivist's draft Memorandum as "copying or transfer of files for storage. In general, these applications collect in a central repository the e-mail (possibly including attachments, calendars, task lists, etc.) of some or all agency users." We assume, for the purposes of this memorandum, that the DM/RM solution meets this definition.

has exercised “due diligence” in this regard will be substantially enhanced by the FRA training currently taking place.

E. Conclusion

SOL has concluded that neither litigation holds, record retention requirements, FOIA requests, nor Congressional oversight give rise to a general “legal” requirement that DOL maintain backup media for an indeterminate period of time. In developing a policy solution, the relatively minimal risk that substantial amounts of data responsive to a current litigation hold, FOIA request or Congressional inquiry might be destroyed and only available in backup media must be balanced against the substantial and ever-growing costs associated with the extensive and – at least in the case of the ECN – “permanent” maintenance of an ever-increasing number of backup tapes, and the enormous expense associated with potential future searches for information within thousands of backup tapes.

A conservative, low risk solution could include the following features:

- Maintenance of existing backup media for a “reasonable” period, during which any required disaster recovery can be accomplished. We agree with the December 2006 policy announcement that the general standard for the retention of all DOL EIN backup media be six months from the month of creation.
- Formulation of a more formal DOL litigation hold procedure that addresses considerations of backup media.
- Gradual recycling of the mass of ECN backup tapes, as well as the backup media from any other DOL EIN that is greater than six months old, beginning with the oldest tapes first, based upon the self-evident fact that the older the material and more unsupported the recovery methodology, the more remote is the possibility that a current litigation hold would require a search that far back in time and technology.

We will be happy to discuss this memorandum with you and your staff.

cc: Carol De Deo
Ron Whiting
Bill Thompson
Tim Hauser
Ed Hugler
Rose Audette
Don Knickerbocker

U.S. Department of Labor

Office of the Assistant Secretary
for Administration and Management
Washington, D.C. 20210



AUG 18 2008

MEMORANDUM FOR AGENCY HEADS

FROM: PATRICK PIZZELLA
Assistant Secretary for Administration and Management,
Chief Information Officer

SUBJECT: DOL Records Management Program
Recordkeeping Requirements—Transitory Records

Since 2004, DOL has undertaken considerable efforts to improve its records management program, including working with agency records management staff to review and update agency records schedules and expand the overall level of knowledge and professionalism of DOL agency records management staff. Examples include providing agencies and employees with guidance and specific instructions on how to handle and manage electronic records, including e-mail; issuing an updated Records Management Handbook; conducting numerous senior management training sessions with the aid of National Archives and Records Administration (NARA) experts; conducting records and e-mail management workshops; and implementing mandatory records management training for all DOL employees.

Substantiating the Department's robust records management activities —attributable to the skill and dedication of your staff—are the quantifiable results of the program: the Department retired more than 140,000 cubic feet of Federal records (including paper and electronic media) to NARA's Federal Records Centers during the period FY 2001 through the second quarter of FY 2008. For perspective, consider that the volume of the records retired by DOI for this period would fill an Olympic-size swimming pool one and one-half times.

As part of our work to build up the Department's records management program, we have also become more aware of the value and prudence of disposing of what are characterized by NARA as *transitory records*. These are records which have very limited legal retention requirements under the Federal Records Act.

According to guidance from NARA, *transitory records* are records of short-term (180 days or less) interest, including in electronic form (e.g., e-mail messages), which have minimal or no documentary or evidential value. Examples of transitory e-mail and other records include:

- Routine requests for information or publications and copies of replies which require no administrative action, no policy decision, and no special compilation or research for reply;
- Originating office copies of letters of transmittal that do not add any information to that contained in the transmitted material, and receiving office copy if filed separately from transmitted material;

- Notices including memoranda and other records that do not serve as the basis of official actions, such as notices of holidays or charity and welfare fund appeals, bond campaigns, and similar records;
- Records documenting routine activities containing no substantive information, such as routine notifications of meetings, scheduling of work-related trips and visits, and other scheduling related activities; and
- Suspense and tickler files or “to-do” and task lists that serve as a reminder that an action is required on a given date or that a reply to action is expected, and if not received, should be traced on a given date.

NARA guidance calls for the destruction of transitory records immediately, or when no longer needed for reference, or in accordance with a predetermined schedule or business rule.

Building on our progress, I ask that you take the steps necessary to establish program-specific record keeping procedures that instruct employees on the maintenance and disposition of transitory records and documents in your agency, and that these procedures are effectively communicated to your employees. To assist with this task, we will work with your staff to provide training and guidance to help them establish record keeping procedures for transitory records and documents appropriate to your agency programs. These procedures should be made a component part of your agency records management system and will be evaluated during the Department’s periodic reviews of DOL agency records management practices. Your Agency Records Manager may contact Karen Nunley, DOL’s Records Officer, at (202) 693-7289 or nunley.karen.h@dol.gov, for assistance.

I know I can count on each of you to support our ongoing Departmental effort to ensure that we continue to carry out our records management responsibilities effectively.

Thank you for your cooperation.

cc: Agency Administrative Officers
Agency Records Managers
OASAM Regional Administrators