

6N 38A Lookout Place

DEC 07 1989

Mr. Dennis M. Crutchfield
Associate Director for Special Projects
U.S. Nuclear Regulatory Commission
Office of Nuclear Reactor Regulation
Washington, D.C. 20555

Dear Mr. Crutchfield:

In my July 27 and October 2, 1989 letters to you, I discussed certain actions we were taking to ensure that complaints under Section 210 of the Energy Reorganization Act are effectively being investigated and handled and that proper management decisions are being made with respect to safety concerns and employment issues that are raised. I also responded to your inquiry about a complaint filed by [], who was concerned that a May 25, 1989 memorandum from TVA's General Counsel to me could be improperly used as a blacklist of individuals who have raised safety concerns. Since my October 2 letter, there have been some developments with respect to this specific issue and other Section 210 proceedings that we thought you should be aware of. Accordingly, we are briefly summarizing these developments below to put the allegations that have been raised in perspective. We are continuing to review the effectiveness of management activities in this area and to emphasize to TVA employees that TVA is committed to a policy against intimidation, harassment, or any other form of improper discrimination, and will continue to take aggressive action to prevent discrimination of any kind against anyone in connection with their expression of safety-related concerns.

In our investigation of [] complaint we found no evidence that the May 25 memorandum had been improperly used against him or others. However, we did discover that a selecting supervisor, who otherwise knew that [] had filed a complaint, improperly considered that information in evaluating him for other employment positions. Accordingly, even though the complainant would not have been selected for the vacant position, we resolved his complaint on a basis that allowed him to continue his employment with TVA. We also took disciplinary action against the manager involved.

There have been some additional developments on this same blacklist issue of which you should be aware. In one case, the United States Department of Labor, following a full investigation of a very similar complaint about the May 25 memorandum, ruled in TVA's favor finding that there was no evidence of any discrimination by TVA on the basis of that memorandum. That complaint was filed by a former employee, [] [], who claimed that the memorandum was used as a blacklist against him to eliminate his TVA employment opportunities and provide unfavorable references to outside employers. [] has appealed this decision. We would note that [] has

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initiated at least 15 other legal proceedings involving TVA, including 5 other pending Department of Labor complaints. As you probably know, his most recent pending complaint charges NRC and TVA with conspiring to violate his rights under the Energy Reorganization Act. The Department of Labor rejected the complaint.

I referred in my October 2 letter to a finding by the Department of Labor's Wage and Hour Division that TVA had blacklisted another employee, [], by including her on the May 25 memorandum. TVA appealed this finding because no allegation of this kind was raised in her complaint and we were not informed by the investigator that it was an issue in the case. As a result, that finding was rejected as outside the scope of that case by the Administrative Law Judge. For the limited purpose of showing whether any pattern of discrimination existed, the judge did allow the complainant to introduce proof of any such blacklisting, at the evidentiary hearing, which is now completed. No proof was offered of any blacklisting activity. [] has filed two other Department of Labor complaints (one raising solely the blacklisting claim). In a [] decision on both of these complaints, the Wage and Hour Division did not find discrimination with respect to the blacklisting complaint, but did conclude that TVA harassed "her and her work product" at an [] meeting. Our investigation did not show any illegal conduct at that meeting or otherwise, and we will appeal for a hearing by an Administrative Law Judge. [] has also filed a Federal court lawsuit claiming sex and age discrimination with respect to various personnel actions over the course of her career. The court, on our motion, has denied her claim of age discrimination in that suit.

The Wage and Hour Division also ruled in TVA's favor on [] on a complaint by [], a former TVA employee who had filed numerous prior administrative complaints and two pending court cases against TVA regarding his treatment as an employee. [] claimed that the termination of his employment by a reduction in force (RIF) when [] was discriminatory, and that the May 25 memorandum was a blacklist circulated to all TVA managers in an attempt to eliminate his TVA employment opportunities. The Department of Labor found that his claims related to the RIF were the subject of one of his pending court cases against TVA, and that a decision on that claim would thus be "inappropriate." (All of []'s other claims in that court case have been dismissed, and he is appealing the district court's dismissal of his other case.) The Department of Labor further found that "[t]here was no evidence to substantiate" []'s claim that there had been any adverse action by anyone against him because of the mention of his case in the May 25 memorandum.

These developments in relation to allegations of blacklisting based on the May 25 memorandum are consistent with a report issued November 22, 1989, by TVA's Inspector General following his investigation of the purpose and distribution of the memorandum. That investigation was conducted at my request. The Inspector General found no evidence that the memorandum was created or used to blacklist the individuals identified in the status report

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attached to the memorandum. Rather, he concluded that the memorandum was prepared to provide Nuclear Power management with a total picture of recent Section 210 cases and to improve TVA's effectiveness in handling such complaints. No evidence was found that TVA management disclosed the document outside TVA or that it was widely circulated throughout the nuclear utility industry as had been alleged by certain complainants. A copy of the Inspector General's report is enclosed.

We have recently received several other rulings in proceedings filed by employees of Nuclear Power who claimed that TVA discriminated against them.

An Administrative Law Judge for the Department of Labor, following extended discovery, has ruled that TVA did not discriminate against [], a former TVA contract employee at []. [] claimed that TVA terminated his employment because he had been blacklisted by his prior employer for raising safety concerns. The judge found that there was no evidence of any blacklisting or discrimination by TVA or the prior employer.

In another case, three [], [], and [], filed complaints with the United States Merit Systems Protection Board, alleging that TVA improperly terminated them and refused to rehire them in retaliation for their insistence that TVA comply with proper procedures and safety regulations and their reporting of safety concerns to the NRC and TVA's Employee Concerns Program. After a full evidentiary hearing, the Merit Systems Protection Board upheld their terminations and specifically found that the terminations were not motivated by the employees' expressions of safety concerns. All three complainants have also filed Section 210 complaints with the Department of Labor.

An Administrative Law Judge of the Department of Labor, after a full evidentiary hearing, has ruled against [], a former TVA []. [] was terminated from TVA employment after he had failed on three occasions to pass a required examination for qualification as a []. He claimed that he was terminated in retaliation for raising safety concerns and because of age and race discrimination. The judge found no evidence of retaliation with respect to []'s termination.

In another case, the Merit Systems Protection Board, again after an evidentiary hearing, upheld the termination of a Nuclear Power engineer at [], [], who filed two complaints--one with the Merit Systems Protection Board and another with the Department of Labor under Section 210--claiming that he was improperly terminated and not hired for other positions because he raised safety concerns. He also challenged the validity of TVA's decision to []. The Merit Systems Protection Board upheld [] and held that []'s termination was valid. A hearing was held on []'s Department of Labor complaint in [], and we are awaiting a decision.

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In three separate proceedings, both the Department of Labor and the Merit Systems Protection Board have rejected the claims of another [] employee, []. [] claimed that he was terminated and not selected for another position because he had reported safety concerns to the NRC and had participated in earlier Section 210 cases. The Wage and Hour Division of the Department of Labor found no discrimination against [] and he did not appeal, thus making the decision final. The Merit Systems Protection Board also found that his termination was proper. While his Merit Systems Protection Board proceeding was pending, [] filed another complaint with the Department of Labor again charging that his nonselection for another position when [] was discriminatory. The Wage and Hour Division of the Department of Labor has denied that complaint as well and [] has appealed that decision.

An Administrative Law Judge of the Department of Labor has issued a recommended decision finding that TVA discriminated against [] [], a former contract employee. [] had filed a complaint charging that his contract was not extended because he had revealed safety concerns []. However, the decision included no findings of discriminatory acts by any particular TVA manager, and TVA does not believe that any discriminatory acts occurred. For these and other reasons, TVA plans to argue before the Secretary of Labor that the recommended decision was incorrect.

The Department of Labor has found discrimination in another complaint, filed by [], who had complained about a number of alleged discriminatory events. During conciliation, [] had demanded payment of \$110,000 plus attorneys fees to settle her complaint. The Department of Labor found discrimination in certain actions which comprised her complaint, including an unsuccessful attempt to interfere in a selection decision involving complainant, but did not award her the damages she was seeking. Our investigation had disclosed that even though TVA management in our view did not violate Section 210, certain managers acted improperly under TVA standards with respect to the selection. For this reason and in light of the fact that no backpay or consequential damages were awarded, TVA did not appeal the decision (nor did the complainant). Disciplinary action was taken against the two managers involved.

There are several other complaints that TVA has either resolved or is attempting to resolve. We will be glad to provide you with information on those cases as well as the cases discussed above, including copies of the various rulings that have been made.

We think it would be useful to discuss with you and James Lieberman TVA's actions in this area more fully, and we appreciate the opportunity to meet with you on December 12. We will call you to discuss the agenda for the meeting. In addition, because of our concern that this letter not be viewed by those involved as in any way infringing upon any privacy interests that

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they may have, we request that this letter not be placed in your Public Document Room or otherwise be disclosed to the public. However, I am enclosing with this letter an additional copy from which certain identifying information regarding the affected individuals has been deleted. This deleted copy could be used for whatever public disclosure you believe is necessary.

Sincerely,
Original signed by
O. D. Kingsley, Jr.

Oliver D. Kingsley, Jr.
Senior Vice President,
Nuclear Power

Enclosure

cc: Mr. James Lieberman (Enclosure)
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

C. E. Ayers, MR 2S 65C-C
E. S. Christenbury, ET 11B 33H-K
W. R. Cobean, Jr., LP 6N 38A-C
L. M. Cuoco, LP 5N 156B-C
T. A. Ippolito, Rockville Licensing Office
N. C. Kazanas, LP 5S 83E-C
M. O. Medford, LP 6N 38A-C
F. L. Moreadith, WT 12A 12A-K
S. E. Wallace, LP 3N 75A-C
R. F. Wilson, LP 6N 38A-C

ENCLOSURE 6

TENNESSEE VALLEY AUTHORITY
Office of the Inspector General
REPORT OF ADMINISTRATIVE INQUIRY

Title of Case: TVA Management
Nuclear Power
Alleged Blacklisting of Individuals
Who Raised Nuclear Safety Concerns
Harassment and Intimidation
File Number: 2A-282

Date of Issue: NOV 22 1989

Investigated By: Randall B. Morris

Report Written By: Evelyn H. Sturgill

Approved By: James H. Livingston
Inspector General
Thomas A. Fickell

INTRODUCTION

This investigation was based on a request from Oliver D. Kingsley, Jr., Senior Vice President, Nuclear Power (NP). Kingsley asked the OIG to investigate the circumstances surrounding the purpose and distribution of a May 25, 1989, memorandum from Edward S. Christenbury, General Counsel, to Kingsley. That memorandum concerned the handling of complaints filed under Section 210 of the Energy Reorganization Act and attached a status report on pending and recently resolved Section 210 cases. Kingsley stated that several former and current TVA employees have (1) questioned the distribution of the memorandum and (2) suggested the memorandum and its attachment could be used to "blacklist" individuals who expressed nuclear safety concerns. Kingsley subsequently asked the OIG to investigate the alleged distribution of the memorandum outside TVA.¹

SUMMARY OF INVESTIGATION

Our findings are outlined below.

- Our investigation revealed no evidence of employee misconduct in connection with the General Counsel's May 25, 1989, memorandum to the Senior Vice President of Nuclear Power.
- There is no evidence the General Counsel's office (OGC) created the memorandum or NP managers intended to use the memorandum to blacklist the individuals identified in the status report attached to the memorandum. Rather, OGC prepared the memorandum to provide NP with a total picture of recent Section 210 cases and improve TVA's effectiveness in handling such complaints.

1. Eight employees filed a joint Section 210 complaint with the U.S. Department of Labor (DOL) claiming TVA discriminated against them by releasing the memorandum and status report containing their names. They alleged the memorandum was widely distributed within TVA and the nuclear industry, including Martin Marietta Energy Systems, Inc. Since DOL has the statutory responsibility to address the issues raised in this pending complaint, the OIG did not investigate any specific impact the memorandum

- NP support personnel distributed the memorandum to the NP Vice Presidents and, in some cases, to managers below the Vice Presidents. NP, in accordance with its customary procedures, also put the document on the Records and Information Management System (RIMS).² The following factors contributed to this wide distribution: (1) the document was not marked administratively confidential by OGC or NP or otherwise given special handling (as a result, NP administrative personnel, in accordance with the usual practices, put the document in RIMS), (2) OGC and NP have differing opinions on which organization is responsible for determining whether an OGC document should be treated as confidential, and (3) neither TVA, NP, nor OGC have guidelines for determining when documents should be classified as administratively confidential.³
- We found no evidence that TVA management disclosed the document outside TVA or that it was widely circulated throughout the nuclear utility industry. (More specifically, we developed no evidence that the report was distributed outside TVA, except to the Nuclear Regulatory Commission [NRC]. However, we recognize because of the wide distribution within TVA that some TVA employees may have released it outside TVA.)
- NP and OGC have informed us that they have taken corrective actions to prevent future disclosures of potentially sensitive DOL matters, and NP has taken corrective actions to help ensure the May 25 memorandum is not used improperly.

The bases for these conclusions are outlined below.

THE PURPOSE OF THE MAY 25, 1989, MEMORANDUM

In a July 27, 1989, letter to the NRC, Kingsley stated that soon after he started working at TVA (during November 1988), he realized TVA's handling of DOL Section 210 complaints needed improvements. Kingsley stated there was a need for greater management attention to, among other things, evaluating

2. RIMS is an automated document filing and retrieval system for Power and NP. The organization which first receives a document is responsible for putting the document on RIMS unless the originator of the document has already placed the document in RIMS. (OGC does not utilize RIMS.)

3. References in this report to "Administrative Confidential" documents are to documents that are classified as such by OGC or NP.

and conciliating such complaints. Kingsley further stated that needed efforts included maintaining up-to-date information on Section 210 cases, and OGC prepared the May 25 memorandum "as an integral part of this major effort."⁴

Douglas E. Nichols, Assistant General Counsel, and Brent R. Marquand, an OGC attorney who helped prepare the memorandum, both stated the memorandum and status report were prepared to provide Kingsley (1) a total picture and status report on recent Section 210 cases against TVA and (2) ways to more effectively handle DOL complaints. Nichols also stated OGC prepared the memorandum to ensure that individuals who filed DOL complaints did not receive disparate treatment. Marquand further stated that OGC maintains a list of DOL cases in order to respond to inquiries from various sources, including NP, DOL, and NRC.⁵ According to Marquand, this particular status report was prepared, in part, in response to the ECP's and OIG's parallel effort to identify Section 210 cases.⁶ Nichols stated NP did not ask OGC to prepare the memorandum.

OGC and NP managers denied they planned to use the memorandum or status report to blacklist or otherwise discriminate against the DOL complainants, and our investigation revealed no evidence to the contrary.

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4. Various entities within TVA, including the OIG, OGC, NP Human Resources, and the NP Employee Concern Program (ECP), also recognized there were problems in TVA's handling of Section 210 complaints.
 5. In this connection, Nichols also provided the OIG a copy of a 1986 NRC report on harassment, intimidation, and wrongdoing issues at TVA. Nichols stated the report came from NRC's Public Document Room. The report contains a listing by name of 12 DOL complaints against TVA.
 6. During April 1989, the OIG asked Sue E. Wallace, NP Human Resource Manager, for an update on the status of certain DOL cases. Subsequently, Wallace decided to respond to the OIG's request by developing a list of all pending DOL complaints. Wallace further stated that developing a list of DOL complaints was the first step in analyzing the impact of TVA reorganizations on employees who had filed such complaints. On May 30-- five days after OGC sent its list to NP--Wallace sent the OIG and OGC her list of DOL Section 210 cases. That document was marked "administratively confidential."

THE DISTRIBUTION OF THE MEMORANDUM

Distribution of the Memorandum Inside TVA

Catherine L. Baugh, an NP administrative assistant, received the memorandum on May 26, 1989, and distributed it to (1) Wallace (NP Human Resource Manager), (2) the NP Vice Presidents, and (3) RIMS. Baugh stated she distributed the memorandum to the Vice Presidents because it dealt with new procedures for handling DOL matters.⁷

Subsequently, an NP secretary and two administrative assistants received the memorandum and distributed it to individuals who reported directly to the NP Vice Presidents. These three support employees distributed the documents further (i.e., to the NP Vice Presidents direct reports) because, in their opinion, the direct reports needed to know about the procedural changes for handling DOL cases. According to one of the support employees, two of the direct reports' secretaries further distributed the document to their direct reports.

Baugh stated the memorandum did not list any individual's names. (However, she acknowledged she did not read the status report of DOL Section 210 complaints that was attached to the memorandum.) She stated the memorandum was not marked confidential and if the document had been classified she would have given it special handling.⁸

Baugh stated she received no instructions or directions regarding her decisions to (1) distribute the memorandum or (2) send the document to RIMS. She stated no NP manager read the memorandum before she distributed it. (In addition, the administrative assistants and secretary who distributed the memorandum in their organizations stated they did not receive any instructions about who should receive the memorandum.)

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7. Nichols and Marquand stated there was nothing improper in distributing the memorandum to the NP Vice Presidents.
 8. Several NP administrative assistants and secretaries stated that the documents NP receives are not given special handling unless they are marked sensitive or it is obvious the information is sensitive. Two NP administrative assistants stated they would not have handled the memorandum any differently than Baugh.

Subsequently, during June 1989, a TVA employee identified on the status report told Mellon D. Robertson, the NP Human Resource Officer assigned to coordinate the handling of DOL matters, that an "upper level" Nuclear Engineering Assurance manager (the employee refused to identify this manager) gave him a copy of the memorandum and characterized the status report as a blacklist. Robertson met with Wallace (NP's Human Resource Manager) regarding the memorandum, and Wallace decided to retrieve the memorandum and status report.

Wallace stated it is fairly obvious that lists of DOL complainants should not be widely distributed, and she acted immediately to retrieve the copies. Wallace stated she wanted to (1) assure employees that TVA would not intentionally circulate a listing of individuals which could be perceived as a blacklist and (2) protect the personal privacy of the individuals identified in the status report.

Wallace directed her secretary to retrieve the copies of the memorandum from the Vice Presidents. Subsequently, the Vice Presidents' secretaries or administrative assistants retrieved the copies of the memorandum and status report.⁹ Wallace stated she did not think of retrieving the document from RIMS until Kingsley received a July 20, 1989, NRC letter asking about the document's distribution. She, Kingsley, and Mark Medford (Vice President of Nuclear Technology and Licensing) agreed the document should be retrieved from RIMS and initiated steps to retrieve it.

On July 24, 1989, Baugh asked RIMS to delete the memorandum from the system. On July 27, 1989, RIMS personnel confirmed that it had been deleted. However, NP subsequently discovered the document had, in accordance with RIMS procedures, only been deleted from the computer index and could still be retrieved from RIMS by using the backup microfiche index.¹⁰ Subsequently, RIMS deleted the document from the microfiche.

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9. We could not determine whether all the copies had been retrieved. For example, one copy sent to Nuclear Training had not been returned at the time of our investigation. Further, there was evidence that TVA employees made copies of the memorandum and status report.
10. As explained in TVA's August 10, 1989, letter to the NRC, TVA's normal procedure for deleting documents from RIMS is to delete references to them from the computer-stored index. However, the document itself remains on microfiche, and there is a backup microfiche index.

Distribution of the Memorandum Outside TVA

According to a Section 210 complaint filed against TVA on behalf of several individuals listed in the status report, the memorandum and status report were widely distributed in the nuclear utility industry, including Martin Marietta.

Our investigation revealed no evidence to support this allegation.¹¹ Several NP managers and OGC attorneys stated they had no specific knowledge that the memorandum or status report were distributed outside TVA. Only one individual provided the OIG with the name of someone outside TVA who allegedly had seen the May 25 memorandum. However, this individual--a Martin Marietta employee and former TVA employee--stated he had seen the memorandum while employed at TVA. According to this employee, he had not seen the May 25 memorandum while employed at Martin Marietta. He further stated he had no knowledge of anyone outside TVA receiving a copy.

In an effort to obtain specific information about this allegation, the OIG contacted each individual listed on the DOL complaint and their attorney. However, neither the individuals nor their attorney provided the OIG any information about their allegation.¹²

TVA PROCEDURES FOR CLASSIFYING DOCUMENTS ADMINISTRATIVELY CONFIDENTIAL

Our investigation revealed that (1) TVA does not have an agency-wide policy for classifying documents or identifying documents that should be classified and (2) neither NP nor OGC have policies for classifying documents.¹³

According to Linda E. Blevins and Georgia S. Greene, Information Services program managers, each TVA office is responsible for maintaining policy and guidelines regarding classification of documents. Alva Jo LaMontagne, RIMS Manager, stated the procedures for document classification are "fragmented and in some instances not current."

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11. Our investigation did reveal that a TVA employee gave a copy of the memorandum to the NRC.
 12. OGC also requested the complainant's attorney to supply any facts regarding circulation of the memorandum outside TVA.
 13. TVA does have some procedures for handling documents after they are classified.

Nichols (Assistant General Counsel) stated OGC does not routinely classify documents they send to senior TVA managers. He stated OGC has sent status reports to senior managers for years without marking the documents administratively confidential.¹⁴ According to Nichols, OGC marks documents "administratively confidential" only when there are Privacy Act protection considerations or the information is exempted from disclosure under the Freedom of Information Act. Marquand (TVA attorney) stated OGC's litigation department only marks documents as confidential if they contain information that is protected by the Privacy Act. (Nichols and Marquand both stated the information contained in the status report is public information and has no Privacy Act protections.) Nichols and Marquand also stated that the recipients of OGC documents are responsible for determining how to classify and distribute those documents.

According to Wallace and NP support personnel, the originating office which sends the documents (in this case OGC) is normally responsible for classifying the document prior to dissemination. According to several NP employees, OGC does mark some documents administratively confidential and OGC documents that are not marked confidential do not automatically receive special handling.

OGC AND NP CORRECTIVE ACTIONS

Although OGC has not officially changed its handling of DOL matters, Marquand and Nichols stated OGC is now more sensitive to DOL matters. They stated OGC is currently either marking DOL-related documents as administratively confidential or conferring directly with the receiving office to ensure the documents are properly handled.

NP is currently marking DOL-related documents as sensitive or confidential (if the document is not already classified), and NP is not putting DOL-related documents on RIMS.

In addition, according to letters Kingsley sent the NRC, NP has taken the following actions in connection with DOL matters.

14. In a July 27, 1989, letter to the NRC, Kingsley stated that although the memorandum could have been marked confidential, the General Counsel frequently advises NP managers on the status of cases and other matters without such markings.

- Kingsley counseled the Vice President whose organization distributed the May 25 memorandum about the need to be sensitive in handling DOL issues. He also instructed his support staff to review the process for receiving, distributing, and filing correspondence of this type.
- Kingsley met with groups of employees to emphasize (1) their duty to express safety and quality concerns and (2) TVA will not discriminate against them for expressing such concerns.
- Kingsley released an internal press release to all NP employees confirming TVA's pledge not to discriminate against employees for expressing concerns.
- NP established a specialized orientation program at the Watts Bar Nuclear Plant to heighten managers' sensitivity to (1) employees who have expressed safety-related concerns, (2) Section 210 provisions, and (3) DOL procedures.
- Kingsley directed his immediate subordinates to make clear to all concerned that the status report is not used to discriminate against any of the individuals on the list.
- NP implemented stronger internal procedures for handling DOL cases as suggested in the May 25, 1989, OGC memorandum.

RECOMMENDATIONS

Based on the information developed during this investigation, the OIG makes the following recommendations.

1. The Vice President, Information Services, should consider the feasibility of providing policy and procedural guidance to TVA organizations on identifying and marking documents that should be treated as administratively confidential. The OIG bases this recommendation on the following factors:
 - a. NP and OGC apparently disagree regarding which office is responsible for determining whether an OGC document should be treated as confidential.
 - b. Neither of the organizations we looked at--NP and OGC--had procedures for identifying and marking documents administratively confidential.
 - c. Decisions on marking documents administratively confidential seem to be made on an ad hoc, individual basis.
2. The Senior Vice President of Nuclear Power and the General Counsel should consider clarifying which organization is responsible for determining whether to treat OGC documents as confidential. In this connection, although NP and OGC are now more sensitive to DOL matters, they are still relying on oral guidance to maintain that sensitivity and to classify documents properly.

REMARKS

Our investigation of this matter is closed.

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