

## ***Correspondence Related to Report No. 10-P-0100***

After the issuance of the report, *Region 6 Needs to Improve Oversight Practices*, Report No. 10-P-0100 (April 14, 2010), the Agency and EPA Office of Inspector General (OIG) exchanged the following correspondence:

1. Memorandum from Deputy Administrator Bob Perciasepe to Inspector General Arthur A. Elkins, Jr., re: Elevation of Region 6 Nonconcurrency with Office of Inspector General Hotline Report, dated July 9, 2010
2. Memorandum from General Counsel Scott C. Fulton to Deputy Administrator Bob Perciasepe, re: Legal Effect of Using the Word "Confidential" to Label a Document - Sandia Landfill OIG Hotline Report, dated July 7, 2010 (provided as an attachment to the July 7, 2010, memorandum from Deputy Administrator Bob Perciasepe)
3. Memorandum from Inspector General Arthur A. Elkins, Jr., to Deputy Administrator Bob Perciasepe, re: Response to Agency Request Regarding Elevation of Region 6 Nonconcurrency with Office of Inspector General Hotline Report, dated August 5, 2010
4. Memorandum from Inspector General Arthur A. Elkins, Jr., to Deputy Administrator Bob Perciasepe, re: Response to Agency Request Regarding Elevation of Region 6 Nonconcurrency with Office of Inspector General Hotline Report, dated August 9, 2010



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEPUTY ADMINISTRATOR

JUL - 9 2010

**MEMORANDUM**

**SUBJECT:** Elevation of Region 6 Nonconcurrency with Office of the Inspector General  
Hotline Report

**FROM:** Bob Perciasepe  
Deputy Administrator

A handwritten signature in black ink that reads "Bob Perciasepe".

**TO:** Arthur A. Elkins, Jr.  
Inspector General

I am following up on the request by Region 6 that, in accordance with the audit resolution process, I review and decide a dispute arising from the Inspector General's Hotline report dated April 14, 2010. OIG Hotline Report, "Region 6 Needs to Improve Management of Oversight at Sandia Landfill," Project No. FY08-00025.

Attached is an opinion, prepared at my request, by the Agency's General Counsel regarding whether the use of the term "confidential" is limited, as a matter of law, to national security information. I am seeking your official response as to whether the legal opinion influences your conclusion that Region 6 improperly classified information and withheld documents from a Freedom of Information Act requester. Also attached are two e-mails reporting the receipt of communications from two former Office of Inspector General personnel who performed the original investigation of the Sandia Landfill Hotline allegations. As the allegations by the former OIG staff are troubling, I would like your official response to them.

I will consider your response before making a decision on the elevation.

Attachment




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

JUL -7 2010

MEMORANDUM

SUBJECT: Legal Effect of Using the Word "Confidential" to Label a Document--Sandia  
Landfill OIG Hotline Report

FROM: Scott C. Fulton   
General Counsel

TO: Bob Perciasepe  
Deputy Administrator

Region 6 has formally disputed portions of an OIG audit report. As part of the OIG audit resolution process, you requested a legal opinion on whether only documents classified as national security information (NSI) may be marked with the term, "confidential." The Region has also questioned the OIG's conclusion that the Region improperly withheld a record from the public by classifying the record as NSI.

The OIG report's conclusions regarding Region 6's handling of the document are inaccurate because (1) the use of the term "confidential" is not limited to NSI and (2) the Region did not withhold the document as NSI, and instead properly withheld it pursuant to the Agency's FOIA process.

**Factual Background**

The Office of Inspector General (OIG) received a Hotline complaint on May 7, 2009, from Citizen Action New Mexico alleging mismanagement of the Sandia National Laboratory's Mixed Waste Landfill (Sandia) monitoring wells. Prior to the complaint, Citizen Action New Mexico filed two Freedom of Information Act (FOIA) Requests related to the Sandia monitoring wells. Among other documents, a draft oversight review report marked as "confidential" was withheld pursuant to FOIA Exemption 5 under the deliberative process privilege. The Office of General Counsel upheld the withholding after reviewing two administrative FOIA appeals filed by Citizen Action New Mexico.

The OIG subsequently released a draft Hotline report on January 28, 2010, finding, *inter alia*, that the Region improperly classified the draft review report as NSI and that the Region improperly withheld the document from the public as a result. In reaching its decision, the OIG essentially concluded that the use of the “confidential” designation can only be used for NSI and that by using it Region 6 was attempting to classify a draft report as a national security document. OIG Hotline Report, “Region 6 Needs to Improve Management of Oversight at Sandia Landfill,” Project No. FY08-00025 (January 28, 2010) (“Hotline Report”).

On March 3, 2010, Region 6 submitted an extensive response non-concurring with the draft report on the issue of document classification and explaining that the term “confidential” was used to indicate that the document was internal and fell within the deliberative process privilege. The final Hotline Report was issued on April 14, 2010, without significant changes.

In the final Hotline report, the OIG advanced two relevant recommendations to Region 6’s Regional Administrator:

1. Comply with EPA’s *national security*, public involvement, and records management policies, including removing the *national security marking* from the December 2007 Oversight Review.
2. Evaluate the extent to which the Region has . . . misclassified information, to determine the scope of disciplinary action or training necessary to remedy the situation.

Hotline Report at 6 (emphasis added).

Subsequently, Region 6 invoked the audit resolution process, EPA Manual 2750, as supplemented. This process allows the Deputy Administrator to review and decide audit disputes prior to any issuance of a final decision by the Audit Resolution Board.

## **Analysis**

### **The Use of “Confidential” Is Not Limited To NSI**

The OIG report did not cite to, and we are unaware of, any binding legal authority that limits the EPA’s use of the designation “confidential” to documents classified as NSI.

There are two guidance documents within the Agency that address the use of the term “confidential.” First, an Office of Environmental Information (OEI) compendium explained that “EPA uses the term ‘confidential’ in referring to any information that must be protected from unauthorized disclosure.” Information Sensitivity Compendium (“Compendium”) (published July 2002). OEI provided examples where the “confidential” label is used including: (1)

confidential business information (CBI); (2) confidential Agency information (CAI); (3) Privacy Act information; (4) Enforcement-confidential information; (5) budgetary information prior to OMB release, and (6) other information that is exempt from disclosure under the Freedom of Information Act (FOIA). Compendium at 5. The Compendium reflects that, as a matter of Agency practice, numerous non-NSI documents may be referred to as confidential. Similarly, the Agency Correspondence Manual 1320, revised September 2007, notes that “[i]nformation that is not releasable or typically released to the public under FOIA should be considered confidential[.]” *Id.* at 3.

Numerous training and other materials located on EPA’s Intranet are consistent with the OEI guidance and refer to non-classified executive branch information as “confidential.” Two examples include Region 4 Regional Information Sensitivity (RIS) Training at <http://www.epa.gov/region4/ris-training/pl.htm>, which is modeled on the Information Compendium and OGC 2005 ethics training, which also defines confidential information by reference to the Compendium, <http://intranet.epa.gov/ogc/2005ethicstraining/76add.htm>.

The second guidance document of note is the EPA National Security Handbook (“NSI Handbook” or “the Handbook”) cited in the OIG Report. The reference to the Handbook in the IG Report ignores its context, and, as discussed below, contextual consideration is especially important in this instance. The NSI Handbook’s sole focus is on how NSI-related information is handled by Agency personnel “who have access to classified NSI,” NSI Handbook at 1-1, ¶1-100, and it is plain that the guidance set forth in the Handbook is intended to ensure proper classification of *NSI*.

The fact that “confidential” has a particularized meaning in the NSI realm does not rob the term of its ordinary meaning for other purposes and contexts, and, indeed, there is no indication that the NSI Handbook was intended to have operation with respect to ordinary document management activity undertaken by staff not handling NSI.

As noted above, in other contexts, the term “confidential” is frequently used to signal the need for further privilege (or FOIA exemption) assessment review prior to disclosure. This is a valid and useful practice, although there may be value in referencing the particular privilege or disclosure exemption in lieu of the more general “confidential” label when staff preparing the document are equipped to make an informed assessment in this regard.

Even if the NSI Handbook were viewed as addressing non-NSI document management activity, it bears note that the Handbook does not use mandatory language in the paragraph of interest. The Handbook states, “The terms ‘Top Secret,’ ‘Secret,’ and ‘Confidential’ *should* not be used to identify non-classified information.” NSI Handbook at 4-5, ¶4-500(3) (emphasis added). Accordingly, the Handbook does not purport to be binding authority.

In sum, in our opinion, the OIG report was incorrect in concluding that a “confidential” label can only be used in the NSI sphere.

## **The Region Did Not Withhold the Document as NSI**

In reaching its conclusion that Region 6 improperly withheld the draft by classifying it as NSI, the OIG ignored Region 6's contemporaneously stated basis for withholding the record when it was requested by a member of the public. The draft document was in fact requested through two FOIA requests by the same party that filed the underlying OIG complaint. Under the FOIA, an agency record must be produced unless otherwise exempt by one of nine exemptions. For example, Exemption 1 allows withholding of NSI, while Exemption 5 allows withholding records that fall within the common law privileges (including the deliberative process privilege.). Upon receiving a FOIA request for a record, a decision on release or withholding is made based on the content of the record and not the designation.

The Agency's FOIA regulations at 40 CFR Part 2 Subpart A provide clear instructions concerning the processing of FOIA requests. As stated at 40 CFR § 2.103 (a), "the office that has possession of that record is the office responsible for responding to you." If a request is denied in full or in part, the appropriate office issues an initial denial and the requestor is allowed to file an administrative appeal. With limited exceptions, the OGC will respond to the administrative appeals. 40 CFR § 2.104(j).

In response to the two FOIA requests, Region 6 followed the appropriate FOIA procedures and notified the requestor through an initial denial that it was withholding the draft pursuant to Exemption 5, the deliberative process privilege. The "confidential" marking was not determinative as to whether the document fell within the deliberative process privilege. The document was still reviewed to ensure it qualified for withholding under Exemption 5. Notably, the Region never claimed Exemption 1 as a basis to withhold the draft. Subsequently, the requestor filed two administrative appeals challenging the withholding of the draft, among other issues. The Information Law Practice Group, OGC, reviewed both appeals and affirmed the withholding.

Notwithstanding the FOIA responses, the OIG report incorrectly concludes that Region 6 withheld the record from the public by classifying it as NSI. In finding that the Oversight Report was inappropriately withheld, the OIG report ignored both the record and the established FOIA process.

The underlying circumstances further make clear that Region 6 did not intend to classify the record as NSI. NSI classification does not occur as a result of marking a document; rather a document is marked NSI once it is classified. *Wilson v. McConnell*, 501 F. Supp. 2d 545, 557. (S.D.N.Y. 2007). The Agency follows specific procedures for classifying and handling an NSI document. Executive Order (E.O.) 13526, "Classified National Security Information," dated

December 29, 2009, provides the only basis for classifying NSI. In accordance with E.O. 12958<sup>1</sup>, EPA's NSI Handbook ("NSI Handbook"), December 2006, Revision 1, clearly mandates EPA procedures used to identify and mark information as National Security Information. There are only certain high-level employees in the Agency that may classify a record.. The authority to classify original information at the Secret or Confidential level "may be exercised only by the Administrator, EPA and officials to whom such authority has been directly delegated by the Administrator." (NSI Handbook at page 2-2, paragraph 2-203, page 2-2.) There are also strict limitations on the storage and handling of NSI. In light of the context, the Region 6 staff engineer was not creating NSI by labeling the draft report as "confidential."

## **CONCLUSION**

The OIG report conclusions regarding the markings on the December 2007 "Oversight Review" were based on an erroneous understanding of the relevant law. Marking of a document as "confidential" alone does not classify the document as NSI. Nor is the marking sufficient to support a withholding under Exemption 1 of the FOIA, which protects national security information. In this case, the Region withheld the document appropriately pursuant to Exemption 5 of FOIA, as information protected by the deliberative process. This withholding was upheld by the Office of General Counsel.

Contrary to the conclusion reached by the OIG, the use of the word "confidential" is not limited to NSI. It is often used merely to alert the reader that the document would need to be reviewed before release. In the present case, it was erroneous to conclude that the oversight review document became NSI due to the Project Engineer's marking.

If you have additional questions please feel free to contact me or Alan Margolis of my staff at 202-564-3672.

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<sup>1</sup> This is an earlier version of current E.O 13526. The NSI handbook is currently being revised by OARM to reflect the new Executive Order. The Agency also has regulations at 40 CFR Part 11, "Security classification regulations pursuant to Executive Order 11652" (the Executive Order in effect in 1972.). We have informed the program that these should be revised. Although there are minor changes between E.O. 13526 and E.O. 12958, they are not relevant for purposes of this discussion.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 5 2010

THE INSPECTOR GENERAL

**MEMORANDUM**

SUBJECT: Response to Agency Request Regarding Elevation of Region 6  
Nonconcurrence with Office of the Inspector General Hotline Report

FROM: Arthur A. Elkins, Jr. *Arthur A. Elkins, Jr.*

TO: Bob Perciasepe  
Deputy Administrator

I am responding to your July 9, 2010 memorandum seeking an official response to specific issues regarding the Inspector General's Hotline Report: "Region 6 Needs to Improve Management of Oversight at Sandia Landfill." You indicated that this information would assist you in reviewing and deciding a dispute, as requested by Region 6. Therefore, it appears that the formal audit resolution process has not been followed.<sup>1</sup> Accordingly, this response is limited to the specific issues for which you have requested an official response from my office and is not meant to be the OIG's full response to all matters that may have been raised by Region 6 for audit resolution.

You provided a July 7, 2010 Office of General Counsel (OGC) memorandum and asked whether it influenced the OIG conclusion that Region 6 improperly classified information and withheld documents from a Freedom of Information Act (FOIA) requester. Second, you requested an official response regarding two Agency emails you provided summarizing communication with two former OIG personnel involved in the review of the hotline allegations resulting in the above OIG report.

As a result of our review of the OGC memorandum, as well as our additional legal research, OIG now concludes that the "confidential" stamp on the "December 2007 Oversight Review" did not have the effect of classifying the document as national security information (NSI). Therefore, there was no violation of EPA policies or guidance for marking NSI. The OGC memorandum stated that the Oversight Review document was withheld from disclosure pursuant to Exemption 5 of the FOIA, "the deliberative process privilege." The OIG accepts this statement and that the document was not withheld on the basis of improper classification of the material.

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<sup>1</sup> The audit resolution process is set forth in "EPA's Audit Management Process." EPA Order 2750 CHG2 (December 3, 1998)). See, for example, Sections 3, 4, and 7 in Chapter 10. See also Memorandum from the Administrator, "Interim Process for Audit Resolution," (December 4, 2007).

With respect to the emails you provided, I will address this issue in a separate communication.

Please feel free to contact me or my Associate Deputy Inspector General and Counsel, Mark Bialek at (202) 566-0861, to discuss any unresolved matters.



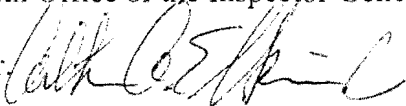
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 9 2010

MEMORANDUM

THE INSPECTOR GENERAL

SUBJECT: Response to Agency Request Regarding Elevation of Region 6  
Nonconcurrency with Office of the Inspector General Hotline Report

FROM: Arthur A. Elkins, Jr. 

TO: Bob Perciasepe  
Deputy Administrator

I am responding to the portion of your July 9, 2010 memorandum seeking an official response to specific issues regarding the Inspector General's Hotline Report: "Region 6 Needs to Improve Management of Oversight at Sandia Landfill" that were not addressed in my August 5, 2010 response.

As I noted in my earlier response, this response is limited to the specific issues for which you have requested an official response from my office and is not meant to be the OIG's full response to all matters that may have been raised by Region 6 for audit resolution.

Attached to your memorandum were two Agency emails reflecting conversations Region 6 employee Kathryn Thomas had with two former OIG evaluators who worked on the OIG evaluation of the Citizen Action New Mexico hotline complaint. I reviewed these emails and determined that, with respect to the matters that you and Region 6 raised, the key question raised is whether OIG properly conducted its evaluation on the hotline complaint. I conclude that it did.

OIG evaluations of hotline complaints are generally guided by the Government Audit Standards and OIG policies and procedures. The concerns raised in the emails with respect to that process did not disclose any specific deficiencies in OIG's evaluation. The review I conducted in response to your request did not identify any deviations from the standards relating to the evaluation of a hotline complaint.

Please feel free to contact me or my Associate Deputy Inspector General and Counsel, Mark Bialek at (202) 566-0861, to discuss any unresolved matters.