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THE NASA ADMINISTRATOR'S SPEECH TO OFFICE OF INSPECTOR GENERAL STAFF, THE SUBSEQUENT DESTRUCTION OF VIDEO RECORDS, AND ASSOCIATED MATTERS

HEARING

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

COMMITTEE ON SCIENCE AND TECHNOLOGY

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MAY 24, 2007

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THE NASA ADMINISTRATOR'S SPEECH TO OFFICE OF INSPECTOR GENERAL STAFF, THE SUBSEQUENT DESTRUCTION OF VIDEO RECORDS, AND ASSOCIATED MATTERS

THURSDAY, MAY 24, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT,
COMMITTEE ON SCIENCE AND TECHNOLOGY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2318 of the Rayburn House Office Building, Hon. Brad Miller [Chairman of the Subcommittee] presiding.

BART GORDON, TENNESSEE
CHAIRMAN

RALPH M. HALL, TEXAS
RANKING MEMBER

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Subcommittee on Investigations and Oversight

Hearing on

The NASA Administrator's Speech to Office of Inspector General Staff, the Subsequent Destruction of Video Records, and Associated Matters

Thursday, May 24, 2007
10:00 a.m. to 1:30 p.m.
2318 Rayburn House Office Building

Witness List

Panel 1

Ms. Evelyn Klemstine
Assistant Inspector General for Audits, NASA Office of Inspector General

Mr. Kevin Winters
Assistant Inspector General for Investigations, NASA Office of Inspector General

Panel 2

Mr. Michael Wholley
General Counsel, NASA

Mr. Paul Morrell
Chief of Staff, NASA

HEARING CHARTER

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT
COMMITTEE ON SCIENCE AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES

The NASA Administrator's Speech to Office of Inspector General Staff, the Subsequent Destruction of Video Records, and Associated Matters

THURSDAY, MAY 24, 2007
10:00 A.M.—1:30 P.M.
2318 RAYBURN HOUSE OFFICE BUILDING

Background

Since early 2006, Robert Cobb, the Inspector General of the National Aeronautics and Space Administration (NASA), has been under investigation for allegations of misconduct. After a review of 79 allegations, in early 2007, the Integrity Committee of the President's Council on Integrity and Efficiency (PCIE), an organization of agency inspectors general, issued a report finding that Mr. Cobb had abused his authority and demonstrated the appearance of a lack of independence from the agency's top officials, particularly Sean O'Keefe, NASA's former administrator. Most of the allegations came from current and former employees of NASA's Office of Inspector General (OIG).

The Committee has been tracking this investigation since 2006 and made repeated requests for the final report and its supporting documentation over a several-month period until it was released to the Committee in late March of 2007. On April 2, 2007, Chairmen Miller and Gordon called for the removal of Mr. Cobb. Since that time, the Committee, along with the Senate Subcommittee on Space, Aeronautics, and related Sciences has been conducting interviews in preparation for hearings on the Cobb investigation.

The criteria used by the PCIE are set forth in Executive Order 12993, which includes an "abuse of authority" as one of the allegations that must be investigated. The PCIE also has developed the "Quality Standards for Federal Offices of Inspector General," which all IGs are required to meet. They include integrity, objectivity, independence, professional judgment and confidentiality. Independence is defined as a "critical element of objectivity. Without independence, both in fact and in appearance, objectivity is impaired."

The PCIE's Integrity Committee, which conducted the investigation, recommended action be taken against Mr. Cobb up to and including dismissal. That recommendation was sent to Clay Johnson III, the head of PCIE and deputy director for management of the Office of Management and Budget for further action. Mr. Johnson sent the report on to Michael Griffin, NASA's Administrator, and asked him to propose a corrective action plan for Mr. Cobb.

Griffin turned the task of studying the hundreds of pages of material and crafting a set of potential actions over to his General Counsel, Michael Wholley. Mr. Wholley independently decided to apply his own standards to the work of the HUD Inspector General and re-judge the case based on that report. This was completely outside the scope of the assignment to Mr. Griffin contemplated in the Executive Order. Mr. Wholley, asking what laws had been violated, determined that the Integrity Committee got it all wrong when they declared Mr. Cobb to have abused the authority of his office. In fact, Mr. Wholley seemed hard pressed to find that Mr. Cobb had done anything wrong at all. Notably, Mr. Wholley has developed a mentor-protégé relationship with Cobb and so his actions bear out the finding of the Integrity Committee that at least the appearance of a lack of independence exists. Mr. Wholley was blind to that situation as he went about his self-defined task.

Upon the suggestion of Mr. Johnson, the plan for dealing with Mr. Cobb included a meeting between Mr. Griffin and the staff of the Office of Inspector General (OIG) to inform them that Mr. Griffin had reviewed the Integrity Committee's Record of Investigation and taken "the actions that I believe are necessary to address the

ROI's findings." In a letter to Mr. Johnson, Mr. Griffin also said that he would "listen to any concerns that may exist among the staff and. . .express my support for a strong and effective Office of Inspector General."

In early April, Mr. Griffin made public statements questioning the conclusions of the PCIE report. He claimed to have reviewed the report himself—although there is no evidence of that—and found no evidence of an "abuse of office" "lack of integrity" or "actual conflict of interest" or "improprieties." He expressed his support for Mr. Cobb, said he would not recommend his removal, and that Mr. Cobb's "impartiality" was not in question. Mr. Griffin said there were examples of "overly harsh treatment of subordinates; verbal treatment" by Mr. Cobb, and that he would recommend that Mr. Cobb take management courses at the Federal Executive Institute every year, have a management coach, and report on his progress to NASA's Deputy Administrator.

The "all-hands" mandatory meeting was scheduled for April 10 at 2:30 p.m. Before the meeting, several persons expressed concern about the NASA Administrator's prior supportive statements concerning Mr. Cobb and questioned whether holding such a meeting with the OIG staff gave the appearance that the Administrator was asserting control over the independent Inspector General's office.

Because OIG employees are located at headquarters and several NASA centers, the meeting was videoconferenced. Prior to that meeting, Paul Morrell, Mr. Griffin's Chief of Staff, said he told the contract employee running the Video Teleconferencing Service (ViTS) center not to record the session, although the employee does not recall that directive. However, during the planning for the meeting, a NASA public affairs officer requested a DVD be made of the meeting, and when the meeting was actually held, there were multiple signs (as many as 8) noting that the session was being recorded. It was subsequently learned that at least two of the NASA centers also videotaped the session so that employees who were not present could view the meeting. This appears to be a standard practice in NASA IG staff "all hands" videoconferences.

The Meeting

Mr. Griffin addressed the meeting, which was also attended by Mr. Cobb. According to written reports from attendees of the meeting, Mr. Griffin went far beyond a simple recitation of his support for Mr. Cobb, the facts of Mr. Cobb's corrective action plan, and an assurance of independence for the OIG's office. Mr. Griffin indicated that he was not interested in the OIG's program or operational audits because the OIG staff did not have the technical skills to audit in that area, that OIG auditors should not be questioning NASA management decisions, and that he would not pay attention to findings that didn't result in savings in the hundreds of millions of dollars. Attendees at the meetings also indicated that it was inappropriate for Mr. Cobb to be at the meeting if open and honest dialogue was the goal.

Destruction of the Video Records of the Meeting

Early on April 11, Mr. Griffin's Chief of Staff called the ViTS center employee. At the request of the Public Affairs Office, the employee had created an original DVD and four copies, which were to be provided to various offices. Mr. Morrell told the ViTS employee that this meeting was not to be recorded and to get back the DVD and the copies. The ViTS employee did so, and also called all of the centers and told them to destroy the copies that they had. In a dramatic moment, the ViTS person at one center actually destroyed a videotape by beating it with a shelf board. Mr. Morrell claims that he never even asked about whether the Centers might have tapes; the ViTS staffer remembers this somewhat differently and is fairly confident he was following Mr. Morrell's orders when he asked the Center ViTS people to collect and destroy tapes.

At headquarters that morning, Mr. Morrell collected all of the DVDs and then gave them to Michael Wholley, NASA's General Counsel. Some time later, Mr. Wholley destroyed the DVDs by breaking them up with his hands. Mr. Wholley later told Committee staff that he did so because he wanted to be sure that no one could obtain the DVD by filing a request under the *Freedom of Information Act* (FOIA).

Congressional Request

On April 18, the Committee learned of the April 10 meeting and the possible destruction of the video recordings of that meeting and sent letters to Administrator Griffin and Inspector General Cobb requesting a copy of the videotape and all records related to it. When the response stated that all copies had been destroyed, the Committee asked for all records relating to Mr. Griffin's review of the PCIE report, the April 10 meeting with the OIG staff and the destruction of the video records.

Committee Investigation

Ever since Mr. Johnson put the responsibility on Mr. Griffin to develop and implement a corrective action plan for NASA's Inspector General, there have been concerns in Congress and elsewhere that it would be difficult for Mr. Cobb to maintain his independence from NASA management when he owed his continuance as NASA's IG to Mr. Griffin and his General Counsel. This is of particular concern as one of the substantiated allegations was that Mr. Cobb did not demonstrate the appearance of a lack of independence of the prior NASA Administrator and General. Staff review of the responsive documents and follow-up interviews indicate a disturbing lack of concern by NASA management about maintaining the independence of its Office of Inspector General.

The actions by staff at the highest levels of NASA to physically destroy records of a questionable meeting between the Administrator and the OIG staff points to a serious lack of public accountability. It is unprecedented for a General Counsel to personally and knowingly destroy agency records so that they cannot be obtained by Congress or the public. Apologies referring to the use of "stupid pills" are not acceptable for a person in such a position of public trust and responsibility.

In its hearing, the Committee will hear from witnesses personally involved in both the meeting and the destruction of its record.

Witnesses:

The first two witnesses are current, high-ranking staff of the NASA Inspector General's office. They will testify as to the impact of Dr. Griffin's address to the OIG staff. They also have insights into the destruction of tapes.

- **Evelyn Klemstine,** Assistant Inspector General for Audits, NASA Office of Inspector General
- **Kevin Winters,** Assistant Inspector General for Investigations, NASA Office of Inspector General

The second panel of witnesses can speak to the disposition of the Cobb case by NASA when it was presented to the agency by PCIE. They can also speak to the relationship between Cobb and Wholley. Finally, they can address the manner and motive for destroying the recordings of Administrator Griffin's appearance before the IG staff.

- **Michael Wholley,** General Counsel, NASA
- **Paul Morrell,** Chief of Staff, NASA

Chairman MILLER. Good morning. The hearing will come to order.

In January, the Integrity Committee of the President's Council on Integrity and Efficiency, PCIE, completed an investigation into allegations of misconduct by Robert "Moose" Cobb, the Inspector General of the National Aeronautics and Space Administration, NASA.

The report was damning. The report found that Mr. Cobb abused his authority and showed a lack of the appearance of independence from NASA management, and concluded that discipline up to and including removal was appropriate. After reading the report, Chairman Gordon and I of this committee, and Senator Bill Nelson, the Chair of the counterpart committee in the Senate, called upon President Bush to remove Mr. Cobb as Inspector General of NASA.

Mr. Cobb continues to serve at the pleasure of the President. It apparently continues to please President Bush for Mr. Cobb to serve as the NASA Inspector General. This committee, this subcommittee, will hear from Mr. Cobb and others in the next weeks concerning the allegations of misconduct that were the subject of the PCIE report.

As damning as the report was, it appears on closer examination that the report was overly generous. The subject of this hearing is the conduct of NASA officials in handling the Cobb matter. Specifically, this hearing concerns a meeting with the staff of the Office of Inspector General of NASA, a meeting that all staff members were expected to attend, a meeting at which Mr. Cobb sat beside Administrator Michael Griffin while Administrator Griffin disputed the findings of the PCIE report. NASA officials certainly have known that such a meeting would only further the appearance of a lack of independence by the NASA Inspector General.

In his prepared statement today, Michael Wholley, the General Counsel of NASA, is in high dudgeon about the accounts of NASA employees who attended the meeting, which he testifies range from the patently false to the ridiculous. He asserts that this subcommittee should be skeptical of allegations slipped under the door or thrown over the transom, often anonymously or with the request for anonymity. That is exactly how whistleblowers provide information to oversight committees of Congress and to Inspector Generals acting independently, as required by statute.

We could have known for certain just exactly what happened at that meeting, and not had to decide between wildly conflicting accounts, decide which accounts to believe, because there was a DVD made of the meeting, and then copies were made of the DVD. Mr. Wholley personally destroyed those tapes. A great American lawyer, Elihu Root, said that about half the practice of a decent lawyer is telling would-be clients that they are damn fools and should stop. That is a view of the ethical expectations of a lawyer that I learned in law school, and it remains the expectation set forth in the Code of Professional Responsibility.

Instead, the view within NASA apparently was that DVDs could be destroyed absent advice that any legal arguments that the DVDs should be preserved was "categorically fatally legally flawed." I worry that the ethical obligations of a lawyer that I

learned in law school are now regarded as quaint and antiquated like the Geneva Convention.

NASA officials, Mr. Wholley and Paul Morrell, knew that there were questions about the propriety of the meeting. They knew that the Cobb matter was a subject of interest by the oversight committees of the House and the Senate. They knew that the DVD of the meeting would be subject to disclosure, and Mr. Wholley made a conscious decision to destroy the DVDs. It is impossible not to conclude the worst from that conduct.

At this time, the Chair recognizes Ranking Member Sensenbrenner for his opening statement.

[The prepared statement of Chairman Miller follows:]

PREPARED STATEMENT OF CHAIRMAN BRAD MILLER

Good morning. In January, the Integrity Committee of the President's Council on Integrity and Efficiency (PCIE) completed an investigation into allegations of misconduct by Robert "Moose" Cobb, the Inspector General of the National Aeronautics and Space Administration (NASA). The report was damning.

The report found that Mr. Cobb abused his authority and showed a lack of the appearance of independence from NASA management, and concluded that discipline "up to and including removal" was appropriate. After reading the report, Chairman Gordon and I and Senator Bill Nelson, the Chair of the counterpart committee in the Senate, called upon President Bush to remove Mr. Cobb and Inspector General of NASA.

Mr. Cobb serves at the pleasure of the President, and it apparently still pleases President Bush for Mr. Cobb to serve as the NASA Inspector General.

This subcommittee will likely hear from Mr. Cobb and others in the next few weeks concerning the allegations of misconduct that were the subject of the PCIE report. As damning as the report was, it appears on closer examination that the report was overly generous.

The subject of this hearing is the conduct of NASA officials in handling the Cobb matter.

Specifically, this hearing concerns a meeting with the staff of the Office of Inspector General of NASA, a meeting all staff members were expected to attend, a meeting at which Mr. Cobb sat beside Administrator Michael Griffin while Administrator Griffin disputed the findings of the PCIE report. NASA officials certainly should have known that such a meeting would only further the appearance of a lack of independence by the NASA Inspector General.

In his prepared statement, Michael Wholly, the General Counsel at NASA, is in high dudgeon about the accounts of NASA employees who attended the meeting, which he testifies "range from the patently false to the ridiculous." He asserts that this subcommittee should be skeptical of "allegations slipped under the door or thrown over the transom, often anonymously or with the request for anonymity." That is exactly how whistle blowers provide information to oversight committees of Congress, and to Inspector Generals acting independently as required by statute.

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I worry that the ethical obligations of lawyers that I learned in law school are now regarded as quaint and antiquated, like the Geneva Convention.

NASA officials, Mr. Wholly and Paul Morrell, knew that there were questions about the propriety of the meeting, they knew that the Cobb matter was the subject of interest by the oversight committees of the House and Senate, and they knew that the DVD of the meeting would be subject to disclosure, and Mr. Wholly made a conscious decision to destroy the DVDs. It is impossible not to conclude the worst from that conduct.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

We are here today, in part, to reconstruct a meeting we should have been able to watch. Congress relies on Inspectors General as agency watchdogs to oversee the conduct at agencies. And let me say, ten years ago, when I was the Chairman of the Full Science Committee, I used Inspectors General very effectively in doing the oversight that the Constitution and the public demands that the Congress do.

And even though I had a very contentious relationship with then Administrator Daniel Goldin, the Inspector General, who was also appointed by President Clinton, maintained his fierce independence, and was able not only to give the Committee relevant information on matters of concern, but according to Mr. Goldin, these efforts, together with others that this committee did, made NASA a better agency.

Now, because we rely on Inspectors General so heavily, we take allegations against them seriously, and after a year-long investigation and deliberative process, in which Congress was kept almost entirely in the dark, the President's Council on Integrity and Efficiency, the PCIE mentioned, too, by the Chairman, forwarded its investigative committee's findings on NASA's Inspector General to Administrator Michael Griffin.

Administrator Griffin, in concert with NASA's senior management, reviewed the findings, and recommended that the Inspector General attend management training courses. He forwarded his recommendations to the Chairman of the PCIE, who adopted them. Administrator Griffin then scheduled a meeting on April 10 with staff from the Office of the Inspector General to explain his decision.

By several accounts, Administrator Griffin's meeting on April 10, with the Office of the IG further undermined the IG's independence, and I am extremely concerned about that. As one NASA employee told Committee staff after attending the meeting, if there was an appearance of independence before, there is none now. Given our reliance on Inspectors General, Congress would have benefited from reviewing a tape of that meeting. It is therefore unfortunate that these tapes were destroyed, but hopefully, through testimony today, we can develop an accurate picture of the meeting as possible.

I would further request the Chair, and I will be happy to sign a letter to that effect, to refer this matter to the Justice Department for investigation, because I believe that this tape, which was produced by a NASA employee with NASA equipment, is government property, and there are criminal penalties for the destruction of government property.

But perhaps more unfortunately, we need to know why recordings of that meeting were destroyed. I believe in open government, and I am very concerned to hear that a government employee was beating a videocassette with a plank and an agency's General Counsel physically destroyed a stack of DVDs. The fact that these events happened at different locations across the country, and the fact that no copies of the recorded meeting remain, suggest a coordinated effort to destroy all record of the event.

This destruction also seems to have occurred with limited understanding of the applicable law, and under full awareness that Congress and specifically, this subcommittee, was investigating this issue. I believe that personnel decisions within the Administration should be handled by the Administration, and as such, I support the decisions made by NASA, the PCIE, and the President, but these decisions need to be made transparently, and they need to be made in a way that preserves confidence in the Office of Inspector General and our agencies' leadership.

From the information that this subcommittee has received to date, there is no reason to give us any confidence whatsoever in how this matter was handled, and I hope that this hearing inspires confidence, and will be able to restore at least a scintilla of faith in what is going on at NASA headquarters.

Thank you.

[The prepared statement of Mr. Sensenbrenner follows:]

PREPARED STATEMENT OF REPRESENTATIVE F. JAMES SENSENBRENNER

We are here today, in part, to reconstruct a meeting that we should have been able to watch. Congress relies on inspectors general as agency watchdogs to oversee the conduct at agencies. As such, we take allegations against inspectors general seriously. After a year-long investigative and deliberative process, in which Congress was kept almost entirely in the dark, the President's Council on Integrity and Efficiency (PCIE) forwarded its Investigative Committee's findings on NASA's Inspector General to NASA's Administrator, Michael Griffin. Administrator Griffin, in concert with NASA senior management, reviewed the findings and recommended that the Inspector General attend management training courses. He forwarded his recommendations to the Chairman of the PCIE, who adopted them. Administrator Griffin then scheduled a meeting on April 10 with staff from the Office of the Inspector General to explain his decision.

By several accounts, Administrator Griffin's April 10 meeting with the Office of the Inspector General further undermined the NASA Inspector General's independence. As one NASA employee told Committee staff after attending the meeting, "If there wasn't an appearance of independence before, there is now."

Given our reliance on inspectors general, Congress would have benefited from reviewing a tape of that meeting. It is therefore unfortunate that the tapes were destroyed, but hopefully, through testimony today, we can develop as accurate a picture of the meeting as possible.

Perhaps more unfortunately, we also need to understand why recordings of that meeting were destroyed. I believe in open government and I am very concerned to hear that a government employee was beating a videocassette with a plank and an Agency's General Counsel physically destroyed a stack of DVDs. The fact that these events happened at different locations across the country and the fact that no copies of the recorded meeting remain, suggest a coordinated effort to destroy all record of the event. This destruction also seems to have occurred with limited understanding of the applicable law and under full awareness that Congress was investigating this issue.

I believe that personnel decisions within the Administration should be handled by the Administration. As such, I support the decisions made by NASA, the PCIE, and the President. But those decisions need to be made transparently and they need to be made in a way that preserves confidence in the Office of the Inspector General and in our agencies' leadership. Hopefully, today's hearing will inspire that confidence.

Chairman MILLER. Thank you, Mr. Sensenbrenner.

Our first panel will not be providing written testimony or formal opening statements, though I understand that you may be, would like to say something extemporaneously in a moment before we actually begin with our questions.

We have asked both of them, in large part, to discuss the April 10 meeting that is at issue here, between Administrator Griffin and the staff of NASA's Office of the Inspector General. In re-

sponse, the response of the staff to that meeting, and the destruction of the DVDs of the meeting.

Evelyn Klemstine is the Assistant Deputy Inspector General for Audits at NASA. Kevin Winters is the Assistant Deputy Inspector General for Inspections. In a senior OIG, Office of Inspector General staff meeting on April 11, Ms. Klemstine brought the concerns of the OIG staff, that the OIG staff had raised with her about the meeting, and subsequently, drafted a memo that set forth those concerns.

In an interview with the Committee staff, Mr. Winters also expressed reservations about the propriety of the meeting, and said that he was investigating the destruction of the DVD.

We want to thank both of you for being here. It is the practice of the Subcommittee to take testimony under oath. Do either of you have any objections to being sworn in?

Mr. WINTERS. No, Mr. Chairman.

Ms. KLEMSTINE. No, Mr. Chairman.

Chairman MILLER. Okay. You also have the right to be represented by Counsel. Are either of you represented by Counsel today?

Mr. WINTERS. No, Mr. Chairman.

Ms. KLEMSTINE. No, Mr. Chairman.

Chairman MILLER. All right. If you would please stand and raise your right hand.

[Witnesses sworn]

Chairman MILLER. Two quick matters. One is before we begin, I would like to place into the exhibit of this hearing a record of exhibits. That has been provided to Mr. Sensenbrenner, to the Minority staff as well, and is, I believe, on the table for your reference, for the witnesses, reference by the witnesses. And without objection, it is so ordered. [The information appears in the Appendix.]

And then, second, I know that neither of you were asked, we didn't ask either one of you to provide a written statement, but either of you wish to make any preliminary statement before we begin?

Mr. WINTERS. Yes, Mr. Chairman. Thank you.

Chairman MILLER. Mr. Winters.

Panel 1:

STATEMENT OF MS. EVELYN KLEMSTINE, ASSISTANT INSPECTOR GENERAL FOR AUDITS, NASA OFFICE OF INSPECTOR GENERAL AND MR. KEVIN WINTERS, ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, NASA OFFICE OF INSPECTOR GENERAL

Mr. WINTERS. My name is Kevin Winters. I am the Assistant Inspector General for Investigations at NASA's Office of Inspector General.

With the Chairman's permission, we would like to provide a brief opening statement. Our intent is to provide what we hope is a helpful context regarding the organizations for which Ms. Klemstine and myself are responsible.

As the Chairman knows, the mission of the Office of Inspector General is to conduct objective oversight of NASA's programs and

operations, and then, to independently report to the NASA Administrator, this Congress, and to the public, to further help NASA's accomplishment of its mission.

Public Law 95–452, commonly known as the *Inspector General Act of 1978,* is the statutory basis for Offices of Inspector General throughout 61 federal agencies, and accordingly serves as our statutory foundation for a series of broad mandates.

One such mandate under the Act is that the Office of Inspector General perform the following two operational functions: one being audits, the second being investigations. The Office of Audits, supervised by Ms. Klemstine to my right, focuses on the conduct of audit activities relating to NASA's programs and operations. There are 101 NASA OIG employees in the Office of Audits, who are deployed throughout most of NASA's field centers. Ms. Klemstine, as the Assistant Inspector General for Audits, is a 28-year career civil servant, largely in the IG community, and has been with NASA OIG since November 2004.

I am privileged to lead the other operational function, the Office of Investigations, which performs investigative activities both criminal and administrative, pertaining to NASA's programs and operations.

There are 81 NASA OIG employees in the Office of Investigations, of which 58 are federal law enforcement officers who serve as special agents. Like their audit counterparts, our investigative staff is deployed throughout most of NASA's field centers.

As the Assistant Inspector General for Investigations, I am relatively new to the Inspector General community, having served in NASA OIG for 17 months. Before that, I served 30 years of uniformed service in the U.S. Marine Corps. Like Ms. Klemstine, I am now a civil servant.

Finally, we are responsible for our respective functions to NASA Inspector General, the Honorable Robert Cobb. As the Chairman mentioned, Mr. Cobb was nominated by the President as NASA's Inspector General, on February 26, 2002, and confirmed by the U.S. Senate on April 11, 2002.

We are here today at your invitation, and we look forward to your questions.

DISCUSSION

Chairman MILLER. Thank you, Mr. Winters. That was one of the better opening statements I have heard, certainly from a witness that we didn't ask to prepare an opening statement. If all witnesses that we didn't ask to prepare an opening statement gave one like that, we would not ask more often.

At this point, I will recognize myself for five minutes, and Mr. Sensenbrenner for five minutes. If any other Members attend, they will be entitled to five minutes of questioning as well. We will rotate back and forth until we have completed the questions that we have of you.

APRIL 10, 2007 MEETING

Mr. Winters and Ms. Klemstine, you did both hear of the all-hands meeting on April 10. How did that e-mail, how did you hear of that meeting?

Ms. KLEMSTINE. I received an e-mail from the Deputy Inspector General, stating that there would be a meeting on April 10 that was mandatory for all staff members.

Chairman MILLER. Okay. Mr. Winters.

Mr. WINTERS. The same thing, it was an e-mail on April 9, which I believe was a Monday, late in the day, I want to say about 5:00, from the Deputy.

Chairman MILLER. And the Deputy was Tom Howard.

Mr. WINTERS. It was Mr. Tom Howard.

Chairman MILLER. All right. Thank you.

If employees cannot attend all-hands meetings, meetings at which every member of the staff is expected to attend, has it been the practice to have a recording of that meeting for those employees, and is it reasonable to do so?

Ms. KLEMSTINE. Yes. Every all-hands meeting I have been to, as well as some ethics training, and other meetings where everybody is required to go to, have always been videotaped.

Mr. WINTERS. Yes. I think it is a reasonable idea that people can come back and look at a tape. In this case, I don't have a recollection that it was mandatory to go back and look at a tape, though.

Chairman MILLER. Okay. Mr. Winters, you told us, our staff, that Mr. Cobb, Mr. Howard, Ms. Klemstine, and you were in the meeting room when the Administrator, Mr. Griffin, came in, and Mr. Morrell and Mr. Wholley.

You said to our staff that was tension in the room. What was the nature of the tension? Could you describe the atmosphere in the room?

Mr. WINTERS. It was a room in the basement of the NASA Headquarters building, tiered seating. All the NASA OIG employees were present in the room, who worked in the Headquarters building, and to our front were the nine respective NASA field centers displayed up on the screen.

The purpose of the meeting was generally known, that the Administrator was going to discuss, more or less, his review and findings, or it was assumed that he was going to discuss his review and findings of the PCIE investigation. So, there was a natural, in my opinion, tension that the Administrator was going to discuss allegations of misconduct of our boss. So, it was quite reasonable to have a feeling of tension about that, with our boss present.

Chairman MILLER. Sure. Mr. Winters, you told our staff, our Subcommittee staff, that you knew instinctively that this meeting was a mistake, that it gave a perception of a lack of independence of the Inspector General. Is that your testimony today as well?

Mr. WINTERS. That might be a bit of an overstatement, but in my opinion, it was and is difficult to have that type of a discussion with your boss present.

Chairman MILLER. So, it was the appearance—well, you told the staff that there were visuals that raised questions by you and by other members of the staff. What did you mean by that?

Mr. WINTERS. The optics of the head of the NASA, the Administrator, reviewing a report of allegations in front of the Inspector General, and speaking to the staff about it. The optics of just those people in the same room together, talking about this particular subject.

Chairman MILLER. Okay. So, in Washington, we would say that there was a problem with the optics outside of the beltway, and the rest of America would say it looked bad?

Mr. WINTERS. I think that might be an overstatement, Mr. Chairman, but the optics did raise issues, obviously.

Chairman MILLER. Okay. Ms. Klemstine, do you think it was a bad idea? Did you think so at the time, and do you think so now, to have the meeting with Mr. Cobb present?

Ms. KLEMSTINE. I definitely felt that Mr. Cobb should not be there. I was surprised that he was at the meeting. I had not had that expectation.

However, what I was looking for at that meeting was basically, "a pep talk." I felt like our organization needed somebody to come in and tell us that we were valuable to the organization, that we provided some input, and that was what I was looking for.

So, I wasn't opposed to having the meeting, but I didn't agree with the content of the meeting.

Chairman MILLER. Okay. Ms. Klemstine, did your senior staff express any kind of concern to you about the meeting?

Ms. KLEMSTINE. Not prior to the meeting, but after the meeting.

Chairman MILLER. Okay. What was the nature of their concern?

Ms. KLEMSTINE. Some of the comments made by the Administrator as they related to the audit community.

Chairman MILLER. All right. I am going to go over my time just very briefly. I am going to refer to a memo dated April 23, 2007. That is Exhibit 1 in the book in front of you. Could you tell us what that document is?

Ms. KLEMSTINE. Yes. It is an e-mail that I prepared for the Deputy Inspector General. The day after the Administrator had spoken with us, Wednesday, we had our senior staff meeting, as we do every Wednesday, and at the senior staff meeting, I expressed at the meeting that my staff had concerns about some of the content of the ViTS. At that time, I was told to basically document those concerns, and this is the result of that documentation.

Chairman MILLER. Okay. And the concerns were that it was not appropriate for Mr. Cobb to be at the meeting?

Ms. KLEMSTINE. Yes.

Chairman MILLER. And certainly not if Mr. Griffin expected an open discussion of the staff. Is that——

Ms. KLEMSTINE. Yes, that is correct.

Chairman MILLER. And did Mr. Cobb ever address the appearance, the issue of the appearance of a lack of independence, and what would be done to correct that appearance?

Ms. KLEMSTINE. At the meeting itself?

Chairman MILLER. Did I say Mr. Cobb? I meant, Mr. Griffin is what I meant to say.

Ms. KLEMSTINE. Oh. Did he address—I am not quite sure I understand the question.

Chairman MILLER. I am sorry. It was one of the concerns that your staff expressed, was that Mr. Griffin never addressed the principal concern of the PCIE report, that Mr. Cobb failed to maintain the appearance of independence.

Ms. KLEMSTINE. Yes, that was one of their concerns.

Chairman MILLER. That Mr. Griffin never addressed that——

Ms. KLEMSTINE. Yes.

Chairman MILLER. That concern. Okay. And the—and did Administrator Griffin also express, describe the work of the OIG?

Ms. KLEMSTINE. He described the work in terms of what it was that he thought we ought to be concentrating on, or areas that he thought that we should do, such as fraud, waste, and abuse, and other areas where he didn't think that we added value to the community.

Chairman MILLER. All right. And did your staff express to you how they regarded Mr. Griffin's statement? Did they find them disheartening?

Ms. KLEMSTINE. Yes. Several people were quite upset about some of the comments.

Chairman MILLER. Okay.

Ms. KLEMSTINE. Especially my technical staff.

Chairman MILLER. Okay. And did Mr. Griffin make any, say anything about the technical expertise of the staff?

Ms. KLEMSTINE. Yeah, he basically said that the audit community didn't have the ability to make technical type, I don't want to say decisions, but recommendations, I guess would be the correct word. Those weren't his exact words, but in generality.

Chairman MILLER. So, okay, the staff lacked the technical competence to make them.

Ms. KLEMSTINE. Right, exactly, that you know, he had engineers and technical people on his staff that were more technically knowledgeable than those that would be on an audit staff, even though I do have engineers, as well as software engineers, as part of my staff.

Chairman MILLER. Okay. So, this is, expecting a pep talk, you got something very different.

Ms. KLEMSTINE. That was my expectation, yes. I was looking for, because I have been there for two and a half years, and we have been under this cloud, and I really wanted, not only for myself but for my staff, some feeling of adding value to the organization.

Chairman MILLER. Okay. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I would kind of like to go on the broader issues. Do you think the impression that was given by Administrator Griffin's talk to the IG staff was appropriate?

Ms. KLEMSTINE. No.

Mr. SENSENBRENNER. And why?

Ms. KLEMSTINE. Again, as I stated earlier, I really felt that he did owe us some type of pep thing, but I didn't think that he should go as far as making comments about the fact that, you know, if it wasn't a billion dollars worth of savings, it wasn't worth reviewing, that we didn't have the technical expertise to do certain types of jobs, and that our jobs should be basically focused on fraud, waste, and abuse.

Mr. SENSENBRENNER. You think that Administrator Griffin's comments undermined the independence of the IG staff? Either of you.

Ms. KLEMSTINE. I think that would be an individual to individual comment. Personally, it did not undermine my independence, because I have been in this community a long time, and I know that people make comments specifically on the audit side. But I do know that many of my staff members did feel undermined by his comments.

Mr. SENSENBRENNER. Now, did Administrator Griffin make these comments in response to a question, or was this just something that he said on his own, and not in response to any questions by the audience?

Ms. KLEMSTINE. It was in response to a question from the audience.

Mr. SENSENBRENNER. Okay. And what was—if you can recall, what was the nature of that question?

Ms. KLEMSTINE. The nature of the question, that was actually from, not somebody from the audit community, was specifically what type of audits do you think we should be doing?

Mr. SENSENBRENNER. And that question, which came from outside the audit community, and the answer of Administrator Griffin, in your opinion, did it undermine the independence of the audit community to be able to do its job?

Ms. KLEMSTINE. Again, I am not sure it undermines. It does leave an impression.

Mr. SENSENBRENNER. Okay.

Ms. KLEMSTINE. I mean, we are going to do what we need to do, but it does leave the, what is the value, if the Administrator is not interested in our work, then how are we contributing?

Mr. SENSENBRENNER. Well, he might not be interested, but we are.

Ms. KLEMSTINE. Right. And I—right, granted. And that is why it doesn't undermine, because obviously, you are preponderant customer, so you know, that is, it is just one part of the equation.

Mr. SENSENBRENNER. Not only the customer, but the sugar daddy that gives you money every year, too.

Ms. KLEMSTINE. Right.

Mr. WINTERS. Mr. Sensenbrenner, may I——

Mr. SENSENBRENNER. Yeah.

Mr. WINTERS.—put you back on that line of questioning?

Mr. SENSENBRENNER. Yeah.

Mr. WINTERS. The Administrator was very careful, in terms of his prepared remarks, and I think this committee has a copy of the prepared remarks. He actually worked from a list of talking points, in terms of what he wanted to communicate with our staff.

And the comments that Ms. Klemstine is referring to were in response, of course, to questions, and it was my impression, again, we are in the world of perceptions and how you view evidence and how you view statements, that the Administrator was very careful in qualifying his remarks, because he was being asked as to his opinions, as to what mattered to him, in terms of our work—as to the priority and to the type of work that we are doing.

And he went on at great length that he valued very much the fraud, waste, and abuse type investigations that we do. And then, he went into his opinions as to management-type recommendations, which he hears, apparently, you know, according to him, every day. In terms of winners and losers on decisions that are made, it was my impression that he was saying that management-type recommendations are not as helpful to him, in terms of the work the OIG does, as compared to the typical criminal fraud, waste, and abuse investigations.

Mr. SENSENBRENNER. When did you first learn that the meeting was recorded? Both of you.

Ms. KLEMSTINE. It was on the screen there. There were several signs in the room that said that this is being recorded.

Mr. WINTERS. That is true.

Mr. SENSENBRENNER. And when did you first learn that the meeting should not have been recorded?

Ms. KLEMSTINE. I never heard that the meeting should not have been recorded. What I did hear was the following morning, I received an e-mail from one of my staff members telling me that they were told to destroy the tapes, and that was my first knowledge that there was any type of concept of tape destruction.

Mr. WINTERS. I first learned on Monday. Monday, I think it is the 16th or 17th of April. I might have my dates wrong on that. It was after the weekend. The meeting occurred on April the 10th, which I believe was a Tuesday. I had some evidence that employees were asking for the tapes on that Friday, the following Friday.

Mr. SENSENBRENNER. Are these types of meetings usually recorded?

Mr. WINTERS. Yes.

Mr. SENSENBRENNER. Both of you say yes?

Ms. KLEMSTINE. Yes.

Mr. WINTERS. And they are fairly rare, Mr. Sensenbrenner, in terms of——

Mr. SENSENBRENNER. All right.

Mr. WINTERS.—all-hands meetings. This is the first all-hands meeting that we ever had with the Administrator since I have been there.

Mr. SENSENBRENNER. If I can run over my time a little bit, too. Have either of you ever requested that a meeting of this type be recorded?

Mr. WINTERS. No.

Ms. KLEMSTINE. No.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Chairman MILLER. Mr. Sensenbrenner, I ran over three minutes. You could have gone another couple minutes if you had wanted to.

To follow up on that last question, have either of you requested that a meeting not be recorded?

Mr. WINTERS. No.

Ms. KLEMSTINE. No.

Chairman MILLER. Okay.

Mr. Winters, you referred to Administrator Griffin's opening statement being in writing. We actually do not have a copy of that. It is hard to imagine our request would not have included, would

not have reached a copy of that prepared statement, but can we receive that from you?

Mr. WINTERS. Well, we certainly have access to all NASA documents, and we will make a request to get that.

Chairman MILLER. Okay. Right.

Mr. WINTERS. I am sorry—is that——

Chairman MILLER. You can answer this question quickly, excuse me.

Mr. WINTERS. We can request a document for you.

Chairman MILLER. Okay. I neglected to notice that Mr. Feeney was here, and he is entitled to five minutes of questioning as well. Mr. Feeney.

Mr. FEENEY. Well, thank you, Mr. Chairman. If now is the appropriate time, I probably won't have five minutes worth, but for both of the witnesses, my understanding is that your Office is to function totally independent of the Administrator's supervision or control. Is that right?

Mr. WINTERS. Under the IG Act, we are under what is called the general supervision of the head of the agency, which is a term that is often debated in the periodicals.

Yes, we are independent, in terms of——

Mr. FEENEY. Your mission is to be independent.

Mr. WINTERS.—what we decide to investigate or audit, and things like that.

Mr. FEENEY. And so, for example, if the Administrator told you not to investigate abuse, waste, or fraud, you would have been required to ignore those instructions?

Mr. WINTERS. Correct. We make our independent assessments as to what to do.

Mr. FEENEY. In his original letter calling the meeting, Mr. Griffin said that he had reviewed the ROI, and I have taken actions that I believe are necessary to address the ROI's findings. Did he express that in his statement that we don't have a copy of?

Mr. WINTERS. Yes, he did. I don't know what was on the statement. I presume—it was a written statement one page, and he had some talking points, which he appeared to have, he read from these talking points, in terms of why we are at the meeting that he has been, that he was requested to provide input to the Chair of the PCIE, and he went through the chronology as to how we got to this particular place that he reviewed the investigation, and that he is making the following recommendations.

Mr. FEENEY. Other than saying that with respect to the technical expertise in running the agency, he felt like he had people more suitable and qualified. Did he, in general, give support to your Office, in terms of your mission, and in general, express sympathy or empathy with the jobs that you had, and support for what you do?

Mr. WINTERS. Well, we represent two separate functions of the Office of Inspector General. From my functional area, the Office of Investigations, my staff was supportive of him, stating essentially "good for the Administrator" that he is all about finding out about fraud, waste, and abuse, and supports us.

Mr. FEENEY. And Ms. Klemstine.

Ms. KLEMSTINE. My staff's perspective, not as glowing. There were concerns about, especially since I do have two groups that

specifically lean towards a technical area, both my Science and Aeronautics Research Group, as well as my Space Operation and Exploration Group. And they do more technical type audits, as well as make technical recommendations.

So, there was some concern, specifically in those two areas.

Mr. FEENEY. And these concerns were expressed to you after the meeting?

Ms. KLEMSTINE. Yes.

Mr. FEENEY. Were they expressed during the meeting to the Administrator?

Ms. KLEMSTINE. No.

Mr. FEENEY. And was there a reason that they were not expressed during the meeting?

Ms. KLEMSTINE. No, I can't answer that question. I have not asked that question, nor do I know any reason why it was not expressed.

Mr. FEENEY. Did anybody express at the time that they felt it was inappropriate for Mr. Cobb to be in attendance at the meeting? During the meeting, did anybody tell the Administrator they would be more comfortable——

Ms. KLEMSTINE. No.

Mr. FEENEY. Okay. I have no further questions.

Chairman MILLER. Thank you.

DESTRUCTION OF DOCUMENTS

Ms. Klemstine, we spoke for a moment about how both you and Mr. Winters first heard that the tapes were being destroyed. And I think you said you had gotten e-mails, I think according to your interviews with our staff, Karen VanSant was involved in an e-mail exchange. Catherine——

Ms. KLEMSTINE. Actually, it was Susan Aggen, who mentioned Karen VanSant. She was the one who actually had sent the e-mail, that Karen had been told to.

Chairman MILLER. Okay. All right. And then, Catherine Schneiter——

Ms. KLEMSTINE. Schneiter, yes.

Chairman MILLER. Schneiter?

Ms. KLEMSTINE. Yes.

Chairman MILLER. Okay. And what did she tell you about the DVDs?

Ms. KLEMSTINE. Well, the first, and I believe that you have a copy of that, was an e-mail that she sent to me, saying that they had asked for the destruction of the tapes, and I wrote an e-mail back in response, saying why are we doing this? And then, I went actually down to physically talk to her, as to why was this occurring, because in my mind, it sent up a bunch of red flags, as to why would we destroy tapes.

Chairman MILLER. Okay. You mentioned e-mails. Exhibit 5, in the exhibit book before you, are those e-mails that you have referred to?

Ms. KLEMSTINE. No, this one comes from Dave Gandrud to Catherine. It was a different e-mail.

Chairman MILLER. I have got the wrong number. Exhibit 2.

Ms. KLEMSTINE. Yes.

Chairman MILLER. All right. Did you consider telling Ms. VanSant or Ms. Schneiter not to destroy——

Ms. KLEMSTINE. Yes.

Chairman MILLER.—the tapes?

Ms. KLEMSTINE. Very much so. I did.

Chairman MILLER. Okay. You considered it. Did you do it?

Ms. KLEMSTINE. No, I did not do it.

Chairman MILLER. Okay.

Ms. KLEMSTINE. And I did not do it because I was not the originator of the document.

Chairman MILLER. Okay. Do you feel any twinge of regret in——

Ms. KLEMSTINE. Yes.

Chairman MILLER.—that decision?

Ms. KLEMSTINE. Yes, I remember sitting at my desk when I got this e-mail, and I was, I remember thinking jeez, we should not be doing this. You know, the price to pay for destroying a document versus what was on the document to me wasn't worth the expenditure, and I did go and talk to Catherine about can't we try to keep it or whatever, and I did discuss it at my level, but I did not pursue it any higher than my level.

Chairman MILLER. Okay. Did you discuss this with Mr. Winters?

Ms. KLEMSTINE. No, he was not there at the time.

Chairman MILLER. Okay. Did you discuss him with it at any time?

Ms. KLEMSTINE. No.

Chairman MILLER. Okay. Did——

Ms. KLEMSTINE. You have to realize that the tapes were destroyed the following morning, like 8:00 or 9:00 in the morning. It was so quick, it was done within less than 24 hours.

Chairman MILLER. All right. Did you hear Mr. Winters, at any time, tell the staff of the OIG office that destroying something always raises red flags? You used the phrase raises red flags a moment ago.

Ms. KLEMSTINE. Did I hear Mr. Winters make that comment?

Chairman MILLER. Right.

Ms. KLEMSTINE. No, I did not. That was——

Chairman MILLER. Okay. Mr. Winters, what was your response when you heard of the order to destroy tapes, the DVDs?

Mr. WINTERS. The chronology of getting there was, might be helpful to the Chairman. The first time I heard that the tapes were destroyed was the following week, when I talked to the Chief of Staff of NASA.

Chairman MILLER. Okay. Did you tell your staff at any point that destroying something always raises red flags?

Mr. WINTERS. I might have.

Chairman MILLER. Well——

Mr. WINTERS. It is a reasonable statement to make, and one that I would hold today.

Chairman MILLER. Okay. Whether you said it or not, you thought it then, you think it now?

Mr. WINTERS. Correct.

Chairman MILLER. Okay. Mr. Winters, did you begin an investigation of any kind into the destruction of the——

Mr. WINTERS. Yes.

Chairman MILLER. Okay. When did you do that?

Mr. WINTERS. Well, upon learning that the tapes were destroyed, and I went back and talked to my leadership, as to next steps, in terms of what to do.

Chairman MILLER. Who were your leadership?

Mr. WINTERS. The Deputy Inspector General, Mr. Tom Howard.

Chairman MILLER. Mr. Winters, I know that you are a lawyer. Are you familiar with the evidentiary concept of spoilation, s-p-o-i-l-a-t-i-o-n.

Mr. WINTERS. Probably not as much as I should, but maybe the Chairman could share that with me.

Chairman MILLER. Well, let the word go forth that any lawyer who appears before this committee should be expected to be quizzed about the law. Is there any element of what you understand of spoliation to mean, that when a party, knowing that evidence will be of interest to another party, because of pending litigation or anticipated litigation, or the interest of an oversight committee, destroys a document that would be of interest, that the inference about what was in the document is damning to the person who destroyed it? Is that your understanding of——

Mr. WINTERS. I agree with that.

Chairman MILLER. Okay. Is there any element of spoliation that does not fit these circumstances?

Mr. WINTERS. There is not.

Chairman MILLER. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you. For either of you, were OIG employees looking for copies of the destroyed tapes?

Mr. WINTERS. It is my understanding there were some employees that missed the meeting, and were looking for the tapes, so they could view the meeting themselves.

Ms. KLEMSTINE. Yes.

Mr. SENSENBRENNER. What was your reaction, when you received the e-mail asking that copies of the tape be destroyed?

Ms. KLEMSTINE. I think that question applies to me. I, as I stated earlier, when I was sitting at my desk reading that e-mail, my thought was why are we doing this? This is not the right thing to do. So, as I said, red flags went up in my head.

Mr. SENSENBRENNER. When the red flags went up, did you do anything in response to those flags?

Ms. KLEMSTINE. I went back to the originator of the e-mail, Ms. Schneider, and asked her specifically what is the story here? Why are we doing this? Again, the e-mail actually came out of Marshall, which is one of our field centers, where I first obtained the knowledge that this was going on. I was not familiar with the headquarters situation at all, and I was basically told that there was somebody standing there waiting to take the tape from the ViTS office, and that basically, they had already given the individual the ViTS tape.

Mr. SENSENBRENNER. Ms. Klemstine, you have been in the IG's office for a long time. Have you ever received a request like this?

Ms. KLEMSTINE. No.

Mr. SENSENBRENNER. And why do you think the NASA headquarters wanted those tapes destroyed?

Ms. KLEMSTINE. I truly do not know why. Again, the price of destroying those tapes was not worth, in my mind, what was on those tapes. And so, I cannot think why we would do that.

Mr. SENSENBRENNER. Mr. Winters.

Mr. WINTERS. I can only speculate.

Mr. SENSENBRENNER. And who do you think was behind the decision?

Mr. WINTERS. To destroy it?

Mr. SENSENBRENNER. Yes.

Mr. WINTERS. The combination of either the Chief of Staff and the General Counsel.

Mr. SENSENBRENNER. Ms. Klemstine.

Ms. KLEMSTINE. I would say the same. I have no knowledge.

Mr. SENSENBRENNER. I have no further questions. We will be hearing from them in a few minutes.

Chairman MILLER. Mr. Feeney.

Mr. FEENEY. I have no further questions. Thanks.

Chairman MILLER. I am sure that you will be disappointed that that is the end of our questions for you. And if we could take a recess of just a couple of minutes, we will have our next panel.

Thank you.

[Recess.]

Chairman MILLER. The Subcommittee will return to order.

And we now welcome our second panel, Michael Wholley, the General Counsel of NASA, and Paul Morrell, the Chief of Staff for NASA Administrator Michael Griffin.

It is, as you know, the practice of the Subcommittee to take testimony under oath. Do any, do either of you have any objection to being sworn in?

Mr. WHOLLEY. No, sir.

Chairman MILLER. Okay. You also have a right to be represented by Counsel. Are you represented by Counsel today?

Mr. WHOLLEY. No, sir.

Chairman MILLER. If you would now please stand and raise your right hand.

[Witnesses sworn]

Chairman MILLER. Thank you.

Both of you have provided written testimony, and I believe, I assume that your oral testimony will be very similar to that, probably simply reading that.

If you could begin with limiting that testimony to five minutes, all of your written testimony will be placed in the record, and after that, we will ask questions in turn, as we did before.

We will begin with Mr. Wholley. Mr. Wholley.

Panel 2:

STATEMENT OF MR. MICHAEL C. WHOLLEY, GENERAL COUNSEL, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (NASA)

Mr. WHOLLEY. Thank you, Mr. Chairman, Mr. Sensenbrenner, Mr. Feeney.

I have been asked to address five issues in my testimony today before the Subcommittee. As you may be aware, I met with the

staff of the Subcommittee, as well as with the staff of other committees on April 27, for approximately three hours, and addressed these five issues, as well as others, and answered to the best of my recollection and belief all of the questions posed to me.

You have asked me to address the April 10 meeting held by Dr. Griffin. Dr. Griffin set out as his purpose for that meeting what he put in his March 14 letter: "I will schedule a meeting," quoting Dr. Griffin, "with the employees of the NASA Office of Inspector General, to inform them that I have reviewed the Record of Investigation (ROI), and I have taken the actions that I believe are necessary to address the ROI's findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff, and to express my support," that would be Dr. Griffin, "for a strong and effective Office of Inspector General."

I was in attendance at the meeting, arriving with Dr. Griffin and Mr. Morrell, the Chief of Staff. The meeting was held in the videoconference room on the lower level at NASA, and Dr. Griffin spoke initially for approximately ten minutes. He stated, as best I recall, something similar to what he had set forth in his letter to Mr. Johnson, with respect to the ROI, having revealed no evidence of a lack of integrity on the part of Mr. Cobb, nor did the ROI indicate any actual conflict of interest, or actual lack of independence on his part.

I had watched Dr. Griffin's interview on the C–SPAN program *Newsmakers* on Sunday, April 8, which is still online, and his remarks at this meeting were similar to those he articulated on that program. Dr. Griffin then opened up the floor for questions, and several questions were asked and answered. I believe that the meeting lasted a total of approximately 30 minutes.

With respect to the subsequent collection and destruction of all video records of Administrator Griffin's meeting with the OIG staff, my involvement is as follows. At some point on the morning after the meeting, Paul Morrell came into my office. This was not an unusual occurrence. He had what turned out to be several DVDs, and he sat at a table across from my desk.

He appeared upset that in spite of his direction to the contrary that this closed meeting was not to be recorded, the meeting had been recorded. As best I recall, he stated that someone in Public Affairs had asked that the meeting be recorded, and had then asked that a number of copies me made.

Mr. Morrell indicated that he had recovered the copies from Public Affairs, and that this meeting was not a Public Affairs event, but rather, a closed meeting called by the Administrator, for the purpose that the Administrator set forth in his letter.

I believe I told him I clearly understood his pique that his direction had been overridden, and that this closed meeting had been recorded, and that copies had been made. I believe that at the conclusion of our discussion, I asked him to leave the recordings with me, and I put them on my desk.

I want to categorically state at no time and in no way did Mr. Morrell indicate to me that I should destroy these recordings. That did not happen. Sometime either later that day, or early the next day, I honestly can't recall when, I reviewed relevant portions of

the *Federal Records Act* (FRA), and in particular, the definition of what constituted a record.

I also briefly reviewed the *Freedom of Information Act.* I concluded that these copies made by Public Affairs were not records for purposes of the FRA, but also concluded that if they were retained and filed, they could become records by virtue of that retention. From my perspective, and I stated it to the Subcommittee staff, I did not believe it wise to have these in any way become records, subject to release under FOIA. This was a closed meeting, specifically directed to not be recorded, and these DVDs were not agency records at that time, in my opinion.

I personally made the decision to destroy them, and I did so by breaking them into pieces and throwing them in the trash. The next time I heard anything about these recordings was while I was on vacation in Florida the week of April 15 at a family reunion. In looking at my e-mails, I believe I first learned of the request to provide a copy of the recording to this subcommittee some time in the late afternoon or the early evening of April 18, when I learned of the Subcommittee's letter of the same date. I informed my staff I didn't have any copies of the recording, and that I had previously destroyed them. At some later time, I learned that there had been other recordings made at other ViTS locations.

Regarding my role in the response by Dr. Griffin to the report of the Integrity Committee, I became aware that something had been sent to Dr. Griffin from Mr. Johnson in his role as Chairman of the PCIE. I will try and skip forward to stay within my five minutes, sir. I think I received this from Mr. Morrell on Monday the 26th. He gave me what had been delivered to Dr. Griffin. I asked my executive assistant to print all the documents out from the CD that was provided, and I made arrangements to meet with Dr. Griffin and discuss how he wanted this handled.

He indicated that he wanted the matter reviewed, and that he wanted to know the full range of options open to him. Specifically, I might add, he said I do not want a recommendation. I want to know what my options are.

At some point, either the 27th or 28th, I discussed it with my Deputy. I discussed the possibility of having a newly hired individual, an experienced attorney who was due to begin working in my office the following Monday, look over the report and provide me her unvarnished opinion. I believed this was a good option, in light of her extensive experience, and the fact that so far as I was aware, she knew nothing about any of the matters or the parties involved.

I asked Mr. Sefton to call her, and confirm that she knew nothing about the case, and asked her if she could begin working on it at the earliest opportunity, in light of the tight deadline that we were facing. I concurrently reviewed the materials. At the conclusion of her review, she provided me her opinion.

I arranged for a meeting to brief Dr. Griffin, and had her, the newly hired attorney, brief him on her review. At the conclusion of that review, I indicated my full concurrence with her analysis. I then left all the materials with Dr. Griffin, informed him that under the terms of the executive order, he was required to certify that he had reviewed the investigation, and that once he had ar-

rived at his course of action, we would prepare the transmittal letter back to Dr. Johnson. The rest of that paragraph deals with how that letter was sent back.

I have been asked to address concerns about the monitoring of Mr. Cobb's actions under the corrective action plan proposed by Administrator Griffin. Administrator Griffin set forth his recommendation in his March 14 letter, and that is available to you, and I am sure you have it.

I have no role in that monitoring process. The IG Act specifically authorizes that general supervision can be by the principal deputy, but cannot be delegated any further. Of course, there still exist all of the options available to any individual who wishes to file a complaint against the Inspector General, including the Integrity Committee, the EO process, the Office of Special Counsel, and others.

Dr. Griffin has publicly and privately stated that he wants an independent Office of Inspector General, committed to its statutory charter. I have been the General Counsel at NASA since July 6, 2004. This is in reference to my personal relationship, allegedly, with Mr. Cobb. My relationship with Mr. Cobb is professional and amicable. Do we socialize together? No. I have never been to his home, nor he to mine. We are professional colleagues. As I stated to the staff during our three hour meeting, I find him to be a man of integrity. From my perspective, he understands his role as Inspector General, and carries it out with conviction and force, and we understand our boundaries well.

I was asked how often I talked with him. The answer is simple. Every time I see him. We have worked together to establish an acquisition integrity program, for example, and both of us and our respective staffs firmly believe that it will pay great dividends to the agency and to the government.

We also have disagreed on numerous occasions on the law, and he has the impediment of being as stubborn and oftentimes as argumentative as I am when we believe we are correct. We have, on a number of issues, agreed to disagree. I am not sure how much more of my five minutes are here, sir, but——

As I stated to the staff with whom I met on April 27, I do not think that anybody, and I said this to the staff, I do not think that anybody wishes more than I do that a recording of that meeting could be provided to this body. There were somewhere between 120 and 200 people, I believe, at that meeting. The vast majority, in fact almost exclusively, OIG people. I believe the only two non-OIG were probably Mr. Morrell and I, and then, of course, the Administrator.

To in any way imply I destroyed copies of the recordings in an attempt to destroy evidence of the substantive content of that meeting is just not true, sir. Not my intent. I recognize that memories and perceptions about what occurred there differ.

The rest, sir, you have commented on. I am not in high dudgeon or in a fit of pique. I am just skeptical about anything that comes in front of me. You have every right to be skeptical as well.

Finally, I want to publicly apologize to everyone at NASA and this committee who has had to expend time and effort trying to find out whether a copy of this record still exists. I want to particularly apologize to Dr. Griffin and the leadership at NASA. The

agency has important work to do, of this Nation and its people, work that is critical to our national security, our economic future. Misdirections like this are not helpful, and I deeply regret that I have made this a distraction.

I spent my professional life trying to resolve problems, and trying to make things better. Despite my honest and considered efforts in the matter of the destruction of the DVDs, I regret I failed to do so in this regard and necessitated this hearing.

Thank you, sir.

[The prepared statement of Mr. Wholley follows:]

PREPARED STATEMENT OF MICHAEL C. WHOLLEY

I have been asked to address five issues in my testimony today before the Subcommittee. As you may be aware, I met with the staff of the Subcommittee, as well as with staff of other committees, on April 27, 2007 for approximately three hours and addressed these five issues, as well as others, and answered to the best of my recollection and belief all of the questions posed to me.

1. You have asked me to address the April 10, 2007 meeting held by Dr. Griffin with the staff of the NASA OIG. Dr. Griffin had set out his purpose in holding such a meeting in his March 14, 2007 letter to Mr. Clay Johnson detailing the actions he intended to take after reviewing the HUD OIG Report of Investigation (ROI) on Mr. Robert Cobb, the NASA Inspector General. In his letter Dr. Griffin stated that:

> ". . .I will schedule a meeting with the employees of the NASA Office of Inspector General to inform them that I have reviewed the ROI and I have taken the actions that I believe are necessary to address the ROI's findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff and to express my support for a strong and effective Office of Inspector General."

I was in attendance at the meeting, arriving with Dr. Griffin and Mr. Paul Morrell, the Chief of Staff. The meeting was held in the video teleconference (ViTS) room on the lower level at NASA and Dr. Griffin spoke initially for approximately ten minutes. He stated, as best I recall, something similar to what he had set forth in his letter to Mr. Johnson with respect to the ROI having revealed no evidence of a lack of integrity on the part of Mr. Cobb, nor did it indicate any actual conflict of interest or actual lack of independence on his part. I had watched Dr. Griffin's interview on the C–Span program "Newsmakers" on Sunday morning, April 8, and his remarks at this meeting were similar to those he had articulated on that program. Dr. Griffin then opened up the floor for questions, and several questions were asked of and answered by Dr. Griffin. I believe that the meeting lasted a total of less than thirty minutes.

2. With respect to "[T]he subsequent collection and destruction of all video records of Administrator Griffin's meeting with the OIG staff," my involvement was as follows. At some point the morning after the meeting, Paul Morrell came into my office. This was not an unusual occurrence. He had what turned out to be several CD cases in his hand and he sat at the table across from my desk. He appeared upset that, in spite of his direction to the contractor ViTS operator that this closed meeting was not to be recorded, the meeting had been recorded. As best I recall he stated that someone in Public Affairs had asked that the meeting be recorded and had then asked that a number of copies be made. Mr. Morrell indicated that he had recovered the copies and that this meeting was not a public affairs event but rather a closed meeting called by the Administrator. I believe I told him that I clearly understood his pique that his direction had been overridden, and that this closed meeting had been recorded and copied. I believe that at the conclusion of our discussion I asked him to leave the recordings with me, and I put them on my desk. I want to categorically state that at no time, and in no way, did Mr. Morrell indicate to me that I should destroy these recordings. That did not happen.

Sometime either later that day or early the next day, I honestly cannot recall which, I reviewed relevant portions of the *Federal Records Act* (FRA) and, in particular, the definition of what constituted a record. I also briefly reviewed the *Freedom of Information Act*. I concluded that these were not "records" for purposes of the FRA, but also concluded that if they were retained and filed they could become "records" by virtue of that retention. From my perspective, and as I stated to the Subcommittee staff, I did not believe it wise to have these in any way become

"records" subject to release under the *Freedom of Information Act.* This was a closed meeting, specifically directed to not be recorded, and these DVDs were not Agency records at that time. I personally made the decision to destroy them, and I did so by breaking them into pieces and throwing them in the trash.

The next time I heard anything about these recordings was while I was on vacation in Florida the week of April 15th. In looking at my e-mails, I believe that I first learned of the request to provide a copy of the recording to this subcommittee sometime in the late afternoon or early evening on April 18 when I learned of this subcommittee's letter of the same date. I informed my staff that I did not have any copies of the recording and that I had previously destroyed them. At some later time, I learned that there had been other recordings made at other ViTS locations.

3. Regarding my role in the response by Dr. Griffin to the report of the Integrity Committee, I became aware that "something" had been sent to Dr. Griffin from Mr. Johnson in his role as Chairman of the PCIE with regard to Report of Investigation of the Integrity Committee. To the best of my recollection, I became aware of this during a conversation with Mr. Morrell that occurred while we were at Ames Research Center in California at a Strategic Management Council meeting. This would have been either February 21st or 22nd. From reviewing my e-mails I have determined that on Monday, February 26th, Mr. Morrell gave me what had been delivered to Dr. Griffin. The "package" consisted of the January 22, 2007 letter from the Integrity Committee to Mr. Johnson; Mr. Johnson's transmittal letter to Dr. Griffin, a copy of the "Policy and Procedures" of the Integrity Committee, a copy of Executive Order 12993, a copy of a March 24, 1989 Memorandum Opinion from the Office of Legal Counsel to the Integrity Committee, and a CD marked "ROI IC 500, Vols. I–III, –FOUO–" I asked my Executive Assistant to print all of the documents on the CD and put them in three ring binders. I made arrangements to meet with Dr. Griffin and discuss how he wanted this handled. He indicated that he wanted the matter reviewed and that he wanted to know the full range of options open to him in light of the Report of Investigation. At some point, on either the 27th or 28th, I discussed with my Deputy, Keith Sefton, the possibility of having a newly-hired individual, an experienced attorney who was due to begin working in my office on March 5th, look over the report and provide me her unvarnished opinion. I believed that this was a good option in light of her extensive experience and the fact that, so far as I was aware, she knew nothing about any of the matters or the parties involved. I asked Mr. Sefton to call her, confirm that she knew nothing about the case, and ask her if she could begin working on it at the earliest opportunity in light of the tight deadline that we were facing. She agreed to do so, and Mr. Sefton arranged to deliver a copy of the materials to her. I concurrently reviewed the materials. At the conclusion of her review she provided me her opinion. I arranged a meeting to brief Dr. Griffin, and had her, the newly-hired attorney, brief him on her review. At the conclusion of her review, I indicated my full concurrence with her analysis. I then left all of the materials with Dr. Griffin, informed him that under the terms of Executive Order 12993 he was required to certify that he had reviewed the investigation, and that once he had arrived at his course of action we would prepare the transmittal letter back to Mr. Johnson. I believe that it was on Monday, March 12th, that I met with Dr. Griffin and received his direction on what actions he wished to take. We had previously discussed that his actions in his "general supervision" role over the IG were limited, and that several of the proffered options would in fact require the concurrence of the Chairman of the PCIE, Mr. Johnson. I prepared the draft response for Dr. Griffin's letter back to Mr. Johnson after the meeting, then had to go on travel for the remainder of the week. In my absence, the attorney who had reviewed the matter and who briefed Dr. Griffin worked with Mr. Morrell to finalize the March 14th letter transmitted back to Mr. Johnson.

4. Topic 4 that I have been asked to address concerns the "[M]onitoring of Mr. Cobb's actions under the corrective action plan proposed by Administrator Griffin." As indicated in the March 14, 2007 letter from Dr. Griffin, he has directed that Mr. Cobb ". . .meet with the Deputy Administrator on a bimonthly basis to discuss his implementation of his individual leadership/management plan and his professional growth with the Executive Coach." I have no role in that monitoring process. The IG Act specifically authorizes that "general supervision" can be by the principal deputy, but cannot be "delegated" further. Of course, there still exist all of the options available to individuals who wish to file complaints against the Inspector General including the Integrity Committee, the EEO process, the Office of Special Counsel, and others. Dr. Griffin has publicly, and privately, stated that he wants an independent Office of Inspector General that is committed to its statutory charter.

5. I have been the General Counsel at NASA since July 26, 2004. My relationship with Mr. Cobb is both professional and amicable. Do we socialize together: no. I have never been to his home, nor he to mine. We are professional colleagues. As I stated to the staff during our three-hour meeting, I find him to be a man of integrity, intelligent, focused on doing the best possible job he can, and very independent. And I like that in a person. From my perspective, he understands his role as an Inspector General, carries it out with conviction and force, and we understand our boundaries very well. I was asked how often I talked with him and the answer is quite simple: every time I see him. We have worked together to establish an Acquisition Integrity Program, and both of us, and our respective staffs, firmly believe that it will pay great dividends to the Agency and to the government. We have also disagreed on the law on occasion, and he has the impediment of being as stubborn and argumentative as I am when we believe that we are correct. We have, on a number of issues, "agreed to disagree."

As I stated to the staff with whom I met on April 27th, I do not think that anybody wishes more than I do that a recording of that meeting could be provided to this body. Your staff has apparently received allegations of what was said and done at that meeting that range from the patently false to the ridiculous. If a video or audio recording of the event existed, it would clearly demonstrate what actually occurred and we would not, perhaps, be having this hearing. There were, I believe, somewhere between 120 and 200 people, mostly OIG staff members including investigators, who were present at this meeting. To in any way imply that I destroyed the copies of the recordings in an attempt to destroy evidence of the substantive content of the meeting beggars belief. I recognize that memories and perceptions differ. That said, some of the allegations contained in the April 25th letter, and which were related to me in my meeting with the staffers on April 27th, were so false as to clearly imply an intent to mislead on the part of those who provided them.

This latter point leads me to comment on a subject that is of significant and growing concern to me. I believe that "facts" matter, and that before any individual, organization or agency is pilloried, before anyone's reputation is destroyed publicly or privately, there is an ethical obligation to vigorously ascertain the truth, the factual underpinnings, of each and every allegation. I come here today with the firm conviction that such is the purpose of this hearing. My sense in this matter is that there has been, on the part of some of the people involved in this matter, a certain "sentence first, verdict later" mindset. My sense is that allegations have been slipped under the door or thrown over the transom, often anonymously or with the request of anonymity, and in all-too-many cases they are immediately given a mantle of "credibility" because they originate from someone "familiar with the issues" and therefore "must be true." In the best of all possible worlds some level of skepticism, some kernel of "doubt," some due diligence in ascertaining the facts must come into play. In the best of all possible worlds individuals making such allegations would be required to swear to the truth of what they are saying, and would be made aware of the consequences of any false statement. In the best of all possible worlds, judgment would be withheld, and inflammatory, inaccurate public releases and commentary would be curtailed until all allegations had undergone the scrutiny of rigorous analysis. While I recognize that such a "perfect world" may not be attainable, I nonetheless believe that each of us should do our part to come as close to it as possible.

Finally, I want to publicly apologize to everyone at NASA who has had to expend time and effort trying to find whether a copy of this recording still exists. I want to particularly apologize to Dr. Griffin and the leadership at NASA. This agency has important work to do for this nation and its people, work that is critical to our national security and our economic future, and distractions like this are not helpful. I have spent my professional life trying to resolve problems and trying to make things better. Despite my honest and considered efforts in the matter of the destruction of the DVDs, I regret that I have failed to do so in this regard.

Chairman MILLER. Mr. Morrell.

STATEMENT OF MR. PAUL MORRELL, CHIEF OF STAFF, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (NASA)

Mr. MORRELL. Thank you, Chairman Miller, Ranking Member Sensenbrenner, Mr. Feeney.

In his March 14, 2007 letter to Clay Johnson, Chairman of the President's Executive Council on Integrity and Efficiency, NASA Administrator Michael Griffin wrote: "I will schedule a meeting

with the employees of the NASA Office of Inspector General to inform them that I have reviewed the Report of Investigation regarding the allegations of misconduct on the part of NASA Inspector General Robert Cobb, and I have taken the actions that I believe are necessary to address the Report of Investigation's findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff, and to express my support for a strong and effective Office of Inspector General."

In his subsequent letter to Clay Johnson, dated March 29, 2007, Administrator Griffin wrote: "In my meeting with IG Cobb and the OIG staff, I will make clear that I expect and support a strong OIG, which continues to be dedicated to identifying fraud, waste, and abuse, and that I am committed to leading an agency where full and frank discussions are not just tolerated, but are expected, condoned, and encouraged, in a climate without fear of retribution, and one in which the full panoply of protections exist for whistleblowers."

The meeting between the Administrator and the Office of Inspector General staff took place on Tuesday, April 10. The previous day, on Monday, April 9, I contacted the Office of Public Affairs to inquire about using the NASA TV facilities available in the headquarters auditorium for the April 10 meeting, which included OIG staff at headquarters and the various NASA centers across the country. The meeting was on a sensitive subject, and I wanted the OIG staff to feel free to participate in a full and free dialogue. Therefore, I asked Public Affairs to determine if the equipment used in the auditorium could limit the broadcast of the meeting solely to meeting participants.

Later that day, I was informed that the auditorium equipment would not allow the meeting to be limited to participants, and it was recommended that the headquarters videoconferencing facility be used instead. Concerned that the size of the videoconference facility was not adequate to accommodate the number of OIG staff expected at the meeting, I went to the facility and spoke to its manager, Mr. Fred Berger.

During my conversation with Mr. Berger, we discussed whether the technology in the auditorium could be used, whether the technology available in the videoconference center could be used in the auditorium, and whether the video facility could accommodate the number of OIG staff expected to attend the meeting.

I also told Mr. Berger during our conversation that the meeting should not be recorded. My reason for doing so was my belief that recording the meeting might discourage questions and discussion of OIG staff concerns, which was inconsistent with what I believed was the Administrator's stated purpose for the meeting.

The next day, on April 10, shortly after I arrived at the meeting with the Administrator, I noticed a display on the video monitor at the front of the room that indicated the meeting was, contrary to my instructions, being recorded. Later that day, I placed a call to Mr. Berger to inquire why the meeting had been recorded. Mr. Berger was unavailable, and he returned my call the following morning, as I was driving to the office.

I asked Mr. Berger who recorded the meeting. He said he did. I asked him why he recorded it, contrary to my direction. Mr.

Berger said he forgot that I had asked him that it not be recorded, and that Mr. Fred Brown, from NASA TV, under the Office of Public Affairs, had requested that the meeting be recorded, and that Mr. Berger had provided Mr. Brown with a copy of the recording.

I told Mr. Berger that I thought it was highly inappropriate for someone in Public Affairs to request a recording of a meeting between the OIG staff and the Administrator, especially when I told him the previous day that it should not be recorded. I asked Mr. Berger to retrieve the recording from Public Affairs.

I next spoke by phone with my secretary, who informed me that Mr. Bob Jacobs of the Office of Public Affairs had delivered DVD copies of the meeting to my office. I was, needless to say, surprised to learn that not only had the meeting been recorded and provided to Public Affairs, but that Public Affairs was making copies.

When I arrived at the office, I went to see Mr. Jacobs. I asked Mr. Jacobs if he had requested that the meeting be recorded. He said that he had. I told Mr. Jacobs that I believed it was highly inappropriate for him to have requested a recording of a closed meeting between the Administrator and the OIG staff. I told him that he did not have the authority to request recordings of the Administrator's non-Public Affairs-related meetings. I requested that he provide me with any additional copies that he had in his possession, which he in turn did.

I then went to see Mr. Fred Berger at the conferencing facility. When I arrived at his office, he was there with Mr. Fred Brown from NASA TV. Mr. Berger gave me several more DVDs. I asked him if what I had in my possession represented all the copies. He said yes.

I took the DVDs to the NASA General Counsel. I explained to Mr. Mike Wholley, excuse me, what had happened, that a non-Public Affairs-related meeting had been recorded by Public Affairs without proper consent or authorization, despite the fact that I said it should not be recorded. I asked Mr. Wholley what I should do with the DVDs. He said I should leave them with him.

I left the General Counsel's office believing they were in the appropriate hands. I never directed that any DVD or recording be destroyed. It was my understanding that the original recording had been made at headquarters, and that all existing copies had been taken to the Office of the General Counsel.

To the best of my recollection and belief, I was unaware that copies of the meeting had been made and destroyed at NASA centers until some time after the April 10 meeting had occurred, and I believe, to the best of my knowledge, it was some time the following week.

It was and remains my strong belief that the Office of Public Affairs had no legitimate reason or authority to request, copy, or possess a recording of what was a non-Public Affairs-related meeting between the Administrator and the OIG staff. Furthermore, it was and remains my very strong belief that participants in a closed meeting have the right to expect that the contents of the meeting will remain secure and private, even when they know the meeting is being recorded. It was my very strong concern that the possession of the recording by Public Affairs compromised the foregoing.

The Subcommittee asked me to address my role in the Administrator's response to the report of the President's Council on Integrity and Efficiency. My role was as a facilitator: scheduling meetings, conveying information, and coordinating the preparation, editing, review, and approval of correspondence. I did not review the Report of Investigation, and I did not make recommendations to the Administrator regarding his response to the Report of Investigation.

As you know, the Administrator recommended several actions to the Chairman of the PCIE, and obtained his concurrence, consistent with the Inspector General Act. Those recommendations included IG Cobb's attendance at the Federal Executive Institute courses, and the assistance of an executive coach to help enhance IG Cobb's leadership and management skills. In addition, IG Cobb will meet with the Deputy Administrator on a bimonthly basis to discuss the implementation of his individual leadership and management plan, and his work with the executive coach. The Deputy Administrator's meetings with IG Cobb will be one way of monitoring his progress and his commitment to improving his management skills. In addition, there are a number of options available to OIG staff to report any future allegations of inappropriate actions.

[The prepared statement of Mr. Morrell follows:]

PREPARED STATEMENT OF PAUL MORRELL

Mr. Chairman, in his March 14, 2007 letter to Clay Johnson, Chairman of the President's Executive Councils on Integrity and Efficiency, NASA Administrator Michael Griffin wrote:

> I will schedule a meeting with the employees of the NASA Office of Inspector General to inform them that I have reviewed the [Report of Investigation regarding the allegations of misconduct on the part of NASA Inspector General Robert Cobb] and I have taken the actions that I believe are necessary to address the [Report of Investigation's] findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff and to express my support for a strong and effective Office of Inspector General.

In a subsequent letter to Clay Johnson dated March 29, 2007 Administrator Griffin wrote:

> In my meeting with IG Cobb and the OIG staff, I will make clear that I expect and support a strong OIG which continues to be dedicated to identifying fraud, waste, and abuse, and that I am committed to leading an Agency where full and frank discussions are not just tolerated but are expected, condoned, and encouraged in a climate without fear of retribution, and one in which the full panoply of protections exists for "whistleblowers."

The meeting between the Administrator and the Office of Inspector General (OIG) staff took place on Tuesday, April 10.

On Monday, April 9, I contacted the Office of Public Affairs to inquire about using the NASA TV facilities available in the headquarters auditorium for the April 10 meeting, which included OIG staff at headquarters and the various NASA centers across the country. The meeting was on a sensitive subject and I wanted the OIG staff to feel free to participate in a full and open dialogue. Therefore, I asked Public Affairs to determine if the equipment used in the auditorium could limit the broadcast of the meeting solely to meeting participants.

Later that day I was informed that the auditorium equipment would not allow the meeting to be limited to participants and it was recommended that the Headquarters video conferencing facility be used instead. Concerned that the size of the video conference facility was not adequate to accommodate the number of OIG staff expected at the meeting, I went to the facility and spoke to its manager, Mr. Fred Berger. During my conversation with Mr. Berger, we discussed whether the technology in the auditorium could be used, whether the technology available in the video conference center could be used in the auditorium, and whether the video facility could accommodate the number of OIG staff expected to attend the meeting.

I also told Mr. Berger during our conversation that the meeting should not be recorded. My reason for doing so was my belief that recording the meeting might discourage questions and discussion of OIG staff concerns, which was inconsistent with what I believed was the Administrator's stated purpose for the meeting.

The next day, on April 10, shortly after I arrived at the meeting with the Administrator, I noticed a display on a video monitor at the front of the room that indicated the meeting was, contrary to my instructions, being recorded. Later that day, I placed a call to Mr. Berger to inquire why the meeting had been recorded. Mr. Berger was unavailable and he returned my call the following morning as I was driving to the office. I asked Mr. Berger who recorded the meeting. He said he did. I asked him why he recorded it contrary to my direction. Mr. Berger said he forgot that I had asked that it not be recorded and that Mr. Fred Brown, from NASA TV under the Office of Public Affairs, had requested that the meeting be recorded, and that Mr. Berger had provided Mr. Brown with a copy of the recording. I told Mr. Berger that I thought it was highly inappropriate for someone in Public Affairs to request a recording of a meeting between the OIG staff and the Administrator, especially when I told him the previous day that it should not be recorded. I asked Mr. Berger to retrieve the recording from Public Affairs.

I next spoke by phone with my secretary who informed me that Mr. Bob Jacobs, from the Office of Public Affairs, had delivered DVD copies of the meeting to my office. I was, needless to say, surprised to learn that not only had the meeting been recorded and provided to Public Affairs, but copies were being made.

When I arrived at the office, I immediately went to see Mr. Jacobs. I asked Mr. Jacobs if he had requested that the meeting be recorded. He said that he had. I told Mr. Jacobs that I believed it was highly inappropriate for him to have requested a recording of a closed meeting between the Administrator and the OIG staff. I told Mr. Jacobs that he did not have the authority to request recordings of the Administrator's non-public affairs related meetings. I requested that he provide me with any additional copies that he had in his possession, which he in turn did.

I then went to see Mr. Fred Berger, the manager of the video conferencing facility. When I arrived at Mr. Berger's office he was there with Mr. Fred Brown, of NASA TV. Mr. Berger gave me several more DVDs. I asked him if what I had in my possession represented all of the copies. He said yes.

I took the DVDs to the NASA General Counsel. I explained to Mr. Mike Wholley what had happened—that a non-public affairs related meeting had been recorded by Public Affairs without proper consent or authorization, despite the fact that I said it should not be recorded. I asked Mr. Wholley what I should do with the DVDs. He said I should leave them with him. I left the General Counsel's Office believing they were in the appropriate hands.

I never directed that any DVD or recording be destroyed. It was my understanding that the original recording had been made at headquarters, and that all existing copies had been taken to the Office of the General Counsel. To the best of my recollection and belief, I was unaware that copies of the meeting had been made and destroyed at NASA centers until some time after the April 10 meeting had occurred.

It was and remains my strong belief that the Office of Public Affairs had no legitimate reason or authority to request, copy, or possess a recording of what was a non-public affairs related meeting between the Administrator and the OIG staff. Furthermore, it was and remains my very strong belief that participants in a closed meeting have the right to expect that the contents of that meeting will remain secure and private even when they know the meeting is being recorded internally. It was my very strong concern that possession of this recording by Public Affairs compromised the foregoing.

The Subcommittee asked me to address my role in the Administrator's response to the report of the President's Council on Integrity and Efficiency (PCIE). My role was as a facilitator—scheduling meetings, conveying information, and coordinating the preparation, editing, review, and approval of correspondence. I did not review the Report of Investigation and I did not make any recommendations to the Administrator regarding his response to the Report of Investigation.

As you know, the Administrator recommended several actions to the Chairman of the PCIE and obtained his concurrence consistent with the *Inspector General Act*. Those recommendations included IG Cobb's attendance at Federal Executive Institute courses and the assistance of an executive coach to help enhance the IG Cobb's leadership and management skills. In addition, IG Cobb will meet with the Deputy Administrator on a bimonthly basis to discuss the implementation of his individual leadership and management plan, and his work with the executive coach.

The Deputy Administrator's meetings with IG Cobb will be one way of monitoring his progress and his commitment to improving his management skills. In addition,

there are a number of options available to the OIG staff to report any future allegations of inappropriate actions.

Thank you.

DISCUSSION

Chairman MILLER. Thank you, Mr. Morrell.

On the documents, or most of the documents that NASA has provided in response to this committee's request, there is, stamped in large type across the face of the document, in a way that almost obscures the contents of the documents, makes them very hard to read, and in the original, I understand that it is in red ink: "This document is provided by NASA solely for Congressional use and not for further release. No waiver of FOIA exemption or internal agency working document/predecisional/attorney-client privileges are waived in this provision for Congressional use beyond the purposes of the committees making the request." To whom is that warning intended?

Mr. WHOLLEY. Sir, I don't believe it is a warning. I believe it is the recognition that these are, in many cases, predecisional documents that would not be releasable under FOIA, and it was not intended, certainly, as a warning to this committee.

Chairman MILLER. All right. Do you contend that this committee cannot release the documents that you have provided us, under our oversight authority, to the public?

Mr. WHOLLEY. Sir, if we were requested for them, we would deny them under FOIA.

Chairman MILLER. But you don't claim that this committee cannot——

Mr. WHOLLEY. I make no such claim.

Chairman MILLER. Okay. I am struck by two provisions of passages in Mr. Morrell's testimony and Mr. Wholley's testimony. Mr. Morrell, you quoted the letter from Administrator Griffin on the first page of your testimony: "I am committed to leading an agency where full and frank discussions are not just tolerated, but are expected, condoned, and encouraged, in a climate without fear of retribution, and one in which the full panoply of protections exist for whistleblowers."

Mr. Morrell, do you think that is the climate in which NASA and every agency should conduct their business? And Mr. Wholley, do you agree with that?

Mr. MORRELL. Yes, sir.

Chairman MILLER. Okay. Mr. Wholley, in your testimony, you said: "My sense is that the allegations have been slipped under the door or thrown over the transom, often anonymously or with the request of anonymity, and in all too many cases, they are immediately given a mantle of credibility, because they originate from someone "familiar with the issues," and therefore "must be true." In the best of all possible worlds, individuals making such allegations would be required to swear to the truth of what they are saying, and would be made aware of the consequences of any false statement."

Mr. Wholley, aren't we talking about the same people? Aren't we talking about whistleblowers?

Mr. WHOLLEY. Sir, I——

Chairman MILLER. People who throw allegations over the transom to us?

Mr. WHOLLEY. Sir, this was not referring to things that have come before the Committee. It was referring to the number of allegations against Mr. Cobb in that Report of Investigation, many of which were unfounded, some of which were dismissed out of it.

Chairman MILLER. Those were from NASA employees that were whistleblowers, were they not?

Mr. WHOLLEY. I am not sure who they were, sir, and I am not sure how many of them would qualify as whistleblowers.

Chairman MILLER. Okay. Well, it seems like there is some category of a NASA employee that is a whistleblower, and that is a good thing. That is a wholesome thing. They are patriotic Americans. And then, there is some other category of NASA employees who throw things over the transom and request anonymity for it that is an unwholesome thing. Can you tell us how we are supposed to tell the difference?

Mr. WHOLLEY. Sir, I am not saying that one should try and distinguish the difference. What I said was when they come in that way, one needs to, as best as possible, try and find the factual underpinnings for whatever is being said, as opposed to taking it as gospel as it comes through.

Chairman MILLER. Okay. Mr. Morrell, you spoke approvingly, or quoted approvingly from Mr. Griffin's letter, how whistleblowers should be regarded and protected. Do you see anything in Mr. Wholley's testimony that is contrary to how you describe the way whistleblowers should be treated or regarded?

Mr. MORRELL. I don't want to speak for Mr. Wholley, but I do believe that whistleblowers should have all the protections afforded under law.

Chairman MILLER. Mr. Sensenbrenner. I will have time for additional questions.

MORE ON THE DESTRUCTION OF DOCUMENTS

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

I want to get to the tape of the meeting, and what happened to it, and I have 44 United States Code Section 3301, and I will quote it in total: " As used in this chapter, "records" includes all books, papers, 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 under federal law 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 data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included."

Now, from that, it appears that the tape was a public record, that was at least preserved for a brief period of time, or appropriate for preservation, because it did deal with the functions, policies, decisions, procedures, operations, or other activities of the gov-

ernment. So, I think it is very clear that the tape was a public record.

Now, it is also a crime to destroy public records. Mr. Wholley, with your legal analysis of having these records destroyed, were you familiar with the litigation relative to Henry Kissinger's notes while he was at the State Department?

Mr. WHOLLEY. No, sir. I can't, I cannot own up to some familiarity with it.

Mr. SENSENBRENNER. Okay. Well, let me tell you what they said. First of all, in Reporters Committee for Freedom of the Press v. Vance, which was decided by the U.S. District Court for the District of Columbia, the notes that were made of Kissinger's conversations while at the State Department were federal records under the FRA. Then, that case went up, and there was other litigation, and it said the determinant factor for creating a federal record is whether the record was made at government expense, that is, with government materials and on government time. I think very clearly this tape was made at government expense, with government materials, and on government time.

Have you ever been asked to give advice to anybody in NASA relative to what records can be destroyed, and if so, what was that?

Mr. WHOLLEY. No, sir. I can't say that I have been personally asked to give advice to anybody on that.

Mr. SENSENBRENNER. Well, isn't it your job, when an issue like this comes up, and you were personally involved in destroying at least the tapes that were in the NASA headquarters, that you should be concerned about what the law is on this subject?

Mr. WHOLLEY. Yes, sir.

Mr. SENSENBRENNER. Okay. Is it your belief that the tape, once it was made, was a government record?

Mr. WHOLLEY. No, sir.

Mr. SENSENBRENNER. Why not?

Mr. WHOLLEY. If—had it been—had that been my belief, sir, I would not have destroyed it.

Mr. SENSENBRENNER. Well, why not? I read the relevant portions of the law.

Mr. WHOLLEY. Yes, sir.

Mr. SENSENBRENNER. I read the determinant cases, when Mr. Kissinger claimed that his notes should be private, and not government record, you know, it isn't very hard to dig the cases out. Isn't that the job of a General Counsel to do that?

Mr. WHOLLEY. Yes, sir. It is.

Mr. SENSENBRENNER. Okay. Well, it wasn't done. Now, Mr. Morrell. You testified you didn't have anything to do with the destruction of the tapes, and did you speak to the technician, Mr. Berger, who made the tapes, after the teleconference?

Mr. MORRELL. The next morning, sir.

Mr. SENSENBRENNER. Okay. And after your conversation, did Mr. Berger erase his copy of the teleconference, and called NASA centers up, asking them to do the same?

Mr. MORRELL. I have heard that he had.

Mr. SENSENBRENNER. Okay. Did you ask him to do it?

Mr. MORRELL. I did not.

Mr. SENSENBRENNER. Okay.

Mr. MORRELL. It was my understanding that the recording had been made at headquarters.

Mr. SENSENBRENNER. Who is Keith Thomas Sefton?

Mr. MORRELL. He is Mr. Wholley's Deputy.

Mr. SENSENBRENNER. So, he is an attorney as well? Okay. Berger wrote, on an e-mail to Mr. Sefton, dated April 30, which was after the April 27 meeting: "At 10:15 a.m. on Wednesday, April 11, 2007, I received a call from Paul Morrell. During that phone conversation, Paul asked me to contact my counterparts at the centers to find out if those who recorded the meeting still have the recordings, or if they could retrieve them. Paul wanted me to ask them to erase videotapes or shred DVDs of their recordings." And this was an e-mail from Fred Berger to Keith Sefton.

Mr. Wholley, were you aware of that e-mail?

Mr. WHOLLEY. No, sir. Not at the time.

Mr. SENSENBRENNER. So, your deputy didn't tell you this?

Mr. WHOLLEY. Sir, to be honest with you, I was trying to stay away from—in fact, when—well, the answer is I can't remember when I learned of it, but you know——

Mr. SENSENBRENNER. What were you planning on staying away from?

Mr. WHOLLEY. I wanted to stay away from any involvement that, because I was involved in the destruction of tapes, I wanted to stay away from any involvement in talking to any of the witnesses. In fact, when the Committee asked for any e-mails, or any documents, I turned my computer over to another attorney in the office, and said this is everything I have, just take what you believe is responsive.

Mr. SENSENBRENNER. And what—which attorney was that?

Mr. WHOLLEY. That was Ms. Donovan.

Mr. SENSENBRENNER. Now——

Mr. WHOLLEY. I believe she worked with her supervisor, Mr. Falcon.

Mr. SENSENBRENNER. Okay. And Mr. Morrell, I have read you this e-mail from Fred Berger, who was the technician that did the recording, to Keith Thomas Sefton, who works in Mr. Wholley's office.

That is at variance with the testimony that you have given and the answer to my question. How can you explain that?

Mr. MORRELL. I can't explain it, sir. All I know is I asked where it was recorded. He said he recorded it at headquarters. He said that it had been given to Public Affairs, and I asked him to get it back. Never any——

Mr. SENSENBRENNER. I would repeat what is in the—part of the mail: "Paul wanted me to ask them to erase videotapes or shred DVDs of their recordings."

Mr. MORRELL. I did not do that. When I had all the copies that were at headquarters, Mr. Berger gave me the final copies, I asked him was this everything, and he said yes.

Mr. SENSENBRENNER. Okay.

Mr. MORRELL. And at that point, I knew I didn't know what needed to be done with them, so I took them to the General Counsel.

Mr. SENSENBRENNER. Okay. Thank you, Mr. Chairman. I have no further questions.

Chairman MILLER. Mr. Feeney.

MORE ON THE APRIL 10TH MEETING

Mr. FEENEY. Mr. Wholley, I think it was, at best, a foolish mistake to destroy the videotapes. I want to make that clear. But I also want to ask you some questions. Is it your understanding that as part of a decision-making process before a final conclusion or decision or report is issued, that notes and documents that are used, in terms of developing the final decision, are subject fully to the FRA?

Mr. WHOLLEY. I would have to look at that in context. I am not quite sure I have the entirety of your question. Predecisional stuff that——

Mr. FEENEY. Predecisional.

Mr. WHOLLEY. No.

Mr. FEENEY. And in the two letters that Mr. Griffin penned, the first letter, of March 14, he says that one of the purposes is to have an opportunity and "to listen to any concerns that may exist amongst the staff, and to express my support for a strong and effective Office of Inspector General." In his subsequent letter to Clay Johnson, on March 29, he says that he wants to make it clear that he is "committed to leading an agency where full and frank discussions are not just tolerated, but are expected, condoned, and encouraged."

And it seems to me, when I am trying to have that sort of conversation with my staff, that a video recording is the last thing I want to encourage those sorts of full and frank discussions. And so, do you share Mr. Morrell's opinion that this meeting should never have been taped in the first place, given the purposes that Mr. Griffin laid out in those two letters?

Mr. WHOLLEY. Yes, sir. I share that. As I recall, the conversation when he came in that morning, which was the morning of the 11th, with the copies that Public Affairs had made, as you could tell, his concern was that Public Affairs had no right to tape a meeting that was supposed to be a private, internal, closed meeting between the Administrator and the staff of the Inspector General. If I may, the first time I became aware, and this relates back to something Ms. Klemstine said, and the first time I became aware that there was an internal policy within the IG that their meetings are recorded, so other people can see them, was when I saw the IG's response back. I did not consider this an IG's meeting. It was an Administrator's meeting.

Mr. FEENEY. And you were in the meeting. Is——

Mr. WHOLLEY. Sir, I walked in with Mr. Morrell and Mr. Griffin, and Mr. Griffin walked immediately to the front of the room, faced the audience, and began talking.

Mr. FEENEY. Did you know that the meeting was being recorded at that point?

Mr. WHOLLEY. No, I did not. I know there were signs up. I was sitting, what would have been on the very far right of a semicircle, as Dr. Griffin looked, and Mr. Berger was in front of me. There may well have been signs. I was, I just did not see them.

Mr. FEENEY. Our last two witnesses, including Ms. Klemstine, said that it was clear to people that were viewing the monitor that the meeting was being recorded. That was my understanding of her testimony. Did you know that, Mr. Morrell?

Mr. MORRELL. Yes, there were signs.

Mr. FEENEY. There were signs, but Mr. Wholley, you didn't see the signs?

Mr. WHOLLEY. I didn't see them. I mean, frankly, I wasn't looking for them.

Mr. FEENEY. Well, one can only wonder, given the fact that there were concerns that Mr. Cobb was in the room, apparently. There were concerns about the tenor of Mr. Griffin's remarks. One can only—but nobody expressed them at that meeting. One can only wonder whether it was the video, as much as anything, that may have intimidated some of the people that had concerns that they expressed after the meeting, but not at the meeting.

And so, again, I want to say that at best, it was a foolish decision, in my view, in retrospect, to destroy the tapes that should have not been made in the first place, but it seems to me clear that if I were having a meeting like this with my staff, video cameras on all of us would be the last thing that I would want to encourage full and frank discussions and concerns.

And with that, I yield back the balance of my time.

Chairman MILLER. Thank you. Mr. Morrell, I also would like to encourage candor within your staff. You believe that it would inhibit, kill candid discussions within the staff to have it videotaped, but having a discussion of the findings of improprieties of the allegations of misconduct by the Inspector General Cobb, with their supervisor, Inspector Cobb, sitting right there, would not inhibit the discussion. That could be free, that could be open, that could be candid, with him sitting right there?

Mr. MORRELL. I didn't say that. I am sure that some people may have felt intimidated by having him there.

Chairman MILLER. All right. And do you think that inhibited conversation within that room?

Mr. MORRELL. Perhaps it did. It would be very possible, in fact.

Chairman MILLER. Very much sense that it would?

Mr. MORRELL. Perhaps some people would be inhibited to speak up. I think it—I mean, people did ask questions. I thought perhaps some people would have—there would have been more than what there was, but——

Chairman MILLER. Well, the Inspector, the guy they are talking about is sitting right there, beside Administrator Griffin. Is that right?

Mr. MORRELL. He was not beside the Administrator.

Chairman MILLER. He was in the room. Okay. And they were talking about him. And they were talking about allegations of misconduct by him.

Mr. MORRELL. Correct.

Chairman MILLER. And that, you thought, could be an uninhibited, free, candid discussion.

Mr. MORRELL. I didn't say—Mr. Chairman, I didn't say that. I can tell you that the Administrator felt that if he was going to be talking about the IG, the IG should be in the room.

Chairman MILLER. If you were concerned, Mr. Morrell, it strikes me if you were concerned about the candor in the room, and making people feel that they should have an uninhibited discussion, to say what was on their mind, that it was not the taping of it that inhibited that, it was having Mr. Cobb right there, and also, the tenor of what we understand Administrator Griffin said.

Now, we don't have the tape to see what he said. We have still not been provided the written statement that you said that he used, but——

Mr. MORRELL. On the written statement, it was prepared from some talking points that we had prepared, and——

Chairman MILLER. And can we get those?

Mr. MORRELL. You should have them already.

Chairman MILLER. We do not.

Mr. MORRELL. I can get them to you, but they were provided, I believe, in the first set of documents that you requested.

Chairman MILLER. All right.

Mr. MORRELL. It is not a complete document. It is a partial document, of what he used.

Chairman MILLER. All right. Mr. Morrell, Mr. Wholley wrote you an e-mail on March 14, which we have been provided, about this proposed meeting. The proposal in the letter to Clay Johnson that Mr. Griffin would address the Inspector General staff. It is before you, as Exhibit 10. Do you have it?

Mr. MORRELL. Yes, sir.

Chairman MILLER. All right. Do you recognize that e-mail?

Mr. MORRELL. I do.

Chairman MILLER. Okay. Can you read it through the warning that you not disclose it beyond the Congressional Committee?

Mr. MORRELL. I can probably get through it.

Chairman MILLER. Okay. I would like to read from it: "Paul, I wasn't very articulate in our discussion last night and I apologize. Truth is, I am very troubled by the proffered "addition" to the letter," "to call a "special meeting" of the IG staff and not be prepared to back Moose," that is the Inspector General Cobb, "in a strong way would undercut Moose, grant more credibility to the complaints, and the investigation than warranted, and be, I believe, counterproductive. On the other hand, to call a special meeting and praise Moose in front of the selected group," the IG staff, "will risk Mike becoming the center of the controversy," Mr. Griffin, Administrator Griffin. "As I said last night, I see no upside for Mike in the proposed course of action, and I do see a downside. I know that this is a not a legal matter, but I am concerned about how this will play out if the suggested course of action is adopted."

Do you remember getting that e-mail?

Mr. MORRELL. Yeah.

Chairman MILLER. Okay. Did I read that faithfully?

Mr. MORRELL. I believe so.

Chairman MILLER. All right. Do you recall the conversations that you had with Mr. Wholley?

Mr. MORRELL. Vaguely.

Chairman MILLER. Okay. Do you recall the e-mail?

Mr. MORRELL. Yes.

Chairman MILLER. Okay. Did you have the same concerns?

Mr. MORRELL. I raised this issue with the Administrator. He did not believe that he was going there to defend the IG or to criticize the IG, but to talk about facts, and it was something that he decided he wanted to do.

Chairman MILLER. Okay. Well, the concern, the reaction that the previous two witnesses, Mr. Winters and Ms. Klemstine, in particular, described, aren't those exactly the reactions that Mr. Wholley was concerned would result from such a meeting?

Mr. MORRELL. I believe so.

Chairman MILLER. All right. Did you share those concerns? Did you have the same concerns that Mr. Wholley had?

Mr. MORRELL. I don't believe at the time I did. I believed that the Administrator would go in, discuss facts——

Chairman MILLER. All right.

Mr. MORRELL.—what we was asked to do, what he decided to do, and what his expectations were for the Office, as he stated in his letter.

Chairman MILLER. All right. All the testimony today has been that there were signs everywhere. There were—let me not exaggerate. There were visible signs, readily visible signs, saying that the meeting was being taped. The two previous witnesses said that they noticed the signs. They assumed that they were being, the meeting was being taped. Did you notice those signs?

Mr. MORRELL. I did.

Chairman MILLER. All right. Why did you not say at the time to stop the taping of the meeting?

Mr. MORRELL. When I noticed that the Administrator was already speaking, Mr. Berger was at his console working, and I decided it wasn't appropriate to interrupt the meeting.

Chairman MILLER. I have abused my time again. Mr. Sensenbrenner.

Mr. SENSENBRENNER. I will yield the Chairman my time.

MORE ON THE DESTRUCTION OF DOCUMENTS

Chairman MILLER. All right. You had collected the DVDs. You took them to Mr. Wholley. Why did you take them to him? He said that you didn't specifically say destroy these. What did you say?

Mr. MORRELL. I believe what I told—I recapped what had happened, that I didn't ask—I asked that the meeting not be recorded, but Public Affairs had apparently put in a request. I thought it was inappropriate, didn't believe that Public Affairs had any authority or legitimate reason for doing so, that I collected them, take them from Public Affairs, and I had them, and I didn't know what to do with them.

Chairman MILLER. What did you expect Mr. Wholley would do with them?

Mr. MORRELL. Part of the reason I brought them to him was because they had maintained the records on the IG investigation, and I figured he would be, you know, he and his office would know what to do with them.

Chairman MILLER. Did you say that to Mr. Wholley, that because he was maintaining the other records pertaining to the——

Mr. MORRELL. No, what I asked him was what should I do with these?

Chairman MILLER. And he said leave them with me?

Mr. MORRELL. Yes.

Chairman MILLER. Did it not occur to you that he might infer from your conduct that you wanted them destroyed? I mean, it seems like you came powerfully close to saying, "Will no one rid me of these troublesome DVDs, these meddlesome DVDs?"

Mr. MORRELL. No, sir. That was not my intent. I was never, it was never my intent to destroy anything.

Chairman MILLER. Did you ask Mr. Wholley if you could throw the tapes away?

Mr. MORRELL. No.

Chairman MILLER. Did you ask him if the tapes could be destroyed?

Mr. MORRELL. No.

Chairman MILLER. Did you ask him to research the law on what needed to become of the tapes?

Mr. MORRELL. I believe as I was leaving, he said he was, something to the effect that he would look into it, or something to that effect.

Chairman MILLER. Mr. Wholley, how many lawyers reported to you at that time?

Mr. WHOLLEY. In the Office of General Counsel?

Chairman MILLER. Yes, sir.

Mr. WHOLLEY. At headquarters, in the neighborhood of 35.

Chairman MILLER. And were there others in other places within NASA?

Mr. WHOLLEY. Yes, there are attorneys at all ten centers.

Chairman MILLER. And how many attorneys in all are there?

Mr. WHOLLEY. Approximately 152 at this time.

Chairman MILLER. 152 lawyers, and 35 are right there at your elbow.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. Did you ask any of them to research the law on your behalf?

Mr. WHOLLEY. No, sir.

Chairman MILLER. You did not give the research assignment to any lawyer?

Mr. WHOLLEY. No, sir.

Chairman MILLER. You looked at the books yourself?

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Generally, I applaud that in lawyers. It doesn't happen often. Do you have a background in FOIA or records, or records law? You said earlier you are not familiar with the case law that Mr. Sensenbrenner referred to. Is that an area that has been an area of specialty for you, or concentration?

Mr. WHOLLEY. Certainly not a specialty, sir. In terms of my past time serving as the Staff Judge Advocate of various commands and serving at headquarters.

Chairman MILLER. Were there lawyers within the 160, however many who reported to you, who did have that as an area of their concentration?

Mr. WHOLLEY. Yes, sir. That would be the General Law Section.

Chairman MILLER. The General Law Section, but you did not inquire of anyone in the General Law Section?

Mr. WHOLLEY. I did not.

Chairman MILLER. Why did you not?

Mr. WHOLLEY. Well, I guess one reason, it was a very sensitive matter. As my attorneys will tell you, I do a lot of my own research. Even after they present a product, although it is not a question of not trusting them. I am, as you may have gotten from my statement, I am a show me the data, look at the law. I looked at exactly what Ranking Member Sensenbrenner said, '44 U.S.C. sec. 44.' I looked at the FOIA. And sir, as I mentioned in my written remarks, I didn't start on this right away. It was some time later that day. There were other things going on. It was some time later that day. From my perspective, these were recordings that were made by the Public Affairs Office, of a private, closed meeting of the Administrator. They should not have been made.

Chairman MILLER. All right. Mr. Wholley, Mr. Morrell discussed the e-mail that you sent him before the meeting, that I read aloud. Do you recall that e-mail? Do you recall your conversations about your concern about how it looked?

Mr. WHOLLEY. I don't recall the conversation from the night before. I do recall the e-mail.

Chairman MILLER. Okay. So you expressed a concern in the e-mail about how it would all look one way or the other.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. And so, you were present at the meeting, correct?

Mr. WHOLLEY. Yes, sir. I was.

Chairman MILLER. Okay. Were you aware then of the concerns that Ms. Klemstine expressed, and Mr. Winters expressed, that the staff members felt about what was said at the meeting?

Mr. WHOLLEY. No, I was not aware then, sir, and it is——

Chairman MILLER. Well, hearing what happened at the meeting, did you have any of those concerns yourself?

Mr. WHOLLEY. No.

Chairman MILLER. But you did know that there was a very strong potential problem one way or the other, of this meeting not looking good, of—either if Administrator Griffin said Moose Cobb is my boy, or if he criticized Moose Cobb to his own employees?

Mr. WHOLLEY. Yes, sir. I had concerns.

Chairman MILLER. Okay.

Mr. WHOLLEY. They were expressed in the e-mail.

Chairman MILLER. And you knew at the time that this was a subject, at that point, Senator Nelson, Chairman Bart Gordon, and I had all urged the President to fire Moose Cobb. You knew that, did you not?

Mr. WHOLLEY. I am trying to put, I believe your letter was, that particular letter was early April, April 3, perhaps.

Chairman MILLER. April 2.

Mr. WHOLLEY. Second.

Chairman MILLER. But that was before the meeting.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. It was before the tapes were destroyed.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. You knew that how this whole matter was being handled was something that the oversight committees of Congress were interested in, did you not?

Mr. WHOLLEY. I knew they were interested in the matter, yes, sir.

Chairman MILLER. Okay. And you knew, you said that you did not want this to subject to FOIA if you kept it. Isn't that right?

Mr. WHOLLEY. That is what I said, sir. If, but as I, that is only half of what I said. I said I did not believe they were agency records, but if we retained them, they would become agency records. From my perspective, we had five copies that Public Affairs had made of a closed meeting between the Administrator and the IG staff, that was not only not authorized, but was specifically said not to be recorded.

Mr. SENSENBRENNER. Will the Chairman yield?

Chairman MILLER. The Chairman happily yields.

Mr. SENSENBRENNER. In what part of the *Federal Records Act* is it intended to encourage agencies to destroy records promptly so that they won't become records? Is there any clause in that? I haven't been able to find it.

Mr. WHOLLEY. Sir, I have never looked for that clause, nor have I been able to find it.

Mr. SENSENBRENNER. Well, it isn't there. I yield back to the Chairman.

Chairman MILLER. Thank you, Mr. Sensenbrenner.

Mr. Wholley, you are also a lawyer, and the General Counsel of NASA. Are you familiar with the evidentiary concept of spoilation, s-p-o-i-l-a-t-i-o-n, spoilation?

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. And describe that concept for me.

Mr. WHOLLEY. Basically, inferences can be taken negative to the person who fails to provide certain evidence.

Chairman MILLER. And certainly, destroys it, knowing that that the documents are subject to, would be evidence in a pending litigation, or anticipated litigation, or an inquiry from Congress?

Mr. WHOLLEY. Yes, sir. May I continue?

Chairman MILLER. You may.

Mr. WHOLLEY. I don't know how to get that across any more clearly. At the time that I, having finished my research, which we now may say was not sufficient, at that time, I did not believe they were federal records. I did not believe Public Affairs should have copies. I did not believe there was any reason for these copies to exist and be filed, or they could become federal records, and possibly FOIA-able, and as perhaps impossible as this may seem, I did not consider, truly, I did not consider the political aspects of this.

As I have said, nobody regrets more that I can't produce that particular DVD.

Chairman MILLER. And you are aware that now, there are employees of, you spoke of it, or you wrote of it in your written testimony, you did not get to it in your oral testimony, that there are employees of NASA who attended that meeting, who are now providing us with accounts of the meeting that you described as patently ridiculous, outrageous——

Mr. WHOLLEY. Sir, your staff informed me of several allegations that were patently ridiculous and outrageous.

Chairman MILLER. Knowing everything that you knew then, knowing that this meeting was in its very conception a problem, knowing that we were interested, Congress was interested, the oversight committees were interested in how NASA dealt with the PCIE recommendations, knowing that we would likely eventually ask for that DVD, if it still existed, why is there not every element of spoliation present, so we should assume the worst?

Mr. WHOLLEY. Sir——

Chairman MILLER. Under ordinary rules of evidence.

Mr. WHOLLEY. I cannot stop you from assuming the worst, other than to say, sir, that there were 120 to 180 people in there, many of whom were NASA IG investigators. There was certainly no intent on my part to destroy evidence. Frankly, that just was not my intent. As I have stated to your staff, and as I will state here, what I did, I did in good faith. If it was a mistake that I made on the law, it is probably not the first one I have ever made, nor will it, unfortunately, be the last. But it was an honest mistake, and I deeply regret that I destroyed them, for the reason that we are now here debating this.

Chairman MILLER. Okay. Is it your practice to destroy other federal property?

Mr. WHOLLEY. No, sir.

Chairman MILLER. Have you done it on any other occasion?

Mr. WHOLLEY. Not that I can consciously recall, sir.

Chairman MILLER. All right. And how did you do it in this case? Exactly how did you destroy those DVDs?

Mr. WHOLLEY. Broke them in half, threw them in the trash.

Chairman MILLER. Mr. Sensenbrenner.

Mr. SENSENBRENNER. I have no further questions.

Chairman MILLER. Mr. Wholley, in addition to your e-mail to Mr. Morrell, you sent an e-mail to Jeff Rosen, the counsel at OMB for Clay Johnson.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Dated April 4, 2007.

Mr. WHOLLEY. I do not recall that particular e-mail, sir.

Chairman MILLER. Okay. It is in the evidence book as Exhibit 18–B, the exhibit book.

Mr. WHOLLEY. Sir, my #18 is——

Chairman MILLER. 18–B.

Mr. WHOLLEY.—the bullet points from——

Chairman MILLER. 18–B. 18–B.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. All right. The subject line is Hearings with two question marks.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. Now, that was two days after Senator Nelson, Chairman Gordon, and I called on Mr. Cobb, called on President Bush to fire Mr. Cobb.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. And in the e-mail, you, of course, point out the subject of the Cobb case, and you wrote that the Cobb case "continues to spin up to "escape velocity,"" and "the reason for this

e-mail is to arrange a meeting between the two us, and anyone else you care to bring from your staff who has been involved in vetting this investigation, before there is any hearing, so that we can soberly consider the approach to be taken." "I am sure that you can appreciate that I am not particularly keen on seeing two entities of the Executive Branch at odds in a hearing before the Legislative Branch."

So, you were aware that this would likely be the subject of Congressional hearings.

Mr. WHOLLEY. No, sir. I cannot say I was aware that it was likely.

Chairman MILLER. It was possible.

Mr. WHOLLEY. Possible, yes, sir.

Chairman MILLER. All right. If it was likely, there just would have been one question mark. Possible was two question marks.

So, you were certainly very, very aware of the Congress' interest in this, this committee's interest in this, and you were getting together with OMB to kind of get on the same page?

Mr. WHOLLEY. No, sir. My concern, which I had expressed as, since you have all my e-mails, you know, my concern was that the, concerning the disconnect between the Executive Order, the Integrity Committee policies and procedures, and what had actually been produced and what transpired. That was my concern, not the hearing, sir. I mean, you called a hearing. I have given you everything that I have on my computer that my counsels, that my attorneys believe was relevant. I am here to answer any question you have. My concern was about the way the Executive Order and the policies and procedures were not properly interfacing in the way that the investigation came to us.

Chairman MILLER. All right. I am sorry. "I am sure that you can appreciate that I am not particularly keen on seeing two entities of the Executive Branch at odds in a hearing before the Legislative Branch."

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. What was it you were concerned that OMB and NASA might be at odds about?

Mr. WHOLLEY. It wasn't so much OMB, sir. It was the Integrity Committee and the PCIE. And it is not OMB. I was talking to Jeff Rosen, Mr. Rosen, in his capacity as the Counsel to Clay Johnson, Chairman of the PCIE. He was well aware, as were others, of my concerns about the Executive Order and the policies and procedures, and how they were or were not interfacing properly.

Chairman MILLER. All right. Mr. Wholley, could you describe what your role was in the response by Administrator Griffin to the findings of the PCIE, the report of the PCIE?

Mr. WHOLLEY. I was given the package, sir. I was given the package by Mr. Morrell, as I said on, my e-mails reveal it was the 26th. I did review it. I turned it over to someone who knew nothing about it, a very experienced today, and asked for her unvarnished opinion on it.

I had her brief Dr. Griffin. I was in the room. At the conclusion of her brief, he asked me my thoughts. I explained that I was on all fours with her analysis, which had been done independently. We had previously or simultaneously given him the range of options.

As you know, sir, he has no disciplinary options, which is why his letter talks in terms of with the concurrence of the Chairman of the PCIE.

And that was my role, sir.

Chairman MILLER. All right. What was the standard that the attorney that you referred to used in her analysis? Was it one of criminal misconduct, or was it one of appearances?

Mr. WHOLLEY. I believe she would be better able to answer that, sir, but I do know that she had the policies and procedures, with the definitions therein. She had the Quality Standards for Inspectors General. She had the Executive Order. She had all of the, she had everything I had. And she had a number of years of experience.

Chairman MILLER. And—I am sorry.

Mr. WHOLLEY. I am sorry. I don't want to speculate. I was going to say I doubt she used criminal law standards, since any criminal law violation, I assume, would have been given to the Justice Department, and as you know, sir, the investigation specifically says there is no violation of law, rule, or regulation, gross misconduct, or gross waste of funds. They did say there was an abuse of authority in creating a hostile work environment.

MR. WHOLLEY'S RELATIONSHIP WITH MR. COBB

Chairman MILLER. Just one more set of questions, Mr. Wholley.

I know in your written statement, and perhaps in your oral statement as well, you said that you did not socialize, you do not visit with Mr. Cobb in his home. He did not visit in your home. You did talk whenever you saw each other.

Did you have regular meetings with him to discuss matters before your Office or before his Office?

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. And how often was that?

Mr. WHOLLEY. Sir, I would say probably it would be rare that if I didn't see him once every couple of weeks.

Chairman MILLER. Okay. Did you——

Mr. WHOLLEY. Probably more. Weekly, ten days.

Chairman MILLER. Did you tell our staff that you met once a week from the time that you joined NASA?

Mr. WHOLLEY. Yes, sir. Initially, we did have weekly meetings, when——

Chairman MILLER. All right.

Mr. WHOLLEY. There were weekly meetings between the Administrator, that the parties that were supposed to be at the meeting were the Administrator, Deputy Administrator, Chief of Staff, Inspector General, and General Counsel. That had existed before I got there. More often than not, the Administrator wasn't there. It was the Deputy Chief, and this was prior to Dr. Griffin arriving.

Chairman MILLER. All right. And did the two of you compare notes on your discussions with our staff?

Mr. WHOLLEY. No, sir. Compare notes, sir?

Chairman MILLER. Well, that is a phrase. Did you talk with each other about the interviews?

Mr. WHOLLEY. I think we said something, but it was not, frankly, it was not what I would consider anything substantive.

Chairman MILLER. Okay. And you are familiar with all of the allegations, not just the summary report, but all of the allegations within the file of the PCIE matter, the Inspector General, began as an Inspector General's investigation by the Inspector General of HUD. Have you reviewed all of that?

Mr. WHOLLEY. Sir, I have reviewed what I was provided, what NASA was provided. I have reviewed that. I don't know if I have everything. I was, as I mentioned to your staff, I dealt with the pile of wood that was given to us.

Chairman MILLER. All right. In, well, allegation 43, in the Record of Investigation, again, it is an allegation, was that Mr. Cobb had improperly provided you information pertaining to criminal cases.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. You are familiar with that allegation.

Mr. WHOLLEY. Yes, sir.

Chairman MILLER. Okay. And you are familiar, you know that one of the principal concerns about Mr. Cobb's conduct at NASA was the inappropriateness of his relationship with Sean O'Keefe, and how close it appeared to be, rather than an arm's length independence.

Mr. WHOLLEY. Yes, sir. And again, I believe Mr. O'Keefe left in February of 2005.

Chairman MILLER. All right. Did you seek advice from Mr. Cobb on how to manage your own staff, how to lead it, how to deal with challenges, or did he seek advice from you on those matters?

Mr. WHOLLEY. He did not seek advice from me, no sir.

Chairman MILLER. Did you discuss it?

Mr. WHOLLEY. We discussed leadership at times, sir.

Chairman MILLER. Okay. I have no further questions.

Mr. SENSENBRENNER. Neither do I.

Chairman MILLER. I thank both of you for appearing, and for your testimony, and I believe that Mr. Sensenbrenner and I have already discussed further action that we may take. Thank you.

Mr. WHOLLEY. Thank you, Chairman Miller and Mr. Sensenbrenner.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

Appendix:

Additional Material for the Record

#1

Klemstine, Evelyn R. (HQ-WBH10)

From:	Klemstine, Evelyn R. (HQ-WBH10)
Sent:	Monday, April 23, 2007 1:56 PM
To:	Howard, Thomas J. (HQ-WAH10)
Cc:	Payson, Dahnelle (HQ-WBH10)
Subject:	Areas of Concern Expressed by the Staff Related to VITS

Tom,

During our April 11th Senior Staff Meeting I stated that several of the OA Program Directors, or their staff, expressed concern about some of the statements that the Administrator made during the April 10th VITS. You asked that I write you an email outlining those concerns. I asked that those Program Directors send me an email with the concerns so that I could provide you a single product. Below (almost verbatim with some editorial changes) are the concerns that were emailed to me. Evelyn

Concerns Related to Our Audits and Products

1. The perception that the Administrator will not consider (or take action on) any finding that will not result in savings of at least $1 billion. This is a minimum level that almost no IG can ever achieve. It is even more disenheartening given that NASA's budget is only $16 billion per year.

2. It appears the Administrator is not interested in operational audits where engineering decision may be challenged or questioned. What does that mean as it relates to the types of audit we may be doing in the upcoming year. What does that mean for our Space Ops Directorate.

3. The Administrator's assertion that the auditors do not have sufficient intelligence to audit in technical areas and that he will not consider recommendations resulting from audit work on technical issues.

4. The Administrator's implication that our audits should not be questioning NASA management decisions because NASA managers know better than the auditors.

Concerns Related to the Actual Execution of the VITS

1. There is a feeling it was not appropriate for Moose to be present, if the Administrator was really interested in hearing open and honest comments from the staff. One of the allegations against Moose was that he created a hostile work environment. Therefore, did Administrator really expect to get open and honest questions in that forum.

2. Staff members have express concerns that there is such a wide disparity between the Administrator's recommendation and the Integrity Committee's position that the disciplinary action by the Administrator is not adequate. As a result, there may be another investigation by Congress and this matter will continued to be played out in the media.

3. It appears the Administrator did not address the issue of a lack of independence. The fact the Administrator has decided to send Moose to training and to provide a mentor or coach could also raises independence questions. The public perception will be that the IG is beholding to the Administrator for saving his job. In a situation like this, can the IG objectively audit and investigate programs and projects under the Administrator responsibility.

Areas of Concern Expressed by the Staff

It appears the Administrator is not interested in operational audits where engineering decision may be challenged or questioned. What does that mean as it relates to the types of audit we may be doing in the upcoming year. What does that mean for our Space Ops Directorate.

There is a feeling it was not appropriate for Moose to be present, if the Administrator was really interested in hearing open and honest comments from the staff. One of the allegations against Moose was that he created a hostile work environment. Therefore, did Administrator really expect to get open and honest questions in that forum.

There is also a feeling that executives are not being held to the same standards as lower level employees. In some cases, staff members have expressed a feeling apathy or low morale. What difference does any of this makes. The decision has been made and it appears things will remain the same.

Staff members have express concerns that there is such a wide disparity between the Administrator's recommendation and the Integrity Committee's position that the disciplinary action by the Administrator is not adequate. As a result, there may be another investigation by Congress and this matter will continued to be played out in the media.

It appears the Administrator did not address the issue of a lack of independence. The fact the Administrator has decided to send Moose to training and to provide a mentor or coach could also raise independence questions. The public perception will be that the IG is beholding to the Administrator for saving his job. In a situation like this, can the IG objectively audit and investigate programs and projects under the Administrator responsibility.

All Hands Meeting 4/10/07 2:30
HQ VTS Room 2

M.G.
- Response was his & his alone
- Saw no violations, no lack of integrity or conflict of interest
- Lacking such evidence this issue falls under category of mgmt supervision
- There were no legal or ethical issues

M.G identified shortcomings in mgmt style + approach
Example was missing ring
- Noting there, no possible way of removing ring and not pull OFF a finger
- Pays + pays written but noting there - I (M.G.) would have made the same decision as Moose"

Evelyn Hemsline:
- We need to move forward, "When is it going to stop"
EK: "This is not fair to Moose" "Moose has been there a lot"
"We need to move on"

MG - Fading less than a billion are a waste of time
- Transition credit was of no use to me
- JG should stick with travel, improper funds

Moose: - Counsel on your assignments

Im - Karl Allen

#2

Schneiter, Catherine (HQ-WBH10)

From: Schneiter, Catherine (HQ-WBH10)
Sent: Wednesday, April 11, 2007 10:04 AM
To: Klemstine, Evelyn R. (HQ-WBH10)
Subject: RE: Tape recalled

All VITS are taped and usually the tapes are retained. For whatever reason, the tapes from our VITS yesterday are being destroyed.

Just an FYI.

From: Klemstine, Evelyn R. (HQ-WBH10)
Sent: Wednesday, April 11, 2007 10:02 AM
To: Schneiter, Catherine (HQ-WBH10)
Subject: RE: Tape recalled

What is this about

From: Schneiter, Catherine (HQ-WBH10)
Sent: Wednesday, April 11, 2007 9:59 AM
To: Klemstine, Evelyn R. (HQ-WBH10)
Subject: FW: Tape recalled

FYI

From: Aggen, Susan I. (MSFC-M-DI)
Sent: Wednesday, April 11, 2007 9:57 AM
To: Schneiter, Catherine (HQ-WBH10)
Subject: Tape recalled

Karen was just told to return the tape of yesterday's ViTS. They (all tapes) are to be returned and destroyed immediately.

! WARNING ! This email including any attachments is intended only for authorized recipients. Recipients may only forward this information as authorized. This email may contain non-public information that is "Law Enforcement Sensitive," "Sensitive but Unclassified," or otherwise subject to the Privacy Act and/or legal and other applicable privileges that restrict release without appropriate legal authority and clearance. Accordingly, the use, dissemination, distribution or reproduction of this information to or by unauthorized or unintended recipients, including but not limited to non-NASA recipients, may be unlawful.

Gandrud, David L. (ARC-W)

From: Gandrud, David L. (ARC-W)
Sent: Wednesday, April 11, 2007 9:29 AM
To: 'Howard Kwok'
Subject: RE:

Very interesting!!!! dg

From: Howard Kwok [mailto:hkwok@mail.arc.nasa.gov]
Sent: Wednesday, April 11, 2007 8:26 AM
To: dgandrud@mail.arc.nasa.gov
Subject:

Dave:

When you called me yesterday, I said Big John provided me a videotape of the Griffen ViTs. This morning, Big John called me and wanted the tape back immediately. He said he received orders from Headquarters to not distribute the tape to anyone (even within the OIG) and to destroy the tape right away. I have given the tape back to him. Apparently, they are concerned that the tape might be leaked to the press.

Sorry you missed the show.

Howard Kwok, Auditor
NASA Office of Inspector General
Ames Research Center, M/S 204-11
Moffett Field, CA 94035
Phone: (650) 604-2679
Fax: (650) 604-3955

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#3

Klemstine, Evelyn R. (HQ-WBH10)

From:	Klemstine, Evelyn R. (HQ-WBH10)
Sent:	Thursday, April 19, 2007 11:11 AM
To:	White, Jacqueline (HQ-WBH10)
Subject:	RE: ViTS Tape

Thanks. I knew this had been an issue at Marshall

From:	White, Jacqueline (HQ-WBH10)
Sent:	Thursday, April 19, 2007 11:03 AM
To:	LaRocca, Francis P. (HQ-WLH10)
Cc:	Klemstine, Evelyn R. (HQ-WBH10)
Subject:	FW: ViTS Tape

Please read Karen VanSant message below.

Jacqueline White
Director, Quality Assurance

NASA, OIG
202-358-0203

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From:	Vansant, Karen E. (MSFC-M-DI)
Sent:	Thursday, April 19, 2007 10:33 AM
To:	White, Jacqueline (HQ-WBH10)
Subject:	ViTS Tape

Hi Jackie,

I understand that there is a request for the tape of the ViTS on April 10. We do not have a copy of the tape. It was taped here but the tape was recalled and destroyed. Attached are my notes on the subject.

<< File: ViTS.doc >>

Karen VanSant
CIA, CPA, CGFM, CGAP, MBA
Project Manager, Quality Assurance
NASA Office of Inspector General
Mail Code M-DI
Marshall Space Flight Center, AL 35812

Phone: (256) 544-1149
Fax: (256) 544-5856

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#4

Schneiter, Catherine (HQ-WBH10)

From: Birnbaum, Daniel K. (GRC-W000)
Sent: Friday, April 20, 2007 7:15 AM
To: Schneiter, Catherine (HQ-WBH10)
Subject: RE: Congressional request

Catherine,

I was told that the Glenn VITS person was directed by his (HQ) boss to physically come over to our office to retrieve and destroy the tape. This was on 4/11/07. He in fact came over on 4/11/07 to pick up the tape. We have a signed agreement that he in fact took possession of the tape on 4/11/07. If he did what he was directed to do, the Glenn copy of the tape was destroyed by this person.

Thanks, Daniel

Daniel Birnbaum, Auditor
NASA Office of Inspector General, Glenn Research Center Phone (216) 433-3731 Fax (216) 433-5415

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-----Original Message-----
From: Schneiter, Catherine (HQ-WBH10)
Sent: Friday, April 20, 2007 6:22 AM
To: Birnbaum, Daniel K. (GRC-W000)
Subject: FW: Congressional request

Daniel,
I previously sent this to Mike but I am not sure if he is in. Do any of you have a copy of the tape in question. Also, can you check with your VITS people to see if they still have a copy.

Catherine

-----Original Message-----
From: Klemstine, Evelyn R. (HQ-WBH10)
Sent: Thursday, April 19, 2007 2:54 PM
To: Gorman, Carol N. (HQ-WBH10); Schneiter, Catherine (HQ-WBH10); Chisley, Larry T. (KSC); Jenson, Mark (HQ-WBH10); Payson, Dahnelle (HQ-WBH10); White, Jacqueline (HQ-WBH10)
Subject: FW: Congressional request

Please let me know ASAP if you have info - I am aware of the one MFR -----Original Message-----
From: LaRocca, Francis P. (HQ-WLH10)
Sent: Thursday, April 19, 2007 2:04 PM
To: Winters, Kevin H. (HQ-WIH10); Klemstine, Evelyn R. (HQ-WBH10); Lamoreaux, Alan J. (HQ-WBH10)
Cc: Howard, Thomas J. (HQ-WAH10); Chulumovich, Madeline (HQ-WAH10)
Subject: Congressional request

Attached is an April 18, 2007, letter from the House Committee on Science and Technology, Subcommittee on Investigations and Oversight Committee requesting a copy of the April 16,

2007, ViTS videotape whereby the Administrator addressed the OIG staff. The Subcommittee is also requesting any other records related to the videotape (see attachment to the letter). Please check with all of your staff to see if anyone has a copy or the videotape or any related records and provide the information to me by COB today, even if it is a negative response.

Frank LaRocca
Counsel to the Inspector General
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION 300 E Street, SW, Suite 8V69, Room 8V88
Washington, DC 20546-0001

Voice: 202-358-2575
FAX: 202-358-3696
Email: flarocca@nasa.gov
Website: http://www.hq.nasa.gov/office/oig/hq/

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#5

Schneiter, Catherine (HQ-WBH10)

From: Gandrud, David L. (ARC-W)
Sent: Thursday, April 19, 2007 11:37 AM
To: Schneiter, Catherine (HQ-WBH10)
Subject: RE: Records Request

Catherine: This morning, 4/19/07, Howard Kwok called the lead person in the Ames Video Teleconferencing facility to inquire regarding the status of the subject tape. The lead person confirmed that he had destroyed the tape as previously ordered. dg

-----Original Message-----
From: Schneiter, Catherine (HQ-WBH10)
Sent: Thursday, April 19, 2007 6:06 AM
To: Aggen, Susan I. (MSFC-M-DI); Vansant, Karen E. (MSFC-M-DI); Bruns, Michael P. (GRC-W000); Gandrud, David L. (ARC-W)
Subject: FW: Records Request

If any of you have the tape, let me know.

-----Original Message-----
From: owner-code-w-oa-senior-staff@lists.hq.nasa.gov [mailto:owner-code-w-oa-senior-staff@lists.hq.nasa.gov] On Behalf Of Klemstine, Evelyn R. (HQ-WBH10)
Sent: Thursday, April 19, 2007 9:00 AM
To: DL-HQ-CODE-W-OA-SENIOR-STAFF
Subject: FW: Records Request

-----Original Message-----
From: LaRocca, Francis P. (HQ-WLH10)
Sent: Wednesday, April 18, 2007 4:32 PM
To: Howard, Thomas J. (HQ-WAH10); ViTS Staff (vits@hq.nasa.gov)
Cc: Winters, Kevin H. (HQ-WIH10); Klemstine, Evelyn R. (HQ-WBH10); Lamoreaux, Alan J. (HQ-WRH10); Chulumovich, Madeline (HQ-WAH10)
Subject: FW: Records Request

Fyi.

ViTS Staff: Do you, or any of the Center ViTS staff, have this tape?

Frank LaRocca
Counsel to the Inspector General
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION 300 E Street, SW, Suite 8V69, Room 8V88
Washington, DC 20546-0001

Voice: 202-358-2575
FAX: 202-358-3696
Email: flarocca@nasa.gov
Website: http://www.hq.nasa.gov/office/oig/hq/

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-----Original Message-----
From: Falcon, R Andrew (HQ-MB000)
Sent: Wednesday, April 18, 2007 4:24 PM
To: Morrell, Paul (HQ-AA000); Newell, Les (HQ-LD070); Chase, Brian E. (HQ-NC000); Jezierski, Jeffrey T. (HQ-AA000); Wholley, Michael C. (HQ-MA000); Sefton, Keith Thomas (HQ-MA000); Mould, David R. (HQ-NA000); LaRocca, Francis P. (HQ-WLH10); Cobb, Robert W. (HQ-WAH10); Luedtke, Tom (HQ-LH000); Hopkin; Hopkins, Robert (HQ-AB000)
Subject: Records Request

NASA has received a letter, dated today, from Rep. Brad Miller of the Committee on Science and Technology of the U.S. House of Representatives requesting copies of a videotape recording of a meeting held on or about April 10, 2007 between the Administrator and staff of the Office of Inspector General, by video teleconference. In light of this request, NASA is now obligated to preserve and identify all relevant materials.
To comply with this obligation, we are requesting that you search your records for copies of this videotape.

Any NASA office identifying relevant records must preserve them. Please send materials responsive to this request to the Headquarters Office of General Counsel. Each Addressee should immediately notify all employees and/or relevant contractors possessing NASA records and documents to diligently search for and identify, and to ensure preservation of, any responsive materials.

If you have any questions of concerns, please contact R. Andrew Falcon at 202 358-2082.

#6

ViTS – April 10, 2007

Notes from Karen VanSant regarding Videotape

I attended the OIG Staff Meeting ViTS on April 10, 2007 at 1:30 p.m. central in the Marshall ViTS room, building 4200 room 106.

When we (members of the OIG staff and I) arrived at the ViTS room, there was a large notice on the screen that participants should be aware that a ViTS location was taping the meeting. I inquired about taping since we had 3 auditors (Gene Lindley, Gary Clark, and Barbara Deluca) out of the office. Mike McDonald (MSFC ViTS room operator), said he was surprised that it was being taped and he called NASA Headquarters to confirm (his end of the call was witnessed by me, Susan Aggen, Susan Ruhlman, and other attendees) – from what we got from Mike's end of the conversation, he was given the ok to tape the ViTS. Mike provided me with the tape immediately following the ViTS.

On Wednesday morning (April 11) around 8:00 a.m. Mike called me and said that HQ decided it should not have been taped and that all copies should be retrieved and destroyed. I mentioned that our auditors (Lindley, Clark and Deluca) were just about to review it. He said that should not be a problem and asked that I return it after they had seen it. They viewed the tape immediately after my discussion with Mike, on the TV/VCR in the MSFC OIG office. After they viewed the tape, I personally handcarried it to Mike McDonald in the ViTS room in building 4200, room 106. While I was in his office, adjacent to the ViTS room, I witnessed Mike smashing the tape cartridge with a wooden board (shelf board). The tape was destroyed at approximately 8:50 a.m.

If anyone needs information from the MSFC ViTS room operator – his name is Michael McDonald and his number is (256) 544-7726.

#7

Campbell, Janet A. (HQ-WLH10)

From: Winters, Kevin H. (HQ-WIH10)
Sent: Wednesday, April 18, 2007 10:42 AM
To: Howard, Thomas J. (HQ-WAH10)
Subject: VTS Tape

Tom,

In case your Blackberry is working:

I spoke a couple times with the C/S regarding the VTS tape matter. Here are the facts he presented them to me:

- He directed that the VTS not be taped [NFI as to who he told in the VTS taping room]
- Inexplicably, someone in HQTRS public affairs [NFI] subsequently directed the VTS people to tape it.
- When the C/S attended the VTS, he noticed the taping mistake after the session began -- but felt it inappropriate to interrupt;
- After the VTS, he had the 5 CDs (a master and 4 back-ups of the session delivered to the General Counsel.
- He checked with the General Counsel yesterday; the CDs were destroyed.
- It's unclear whether the respective Centers "taped" the VTS -- or if they have that capability;
- C/S also said, however, that if any OIG employee would want to talk to "Mike" about the VTS, he could arrange it.

I explained most of what is above to Sonntag (but not the last point).

Vr
Kevin

Kevin H. Winters
Assistant Inspector General for Investigations
Office of Inspector General
National Aeronautics and Space Administration
Washington DC 20546-0001
(202) 358-2580; (202) 358-3914 (Fax)
kevin.h.winters@nasa.gov

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#8

Howard, Thomas J. (HQ-WAH10)

From: Howard, Thomas J. (HQ-WAH10)
Sent: Tuesday, April 17, 2007 3:56 PM
To: Wyatt, Rhodesia (HQ-WAH10)
Subject: Re: VITS

Dee, thanks. I just talked with Madeline about how to proceed on thism. Tom

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Wyatt, Rhodesia (HQ-WAH10)
To: Howard, Thomas J. (HQ-WAH10)
Sent: Tue Apr 17 14:15:29 2007
Subject: FW: VITS

FYI

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-----Original Message-----
From: Campbell, Michael (HQ-WRH10)
Sent: Tuesday, April 17, 2007 3:07 PM
To: Rogers, Karen L. (GSFC-190.0)[NASHQ]
Cc: Wyatt, Rhodesia (HQ-WAH10); Thomas, Joel (HQ-WAH10)
Subject: RE: VITS

Karen, sorry, I mentioned it to Joel Thomas and Dee Wyatt, who are checking with IG/DIG to see if it is necessary for the missing OIG member to view it ... Will let you know when I do ...thks Mike

---

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-----Original Message-----
From: Karen Rogers [mailto:Karen.L.Rogers@nasa.gov]
Sent: Tuesday, April 17, 2007 2:08 PM
To: Campbell, Michael (HQ-WRH10)
Subject: FW: VITS

Hi Mike - I left you two voice mails but wanted to follow up with an email also. Is there a VITS tape from last week?
Thanks.

Karen Rogers
Program Assistant
NASA, Office of Inspector General
Office of Investigations
Greenbelt, MD 20771
301.286.9316/301.286.0355 fax

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-----Original Message-----
From: Schopper, Joseph A. (GSFC-190.0)[NASHQ] [mailto:Joseph.A.Schopper@nasa.gov]
Sent: Friday, April 13, 2007 9:57 AM
To: Rogers, Karen L. (GSFC-190.0)[NASHQ]
Subject: RE: VITS

No, just as soon as possible.

Thanks

Joseph A. Schopper
Resident Agent in Charge
NASA Office of Inspector General
Office of Investigations
Goddard Space Flight Center
Greenbelt, MD 21546
(301) 286-7776 ofc
(301) 286-0355 fax

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-----Original Message-----
From: Karen Rogers [mailto:Karen.L.Rogers@nasa.gov]
Sent: Friday, April 13, 2007 9:52 AM
To: Schopper, Joseph A. (GSFC-190.0)[NASHQ]
Subject: Re: VITS

I put a call into Mike Campbell - he is out today on leave. Do you need to know before Monday?

At 08:46 AM 4/13/2007, you wrote:
>Karen, please check with HQs and find out if the Administrator's VITS
>was recorded. We have two people who were unable to attend. At least
>one of them would like to view the tape. Let me know as soon as you
>can.
>
>Thanks, Joe
>
>----------
>Joseph A. Schopper
>Resident Agent in Charge
>NASA Office of Inspector General
>Office of Investigations
>Goddard Space Flight Center
>Greenbelt, MD 21546
>(301) 286-7776 ofc
>(301) 286-0355 fax
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Howard, Thomas J. (HQ-WAH10)

From: Howard, Thomas J. (HQ-WAH10)
Sent: Tuesday, April 17, 2007 3:54 PM
To: Winters, Kevin H. (HQ-WIH10); Chulumovich, Madeline (HQ-WAH10)
Subject: Fw: VITS

Kevin,

See below. I just talked with Madeline about my thoughts on this. Tom

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Wyatt, Rhodesia (HQ-WAH10)
To: Howard, Thomas J. (HQ-WAH10)
Sent: Tue Apr 17 14:15:29 2007
Subject: FW: VITS

FYI

#9

May 7, 2007

MEMORANDUM FOR THE RECORD

SUBJECT: DIALOGUE WITH MR. FRED BERGER, NASA ViTS COORDINATOR CONCERING ViTS HELD ON 4.10.2007

Background. I was on travel during the period 4.8.2007-4.19.2007, and returned to duty at NASA HQ on the morning of Friday, 4.20.2007. I was tasked to gather facts with respect to a closed meeting held by Administrator Griffin on 4.10.2007, with members of the NASA OIG staff, where Administrator Griffin informed the OIG staff of his actions in response to the IC investigation of Inspector General Cobb and answered their questions and concerns. The meeting had been held at the NASA HQ ViTS facility and simultaneously broadcast to NASA Centers. Video recordings of that meeting had subsequently been destroyed, and the circumstances of that destruction had become the subject of Congressional inquiry.

Action. I spoke directly with the ViTS Coordinator, Mr. Fred Berger, a NASA Contractor employee who had worked the meeting, to obtain his account of the events in order to respond expeditiously and accurately to the request from Congressman Miller in his role as Investigations and Oversight Sub-committee Chair.

Results of Interview. I was able to reach Mr. Berger by phone on the morning of 4.20.2007, and we met at around 11:30 a.m. in my office. I indicated to Mr. Berger that I would like him to relate, in his own words, in a narrative form and without interruption or questioning from me, the events surrounding the 4.10.2007 ViTS of which he had direct and personal knowledge. Mr. Berger agreed to do so.

He began by indicating that he did not recall Mr. Morrell telling him that he did not want the 4.10.2007 meeting recorded. Mr. Berger stated that he had recorded the meeting in response to a request to him by Mr. Fred Brown, NASA Television. After the meeting, which Mr. Berger recorded both on VHS videotape and a DVD, he determined that the DVD was good and erased the VHS recording according to normal practice, since it was only a backup. Mr. Berger stated he then provided the DVD "master" to Mr. Brown.

Mr. Berger indicated that, on the afternoon of 4.10.2007, and prior to the arrival of IG Cobb, Mr. Morrell and Administrator Griffin, he had announced to those in the room that the meeting would be recorded and further told them that at least one NASA Center would likewise be recording, and that he received no objection. Mr. Berger indicated that Mr. Cobb later arrived alone. Sometime soon thereafter Administrator Griffin and Mr. Morrell arrived and the meeting began. Mr. Berger indicated that all three arrived after his announcement about recordation, but further stated that there were signs posted in the ViTS room indicating that recording was taking place.

Mr. Berger next related to me that when he arrived for work the next morning, 4.11.2007, he noted a voice mail from Mr. Morrell that had been left at 6:30 p.m. on 4.10.07. It said simply "*Call me.*" Mr. Berger indicated that he did in fact call Mr. Morrell at around 8:15 the morning of 4.11.2007. Mr. Berger told me that Mr. Morrell immediately asked him why he had recorded the meeting despite Mr. Morrell's indication that he did not want it recorded. Mr. Berger indicated that he told Mr. Morrell that he had done so at the behest of Mr. Brown and Public Affairs, and that he (Mr. Berger) did not recall having been told not to record. Mr. Berger then stated that Mr. Morrell asked who had given the "OK" to record the meeting. Mr. Berger related he once again said that it had

been Mr. Brown who asked him to record. Mr. Berger further stated that Mr. Morrell then asked who had the recording, and Mr. Berger indicated he told Mr. Morrell that he had given it to Mr. Brown. Mr. Morrell then asked that Mr. Berger retrieve the recording. No mention was made by Mr. Berger of a discussion of Center recording during this conversation as he recounted the events to me.

Mr. Berger indicated that at the time of Mr. Morrell's request to him – shortly after 8:00 a.m. on 4.11.2007 -- he (Mr. Berger) thought that only the single "master" DVD existed at NASA HQ. Mr. Berger then stated that, following Mr. Morrell's call, the substance of which he related in the previous paragraph, he (Mr. Berger) had "*Janice and Nicole*" call all Centers to find out which Centers may have recorded the ViTS, and, of those which had recorded it, which still had those recordings. Mr. Berger stated that he had not been aware of *which* Centers had recorded the meeting, but that he told them to get back, erase or destroy all copies. Mr. Berger made no mention that these calls were prompted by Mr. Morrell, Mr. Brown, or any other NASA management official. Mr. Berger indicated that his efforts in having his staff contact the Centers immediately followed his learning that Mr. Morrell wanted him to retrieve the DVD master (the only copy known to Mr. Berger to be at NASA HQ) from Mr. Brown.

Mr. Berger then related that at 8:15 a.m. on 4.11.2007, he called Fred Brown, who did not answer his phone at that time, and left a message that Mr. Brown should call him (Mr. Berger) ASAP. Mr. Berger indicated that Mr. Brown returned his call at approximately 8:30 a.m. on 4.11.2007, whereupon Mr. Berger asked that the original DVD be returned, and told Mr. Brown that the meeting should not have been recorded. Mr. Berger then stated that Mr. Brown came to his work area at about 8:30 a.m., and handed him the original DVD, indicating that he (Mr. Brown) had already provided copies of the DVD to the "A" Suite and that he had another copy with him at that time intended for the OIG. Mr. Berger retrieved the original and the copy from Mr. Brown at that time.

While Mr. Brown was still in his work area, according to Mr. Berger, Mr. Morrell arrived, and again asked him how could Public Affairs or NASA TV have told him (Mr. Berger) to record "*my* [Mr. Morrell's] *meeting*."

Note: This MFR is compiled from notes taken during my meeting with Mr. Berger on 4.20.2007. I took notes, but asked no questions of him during his narrative. I did not alter the sequence of his narrative. Mr. Berger provided this narrative over a period of approximately 20-25 minutes, during which he related the events noted above. My meeting notes have been provided to NASA personnel collecting information possibly relevant to Congressman Miller's data call. My independent recollection of the facts beyond my notes is limited, and the notes provide my recorded recollection.

I later asked Mr. Berger to write out an account of these events on 4.30.2007. That account was received by me late in the workday on 4.30.2007 by e-mail, as I was on travel. The e-mail is much less detailed than Mr. Berger's narrative statement to me as outlined above.

Keith T. Sefton
Deputy General Counsel

Donovan, Catherine (HQ-MA000)

From: Berger, Fred (HQ-LD070)[InDyne, Inc]
Sent: Thursday, April 26, 2007 2:42 PM
To: Stewart, Harold E. (HQ-LG020)
Cc: Sefton, Keith Thomas (HQ-MA000)
Subject: April 10th Recordings

Harold,
The NASA Headquarters Video Teleconferencing Service (ViTS) uses two means to record conferences on Customer request.

We use a COTS Samsung DVD recorder, model DVD-R130. This machine uses DVD-R or DVD-RW video disks only. This machine has no resident storage capability (no internal hard drive or other memory device) and it cannot retain audio or video program content.

We also use a standard JVC model SR-S3650 VHS video tape recorder for back-up recordings in case a DVD recording is faulty. This machine also lacks an internal memory capability to store program content.

Our procedure with the recordings is as follows: After a meeting has been recorded, the DVD recording is checked and, if it is not faulty, it is provided to the person who requested the recording. Then the videotape is returned to stock for erasure and reuse. That is what was done on April 10th with the videotape used for the conference in which Mike Griffin talked to the IG staff.

Please contact me if you need further information. Fred

****

The NASA Headquarters Video Teleconferencing Service is in room CD-61.
The HQ1 Room seats up to 15 people
The HQ2 Room seats up to 60 people.

For tours or other services, contact us at:
Office Phone.....202-358-0146
ViTS Scheduling....202-358-0073
Office E-Mail.....vits@hq.nasa.gov

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#10

Wholley, Michael C. (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Wednesday, March 14, 2007 8:11 AM
To: Morrell, Paul (HQ-AA000)
Subject: Decision

Paul,
I wasn't very articulate in our discussion last night and I apologize. Truth is, I am really troubled by the proffered "addition" to the letter.
Let me try to spell out my reasons. First, I don't see the value or utility of adopting the "suggestion" and I see a lot of "downside" for Mike.
Who will be invited to this meeting?" Only the HQ IG staff? The entire 200 staff from across the Agency?
Will Moose be there? Will Moose's words look/sound like he has taken Moose to the woodshed, thereby lending more credibility to both the complaints and the complainers, as well as the ROI than they deserve? If Mike, on the other hand, goes too far (and this is an "eye of the beholder" issue) in his comments in support of Moose, then he has opened himself up to criticism and has become the focus of the controversy.
From my perspective, Mike could stick with the original plan. He will have more than adequate opportunities over the next few weeks to tell the ENTIRE NASA community how he has resolved this while, appropriately, not going into the "detail" of a personnel matter. I also believe there I'd great value in being able to answer "No" if asked whether any external input(s) were incorporated into his selected course oif correOtive action. Mike will have the chance to answer questions on tgis matter at Hearings, at the next "Administrator's Updaten" and at other times and we should have a set of suggested answers that are responsive and carefully crafted. To call a "special meeting" of the IG staff and not be prepared to back Moose in a strong way will undercut Moose, grant more credibility to the complaints and the investigation than warranted, and be, I believe, counterproductive. On tge other hand, to call a special meeting and praise Moose in front of the selected "group" will risk Mike becoming the center of the controversy. As I said last night, I see no "upside" for Mike in the proposed COA, and I do see a downside. Mike will have plenty of opportunities over the next several weeks to demonstrate that he has taken appropriate steps, that he recognizes the importance of a solid, independent, OIG and that he considers the matter closed.
I would hate for the focus of the "firestorm" to shift from the "report" and the lengthy process that it consumed to Mike! If the proposed course is being suggested in order to show support for Moose, I believe there are better (and less potentially dangerous ways, to do that.
I an up; call me on 202 465 6954 if you want. I know this is not a "legal" matter, but I am concerned about how this will play out if the suggested COA is adopted.
Mike

Michael C. Wholley
NASA General Counsel
300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

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#11

Donovan, Catherine (HQ-MA000)

From: Donovan, Catherine (HQ-MA000)
Sent: Thursday, March 22, 2007 9:43 AM
To: Wholley, Michael C. (HQ-MA000)
Cc: Sefton, Keith Thomas (HQ-MA000)
Subject: My thoughts on IC letter

Mike:

- I'd like to see the March 14, 2007 letter that Clay Johnson sent to the IC - it would be good to know precisely what he said.
- My first reaction is to do nothing, seems to me that ball is in Mr. Johnson's court
- -Per 5B of procedures, if IG believed admin misconduct established, IC was required to recommend appropriate action when it forwarded report to PCIE - failed to do so - should not now second guess
- 5D2 - IC Review The IC will review the course of action taken by the agency head concerning the investigative findings, and if the IC believes that the action was appropriate, it will close the matter. If the IC has concerns regarding the action, it may so advise the PCIE/ECIE Chairperson and suggest an alternative. However, the IC has no power to compel any particular action.
- Having failed to meet its obligation to recommend an action at the time it forwarded the report, seems inappropriate to recommend discipline at this juncture.
- Note that whole point of discipline is to get the employee to conform his conduct - 2 chief issues with IG - relationship with Administrator cured - currently at arm's length , no risk of repetition, and interpersonal skills improvement - planned course of action focuses on that goal. Should be no need to do anything further.
- Finally, if required to take an action more severe than the counseling/training program, recommend a disciplinary letter.

Cathy

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#12

Wholley, Michael C. (HQ-MA000)

From: Donovan, Catherine (HQ-MA000)
Sent: Friday, March 23, 2007 11:09 AM
To: Wholley, Michael C. (HQ-MA000)
Subject: RE: Edits

Understand. I will make the changes.

-----Original Message-----
From: Wholley, Michael C. (HQ-MA000)
Sent: Friday, March 23, 2007 5:30 AM
To: Donovan, Catherine (HQ-MA000); Sefton, Keith Thomas (HQ-MA000)
Subject: Edits

Cathy
I will try to interleave my comments. I want to steer clear of any implication that the IC has made a "recommendation." Rather, they have made some "assertions" about what they believe should be done, but only in the most general way "discipline up to removal COULD (again, not "would") be appropriate." This is far short of a "recommendation; it is merely a restatement of the range of options. Likewise the use of the word "could"
I also want to get in the memo the distinction between "abuse of authority" as we believe is contemplated by the EO (that is, the authority inhedrent in the office) versus how the IC appears to have misconstrued it. Mention also our advice/allusion to the "abusive supervisor" allegation as being more appropriately handled in an EEO complaint.
Sorry to drone on so long, but there is a lot here and I want to ensure that the MFR covers the advice we provided to the Administrator, so that if it hits the fan, I am. In the crosshairs, not him !
I am expendable; he aint!! (-:

Mike

Michael C. Wholley
NASA General Counsel
300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

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#13

Wholley, Michael C. (HQ-MA000)

From: Donovan, Catherine (HQ-MA000)
Sent: Monday, March 26, 2007 9:45 AM
To: Wholley, Michael C. (HQ-MA000)
Subject: Revision

Attachments: March 22.doc

Mike: My slightly revised version is attached. The new changes are in bold. I have one concern regarding the process for the PCIE to close the case. I read the rules to require the agency head to take action (or determine that he will take no action) before the case is closed. In this instance, the agency has not taken action yet, still awaiting PCIE concurrence. Therefore, my last paragraph is somewhat awkward. Cathy

March 22.doc (48 KB)

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March 22, 2007

MEMORANDUM FOR THE RECORD

In a letter dated January 22, 2007, the Integrity Committee (IC) of the President's Council on Integrity and Efficiency (PCIE) forwarded to the Chair of the PCIE for his consideration a Report of Investigation (ROI) concerning allegations against Inspector General Robert Cobb and the IC's conclusions regarding the allegations. The IC concluded that **certain actions of Inspector General Cobb (IG) created the appearance of a lack of independence and other actions amounted to an abuse of authority.** The IC did not advise the PCIE Chair of any IC recommendations for resolution, as both the E.O. 12993 and the IC's own policies and procedures require.

In a letter dated February 15, 2007, the PCIE Chairperson, Mr. Clay Johnson, forwarded to the NASA Administrator the ROI and the IC's summary and conclusions. The letter notified the Administrator that he had 30 days to review the report and to advise the Chair, of what, if any, action the Administrator planned to take.

The Administrator reviewed the report and received the advice of the General Counsel regarding how to proceed in response. On March 14, 2007, the Administrator responded to the Chair, certifying his review, and advising of the action that he planned to take, with the Chair's concurrence. The Administrator concluded that the IC's concern regarding the IG's **actions that created the appearance** of a lack of independence had been obviated by the IG's current arm's length relationship with him; thus there was no ongoing conduct by the IG that might appear to lack independence to correct.

The "abusive working environment" claim was more troubling. As the General Counsel advised the Administrator, by its own policy, the IC has the jurisdiction to review a charge of "abuse of authority" by an IG. Also by its own policy, the IC does not have jurisdiction to review allegations that fall under the purview of another administrative review process, such as EEO complaints. The allegation set forth in the ROI did not suggest that the IG had abused his unique position as an Inspector General, the jurisdictional prerequisite for IC review. Rather, the facts as presented implicated the

Deleted: that he has reviewed the report

Deleted: in response,

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EEO complaint process, and the IC should have declined to review them on that basis.

Despite the fact that the IC overstepped its bounds and reviewed what boiled down to an EEO issue, the investigation revealed that the IG did have supervisory issues that required correction. To that end, the Administrator decided on the following course of action and delineated it in the letter to the PCIE Chair. The Administrator advised that he would meet with Mr. Cobb and discuss the [illegible] he provide a Letter of Instruction to Mr. Cobb. The letter of instruction would provide for Mr. Cobb's attendance at the Federal Executive Institute (FEI) resident course at the earliest possible time where he would develop an individual leadership and management training plan and assignment of an executive coach to assist Mr. Cobb in developing his leadership and management skills, require his attendance at one management/leadership resident course at FEI or its equivalent annually, and require that he brief the Deputy Administrator on a bi-monthly basis regarding the implementation of his individual leadership/management plan and his professional growth with the executive coach.

Deleted: The Administrator advised that he

The PCIE Chair sent letter dated March 14, 2007, regarding NASA Inspector General Robert Cobb, to the IC. We do not have a copy of that letter, although, presumably, it forwarded the Administrator's letter to the IC.

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In a letter dated March 20, 2007, the IC Chair advised the PCIE Chair of its concerns regarding the proposed action, believing it inadequate to address the conduct of IG Cobb. The IC Chair further advised that all members of the committee believed that disciplinary action up to and including removal, could be appropriate.

The Administrator and the PCIE Chair, Mr. Johnson, spoke about the IC concerns on Wednesday, March 21st. Mr. Johnson indicated that he was awaiting a response from the Administrator.

On March 22nd, the Administrator discussed an appropriate response with his Deputy, Chief of Staff and General Counsel. All believed that the ROI contained insufficient evidence to support a removal of the IG and, thus, there is no basis to recommend a removal. (Only the President can remove the IG). Further, any perception that the IG took actions that lacked independence due to a close

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relationship with the Administrator was eliminated when Dr. Griffin became the Administrator in April 2005. The Administrator concluded that the original rationale behind the March 14th course of action was still sound. He and the IG operate at arm's length, and, therefore, there is no ongoing conduct to correct. The **remaining matter of the** "abusive work environment," was more accurately an EEO-type issue outside the IC's jurisdiction. Still, the record reflected that the IG had exhibited poor supervisory skills that needed correction. The actions described in the Letter of Instruction are specifically designed to improve the IG's supervisory skills. The Administrator reviewed the IC's concerns and the proposed course of action, and concluded that the original plan was an appropriate response to the ROI.

The Administrator took into account the following in reaching his decision: he had an opportunity and an obligation to provide recommendations when they forwarded the ROI to the PCIE Chair on January 22, 2007. The IC did not. The IC now makes an after-the-fact assertion to the PCIE Chair that disciplinary action up to and including removal, "could" be appropriate. **The use of the word "could" is troubling, suggesting that the IC remains unwilling to commit to any position at all on the proper course of action.** Further, in taking its belated assertion, the IC has (1) undermined the fairness of its own process (had the IC made a recommendation in a timely manner, both the PCIE Chair and the Administrator would have had an opportunity to address it in a thoughtful and meaningful manner - **to offer a wide-ranging assertion at this stage serves little purpose other than to undermine the decision-making of both the PCIE Chair and the Administrator**); (2) made an assertion that the entire range of discipline available to a manager could be appropriate in this instance, an assertion so vague as to be virtually meaningless; and (3) pitted the IC itself against the PCIE Chair by creating a record of dissatisfaction with the course of action while never having provided the PCIE Chair or the Administrator the benefit of its insight in the form of a recommendation. Indeed, the IC's method of operation in this matter causes one to question whether its interest lies in ensuring an appropriate outcome or in playing "gotcha." Finally, it is the PCIE Chair that has the authority to close the matter, not the IC. The IC, having asserted that removal could be appropriate, ensures that anything the PCIE Chair does, short of recommending removal,

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to the President, may be called into question.

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Nonetheless, the next step in this matter is for the PCIE to take, and not the Administrator. Should the PCIE advise the IC that the case is closed, that will be the final disposition.

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#14

Donovan, Catherine (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Thursday, March 29, 2007 1:00 PM
To: Griffin, Michael D. (HQ-AA000); Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Subject: Round "whatever"

Importance: High

Attachments: The Honorable Clay Johnson-3-28-07-postCJ.doc

The Honorable Clay Johnson-3-2...

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Mike/ Shana/ Paul:

I just got off the phone with Clay Johnson who had some suggestions about the wording. It was an interesting discussion.

I have attached the changes I made, but they might be difficult to decipher on a Bberry. Accordingly, they are "summarized" below. The full letter, as modified, is attached.

He had 3 recommendations:

1. "show you care" about the IC's feelings by "beefing up" the first sentence of para 3. Accordingly, I added ", and I recognize that the strict, timely, and comprehensive implementation of the identified course of action is absolutely mandated."

2. He was concerned that we were "holding in abeyance" or dalliing with Moose and the OIG staff. I explained to him that you don't announce sentence until the trial is over (as it were) but he says that the IC is concerned about "when will this happen." [I refrained from explaining to him that HE, in fact, was the "final disposition authority" and needed to tell the IC that "the investigation is closed." That didn't resonate with his GC even after I pointed out the applicable language in the ExOrd and the IC's own "policies and procedures."]

Accordingly, I added the following modification at the end of paragraph 3:
"Likewise, my initial meeting with Mr. Cobb to discuss my review of the record, which will take place at the earliest opportunity, as well as my subsequent meeting with the OIG staff which will occur at the earliest feasible time, will emphasize what I expect in terms of a working environment and the commitment to excellence of the OIG."

3. He hates the word "prophylactic" (!! LOL) so I substituted "additional corrective measures" for ""any prophylactic measures"

Once you clear this, I will get it over to Johnson and Rosen ASAP.

Question: Will you be here today to sign, Mike, or do it early tomorrow. On a "practical" note, Moose is gone next week so, in light of the seeming "need for speed" that is being expressed, I would strongly recommend that you meet with him tomorrow if at all possible and then we can start to work on a time to meet with the oiG staff.

Here to serve,

Mike

[I will refrain from being "overly concerned" with the recurring failure of the IC to follow the Executive Order and their own "Policies and Procedures", and with my surprise that Clay Johnson and his GC don't want to take that issue on with them. When all the smoke clears, I will take those issues up with Jeff Rosen.]

Michael C. Wholley

NASA General Counsel

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The Honorable Clay Johnson, III
Chairman, President's & Executive Councils on Integrity and Efficiency
c/o United States Office of Management and Budget (OMB)
17th Street & Pennsylvania Avenue, N.W., Room 260
Washington, D. C. 20503

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Dear Mr. Johnson:

I am writing in response to your sharing with me the March 20, 2007, letter from the Integrity Committee (IC) wherein the IC expressed concerns about the proposed course of action in the case of Robert Cobb, the Inspector General at NASA.

In your transmittal letter of February 15, 2007, forwarding the Report of Investigation (ROI) (IC Case Number 500) regarding IG Cobb, you directed me to review the ROI and to "consider the appropriate action to take in response to the report's conclusions summarized on page 8 of the report." Both the initial paragraph of the IC's January 22, 2007, letter forwarding the ROI to you, and the "Conclusion" paragraph on page 8, indicate that the IC was of the opinion that IG Cobb engaged in an "abuse of authority" as Inspector General by "creating an abusive work environment," and that his actions in two alleged instances created an appearance of a lack of independence outside the quality standards expected of an IG."

Permit me to share with you that I fully appreciate and understand the concerns of the IC, and I recognize that the strict, timely, and comprehensive implementation of the identified course of action is absolutely mandated. Both of the issues called out by the IC in their January 22nd letter to you, the "abusive work environment" and the "appearance of a lack of independence," needed to be, and were, thoughtfully considered in formulating my action plan. That proposed course of action, which I transmitted to you by letter dated March 14, 2007, addresses, I believe, those IC conclusions as well as the other matters contained in the ROI. Specifically, the leadership and management training, the provision of an Executive Coach, and the mandated "progress meetings" with Shana Dale (the Deputy Administrator) will deal with the work environment issues. Likewise, my initial meeting with Mr. Cobb to discuss his review of the record, which will take place at the earliest opportunity, as well as my subsequent meeting with the OIG staff which will occur at the earliest feasible time, will emphasize what I expect in terms of a working environment and the commitment to excellence of the OIG.

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With respect to the "appearance of a lack of impartiality" concern, IG Cobb and I have a professional, arm's-length relationship and I do not believe that additional corrective measures are necessary in that regard. In my meetings with IG Cobb and the OIG staff, I will make clear that I expect and support a strong OIG dedicated to identifying fraud, waste, and abuse, and, that I am committed to leading an Agency where full and frank discussions are not just tolerated but are expected, condoned, and encouraged in a climate without fear of retribution, and one in which the full panoply of protections exists for "whistleblowers."

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Sincerely,

Michael D. Griffin

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#15

Morrell, Paul (HQ-AA000)

From: Griffin, Michael D. (HQ-AA000)
Sent: Thursday, March 29, 2007 1:11 PM
To: Wholley, Michael C. (HQ-MA000); Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Subject: RE: Round "whatever"

Mike, others-

I'm fine with the changes. Let's give them what they want.

I'll be here until 1630. REALLY want to get this out today, so let's try to get it signed by then.

1630 is a hard cutoff. I have dinner scheduled tonight with John Glenn – his request – and I cannot be late, and have some distance to travel to do it.

Mike

From: Wholley, Michael C. (HQ-MA000)
Sent: Thursday, March 29, 2007 1:06 PM
To: Griffin, Michael D. (HQ-AA000); Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Subject: Round "whatever"
Importance: High

<< File: The Honorable Clay Johnson-3-28-07-poetC1.doc >>

Mike/ Shana/ Paul:

I just got off the phone with Clay Johnson who had some suggestions about the wording. It was an interesting discussion.

I have attached the changes I made, but they might be difficult to decipher on a Bberry. Accordingly, they are "summarized" below. The full letter, as modified, is attached.

He had 3 recommendations:

1. "show you care" about the IC's feelings by "beefing up" the first sentence of para 3. Accordingly, I added ", and I recognize that the strict, timely, and comprehensive implementation of the identified course of action is absolutely mandated."

2. He was concerned that we were "holding in abeyance" on talking with Moose and the OIG staff. I explained to him that you don't announce sentence until the trial is over (as it were) but he says that the IC is concerned about "when will this happen." [I refrained from explaining to him that HE, in fact, was the "final disposition authority" and needed to tell the IC that "the investigation is closed." That didn't resonate with his GC even after I pointed out the applicable language in the ExOrd and the IC's own "policies and procedures."]

Accordingly, I added the following modification at the end of paragraph 3:
"Likewise, my initial meeting with Mr. Cobb to discuss my review of the record, which will take place at the earliest opportunity, as well as my subsequent meeting with the OIG staff which will occur at the earliest feasible time, will emphasize what I expect in terms of a working environment and the commitment to excellence of the OIG."

3. He hates the word "prophylactic" (!! LOL) so I substituted "additional corrective measures" for ""any prophylactic measures"

Once you clear this, I will get it over to Johnson and Rosen ASAP.

Question: Will you be here today to sign, Mike, or do it early tomorrow. On a "practical" note, Moose is gone next week so, in light of the seeming "need for speed" that is being expressed, I would strongly recommend that you meet with him

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tomorrow if at all possible and then we can start to work on a time to meet with the oiG staff.

Here to serve,

Mike

[I will refrain from being "overly concerned" with the recurring failure of the IC to follow the Executive Order and their own "Policies and Procedures", and with my surprise that Clay Johnson and his GC don't want to take that issue on with them. When all the smoke clears, I will take those issues up with Jeff Rosen.]

Michael C. Wholley

NASA General Counsel

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Washington, DC 20546

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Michael.C.Wholley@nasa.gov

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#16

Donovan, Catherine (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Thursday, March 29, 2007 2:07 PM
To: jrosen@omb.eop.gov
Subject: Letter
Importance: High

Jeff:

I just FAXed over to you the revised letter. Please get with Mr. Johnson and get back to me as soon as you can this afternoon so I can get it signed out before my boss has to leave at 4. I believe it covers the three points your boss and I discussed.

Much thanks.

Mike

Michael C. Wholley

NASA General Counsel

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Donovan, Catherine (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Thursday, March 29, 2007 2:36 PM
To: Griffin, Michael D. (HQ-AA000); Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Subject: Round "whatever" 2

Importance: High

Mike,

Clay Johnson just got back to me on the letter and stated that in your conversations with him you have indicated that you are pleased overall with the work product of the OIG and with Moose's dedication to his position as IG. He asked that such an affirmative statement be included in the letter.

Here is the "last paragraph" with my proposed language. Any reservations?
If not, I will "go final" and bring it to you for signature.

Mike

"With respect to the "appearance of a lack of impartiality" concern, IG Cobb and I have a professional, arm's-length relationship and I do not believe that additional corrective measures are necessary in that regard. **In the two years that I have observed IG Cobb I have seen a high quality work product from the OIG reflective of a staff and its leadership dedicated to carrying out the mission entrusted by law to the IG. IG Cobb is technically sound, highly conscientious, fully engaged in his work, and he brings rigorous analysis to the OIG work product.** In my meetings with IG Cobb and the OIG staff, I will make clear that I expect and support a strong OIG **which continues to be** dedicated to identifying fraud, waste, and abuse, and that I am committed to leading an Agency where full and frank discussions are not just tolerated but are expected, condoned and encouraged in a climate without fear of retribution, and one in which the full panoply of protections exists for "whistleblowers."

Michael C. Wholley

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MAKING THE REQUEST

Morrell, Paul (HQ-AA000)

From: Griffin, Michael D. (HQ-AA000)
Sent: Friday, March 30, 2007 6:04 AM
To: Wholley, Michael C. (HQ-MA000); Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Subject: RE: Request for Clarification on IC Letter on Robert Cobb Investigation

I think that Clay has taken your points about how the IC has not functioned properly, and is putting them on record as, basically, admitting it.

Mike

From: Wholley, Michael C. (HQ-MA000) [mailto:michael.c.wholley@nasa.gov]
Sent: Thursday, March 29, 2007 9:29 PM
To: [redacted]@nasa.gov; Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000) M. Griffin
Subject: Fw: Request for Clarification on IC Letter on Robert Cobb Investigation

All
This is a VERY interesting letter to the IC IG. Kabuki continues.
Mike

Michael C. Wholley
NASA General Counsel
202 358 2450

Michael C. Wholley
NASA General Counsel
300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

----- Original Message -----
From: Rosen, Jeffrey A. <Jeffrey_A._Rosen@omb.eop.gov>
To: Wholley, Michael C. (HQ-MA000)
Sent: Thu Mar 29 17:43:57 2007
Subject: FW: Request for Clarification on IC Letter on Robert Cobb Investigation

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#17

Morrell, Paul (HQ-AA000)

From: Griffin, Michael D. (HQ-AA000)
Sent: Monday, April 02, 2007 5:46 PM
To: Morrell, Paul (HQ-AA000)
Subject: Re:

No problem. Thanks.

----- Original Message -----
From: Morrell, Paul (HQ-AA000)
To: Griffin, Michael D. (HQ-AA000)
Sent: Mon Apr 02 16:41:02 2007
Subject: RE:

We added the following line:

Griffin added that he found Moose to be "technically sound and fully engaged in his work."

-----Original Message-----
From: Griffin, Michael D. (HQ-AA000)
Sent: Monday, April 02, 2007 5:09 PM
To: Morrell, Paul (HQ-AA000); Dale, Shana (HQ-AB000)
Cc: Mould, David R. (HQ-NA000)
Subject: Re:

Paul-

I'm fine with the TP's and would be happy to do the "add" you suggest.

Mike

----- Original Message -----
From: Morrell, Paul (HQ-AA000)
To: Dale, Shana (HQ-AB000); Griffin, Michael D. (HQ-AA000)
Cc: Mould, David R. (HQ-NA000)
Sent: Mon Apr 02 16:06:38 2007
Subject:

Quick turnaround needed.

Please review talking points for IG story.

Mike, do you want to say something along the lines that you believe Moose is "technically sound and fully engaged in his work?"

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<<IG Talking Points.doc>>

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#18

Wholley, Michael C. (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Tuesday, April 03, 2007 9:59 AM
To: Griffin, Michael D. (HQ-AA000); Dale, Shana (HQ-AB000)
Cc: Morrell, Paul (HQ-AA000)
Subject: Bullet Points

Importance: High

Attachments: BULLET POINTS.doc

Mike/Shana:

Here are some Bullet Points that deal with the "conclusions" of the IC. Paul has seen them. They address the "reasons" that you selected the action you decided on taking.

I hav also prepared a more "in depth" analysis which at this stage is "overkill" to send to you! (-:

BULLET POINTS.doc
(42 KB)

Mike

Michael C. Wholley

NASA General Counsel

300 E Street, SW

Washington, DC 20546

202.358.2450; FAX: 202.358.2741

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BULLET POINTS

- This investigation lasted approximately 8 months, from early 2006 until the end of August 2006 when it was forwarded to the Integrity Committee (IC)
- The IC had the ROI for approximately 5 months when, on January 22nd, they forwarded it, **without any recommendation** on a proposed action (as required by EO 12993, and the IC's own Policies and Procedures), to the Chairman of the PCIE (Clay Johnson)
- Mr. Johnson forwarded it to (me, Mike Griffin) (NASA) on February 15th to "consider the appropriate action to take in response to the report's conclusions."
- The ROI that was forwarded to (me) (NASA) consisted of a "summary" of the evidence (or lack thereof) regarding each allegation.
- The IC in its forwarding letter, indicated in its "conclusions" that it was *their* opinion that:
    - Mr. Cobb had "abused his authority as an Inspector General by creating an abusive work environment" in connection with one of the allegations.
        1. The IC is incorrect in a "legal" sense because the "abuse of authority" referred to must, in my opinion and as seems clear from the IC's own definitions in their Policies and Procedures, relate to his "power" in his role as an IG, not to an alleged "failure" in his capacity as a manager or supervisor. An example would be if he were to initiate a criminal/administrative IG investigation on someone just because he "felt like it" or he "didn't like the person." In other words, I believe this contemplates an "abuse of authority" under the color of office AS AN IG. That is NOT the case here; we are dealing with a management/supervisor issue.
        2. If there is an allegation of a "hostile work environment," that is an issue that should/must be referred to the Executive Agency that has jurisdiction over such an issue which, in this instance it could have/should have been referred back to NASA as a management/EEO issue or, in the alternative, to OSC. [**Note**: The IC is well aware of this "jurisdictional" issue since they state in their January 22nd letter to the Chair of the PCIE, referring to "allegations" that they did not investigate, i.e. "Other Matters": "It is important to note that within this category there were some allegations involving whistleblower retaliation which is an area outside the purview of the IC. The whistleblower retaliation allegations were referred to the Office of Special Counsel, the agency with the appropriate authority to conduct such matters." Additionally, the Executive Order (EO 12993), which is the source of the entire process, states in Section 2.c. "The Integrity Committee shall determine if there is a substantial likelihood that the allegation .... discloses a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds or abuse of authority, and *shall refer the allegation to the agency of the executive branch with appropriate jurisdiction over the matter*."

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(Emphasis added.) When the word "shall" is used, it means that compliance is mandatory. It goes on to state that the IC can initiate an investigation **only** in those instances where the allegation cannot be referred to "an agency of the executive branch with appropriate jurisdiction over the matter."

The "complainant" was the "acting" Deputy IG for Investigations. She had applied for the position (Deputy IG for Investigations) but was not selected. Interesting that her complaint about how terrible it was to work for Mr. Cobb did not arise until her "non-selection" for the position which would have required an even closer working relationship with Mr. Cobb.

Mr. Cobb had created an appearance of a lack of independence .... when he did not report the theft of NASA ITAR files and *prevented* the dissemination of a Crime Stoppers Report." [Emphasis added.]

1. This allegation had been previously looked at by the IC and had been closed by them with no adverse finding. In spite of the regulation that states in such cases a "closure" is considered a "final disposition" of the matter, they re-opened it and found the "appearance" issue.
2. The hacking of the computers at MSFC and the compromise of ITAR data in some of the hacked files was reported in the press and was under active criminal investigation.
3. The IG had referred to this matter in his June 2003 report to the Hill. (So much for trying to "hide" it.)
4. It was an issue that fell under the Security people at NASA and under John Hall in OER. Hall states that he had in fact talked with the Department of State early on about the issue. Likewise, in 2006, he (Hall) had discussed it with Commerce. The NASA IG was NOT "on the hook" to report it to State, but had reported it to the Hill.
5. With respect to the "prevention" of the issuance of a Crime Stoppers Report, the short answer is that **NOTHING** Mr. Cobb did "prevented" the Texas Rangers from issuing such a report if they so chose. We don't control the Texas Rangers; they could have issued it on their own but apparently chose not to do so.

    - Cobb believed that the "EVIDENCE" did NOT support that a ring had been "stolen" from Laurel Clark's remains during the recovery of the Columbia disaster
    - He disagreed with the conclusion of the NASA IG investigator and the Texas Ranger that there had been a ring on the finger of the remains. Cobb sent the pictures to the FBI photo lab for analysis. He made the decision that NASA would not join in the proposed "Crime Stopper Release." That decision was "reasonable" under all of the

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facts and circumstances. (*For what it's worth, I have looked at the pictures and I agree with Cobb. MCW*)

6. With respect to these two "appearance" issues, the *Quality Standards for Federal Offices of Inspector General* promulgated by the PCIE and ECIE and referred to by the IC in its January 22, 2007, letter forwarding the ROI state in **Section II C. Independence**: "The Inspector General and OIG staff should avoid situations that *could lead reasonable third parties with knowledge of the relevant facts and circumstances* to conclude that the OIG is not able to maintain independence in conducting its work." [Emphasis added.]

   This "reasonable person with knowledge of all the surrounding facts and circumstances" test is a fairly well known standard. It is meant to ensure that "appearance" issues aren't determined by the "eggshell plaintiff." Rather, an objective test is set out. In these two instances (JTAR & ring), I believe that an informed and "reasonable" person would NOT conclude that there was any appearance of a lack of independence or a lack of impartiality.

Finally, and as so well stated in Mr. Johnson's letter of March 29th to the IC, the ROI forwarded to NASA does NOT contain any conclusions "that Mr. Cobb had broken any laws or acted illegally. Instead, the conclusions of the Integrity Committee related to management and appearance concerns." That's what your actions deal with.

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#18B

Donovan, Catherine (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Wednesday, April 04, 2007 5:04 PM
To: jrosen@omb.eop.gov
Subject: Hearings ??

Jeff,

As this entire issue continues to pick up to "escape velocity" (if not already there) and we see the selective release of "documents" on a daily basis from Senator Nelson's office (and others on the House subcommittee on I&O), I cannot but wonder where the adult leadership is located for these staffers.

Without putting too fine a point on it, I truly believe that they have now consumed so much of the kool aid that they are intoxicated. There is an analogy about trying to make "chicken salad" out of "chicken something-or-other" that seems increasingly germane.

That said, the reason for this email is to arrange a meeting between the two of us, and anyone else you care to bring from your staff who has been involved in "vetting" this investigation, BEFORE there is any "hearing" so that we can soberly consider the approach to be taken. As I have indicated to you in the past, I have some quite serious concerns about both the substantive and the procedural parts of the "investigation" and the forensic rigor that the IC brought (and/or failed to bring) to their evaluation of what was put up from others by the HUD OIG report.

I am sure that you can appreciate that I am not particularly keen on seeing two entities of the Executive Branch at odds in a hearing before the Legislative Branch. Let me know your availability this week and next if you are interested in meeting.

Here to serve,

Mike

Michael C. Wholley

NASA General Counsel

300 E Street, SW

Washington, DC 20546

202.358.2450; FAX: 202.358.2741

Michael.C.Wholley@nasa.gov

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#19

Fri, May 4, 2007 4:52 PM

Subject: FW: letter to Griffin
Date: Thursday, April 19, 2007 8:59 AM
From: Sefton, Keith Thomas (HQ-MA000) <Keith.T.Sefton@nasa.gov>
To: "Falcon, R Andrew (HQ-MB000)" <r.a.falcon-1@nasa.gov>, "Feinberg, Shari R. (HQ-MB000)" <shari.r.feinberg@nasa.gov>
Cc: "Sherman, Richard W. (HQ-MA000)" <richard.w.sherman@nasa.gov>
Conversation: Letter to Griffin

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To: Morrell, Paul (HQ-AA000); Wholley, Michael C. (HQ-MA000)
Sent: Wed Apr 18 13:22:43 2007
Subject: FW: letter to Griffin

Letter from HST&C I&O subcommittee requesting copies of the tapes made at Mike's 4/10/07 all hands to OIG staff....

Brian

==========

BRIAN E. CHASE
Assistant Administrator
Office of Legislative and Intergovernmental Affairs
(202) 358-1948

From: Pearson, Dan [mailto:Dan.Pearson@mail.house.gov]
Sent: Wednesday, April 18, 2007 2:20 PM
To: Chase, Brian E. (HQ-NC000)
Subject: letter to Griffin

Gone up by NASA messenger. As I said, no release on this thing.

Dan

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April 18, 2007

Dr. Michael Griffin
Administrator
National Aeronautics and Space Administration
300 E St., N.W.
Washington, D.C. 20007

Dear Administrator Griffin:

I have been informed that on or about April 10, 2007, you addressed the employees of NASA's Office of Inspector General (OIG). The purpose of this meeting was to discuss the implementation of the management actions you had proposed in response to a report by the President's Council on Integrity and Efficiency (PCIE) concerning misconduct allegations against Robert Cobb, NASA's inspector general.

It is our understanding that your presentation and the follow-up questions and answers were videotaped so that they would be available for viewing by OIG staff at headquarters and at NASA Centers who might not have been able to attend the original event. However, we have also been told that, after the videotapes were delivered to the Centers for viewing, someone at headquarters ordered that they be returned and/or destroyed.

As you know, the Committee, pursuant to its authority under Rules X and XI of the United States House of Representatives has been reviewing the PCIE report concerning Inspector General Cobb and the follow-up actions being undertaken. It is imperative that no agency records, as defined in the attached Appendix, related to the Committee's investigation be destroyed. I also must remind you that under 18 U.S.C. 1505, it is a criminal offense to obstruct Congressional investigation.

Therefore, by this letter, I am requesting that you provide to the Committee a copy of the videotape of the April 10 presentation, and any other records related to the videotape described above to the Committee offices in B-374 Rayburn House Office Building by Friday, April 20, 2007.

#20

Wholley, Michael C. (HQ-MA000)

From: Sefton, Keith Thomas (HQ-MA000)
Sent: Thursday, April 19, 2007 9:00 AM
To: Falcon, R Andrew (HQ-MB000); Feinberg, Shari R. (HQ-MB000)
Cc: Sherman, Richard W. (HQ-MA000)
Subject: FW: letter to Griffin

Importance: High

Attachments: 4-18-07 Miller to Griffin re video.pdf

4-18-07 Miller to Griffin re v...

Here's the [illegible]
Please DO NOT FORWARD.

As for my arguments, I was compelled to think through, albeit quickly, the application of the FRA and looked to the basics of the definition of "record." I see an argument there, even if it's not a normal one, the management did not want to create a record, saw no need for that information to be retained as a part of the Agency's business, etc.

Also interested in any other "ammo" for the second point -- i.e. what do we counter the subcommittee with.

I fully understand that you want a fully-baked legal answer, and that what I have provided is half-baked.

The problem is that while it's in the oven the inquisitors and others will be carping at MDG/SD and PM -- they don't have the luxury of saying we are "working on the perfect answer." This is, indeed, the time of the "80% solution" refined in the ensuing period. While I take your point that it would be nice to go down the road with the pot of gold at the end, we are at the fork in the road, and in the immortal words of Yogi -- we have to take it.

So move with the ball here, and try to support the basic premise that the material was, first, not a 'record' that needed preserved, and secondly, that the destruction was not "unlawful" and thus reportable, since the management officials (CoS) made the call "as an appropriate designee" to take the action. Let's see where that takes us -- UNLESS YOU ARE PREPARED TO SAY THAT, CATEGORICALLY, SUCH AN ARGUMENT IS LEGALLY FATALLY FLAWED.

If you DO conclude that this is the case, Paul needs to know that ASAP. If not, build the case on the facts we have and the law cited -- filling in any OIG and/or NPD/NPR requirements, etc. along the way. I did not have time to do it here -- so please follow that up. Put all necessary assets on this mission. Follow the tracks, put out all the trackers you need to get the job done.

Keith

-----Original Message-----
From: Morrell, Paul (HQ-AA000)
Sent: Wednesday, April 18, 2007 9:59 PM
To: Sefton, Keith Thomas (HQ-MA000)
Subject: Fw: letter to Griffin

----- Original Message -----
From: Chase, Brian E. (HQ-NC000)
To: Morrell, Paul (HQ-AA000); Wholley, Michael C. (HQ-MA000)
Sent: Wed Apr 18 13:22:43 2007

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Subject: FW: letter to Griffin

Letter from HST&C I&O subcommittee requesting copies of the tapes made at Mike's 4/10/07 all-hands to OIG staff....

Brian

==========

BRIAN E. CHASE
Assistant Administrator
Office of Legislative and Intergovernmental Affairs
(202) 358-1948

From: Pearson, Dan [mailto:dan.pearson@mail.house.gov]
Sent: Wednesday, April 18, 2007 2:00 PM
To: Chase, Brian E. (HQ-MC00)
Subject: letter to Griffin

Gone up by NASA messenger. As said, no release on this thing.

Dan

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#21 Mon, May 7, 2007 10:30 AM

Subject: Response to Congressman Miller
Date: Thursday, April 19, 2007 6:15 PM
From: Andrew Falcon <r.a.falcon-1@nasa.gov>
To: Paul Morrell <Paul.Morrell@nasa.gov>, Michael Wholley <michael.c.wholley@nasa.gov>, Keith Sefton <Keith.T.Sefton@nasa.gov>, "Sherman, Richard W. (HQ-MA000)" <Richard.W.Sherman@nasa.gov>
Conversation: Response to Congressman Miller

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All:

Attached please find a draft response. It is too long, but I am not sure what, in good faith, can be omitted. Some questions to be answered:

1) Who signs?
2) The request also seeks related documents.
    a) At a minimum, that would include my email directing that records be preserved.
    b) Paul: Sherm tells me that you may have prepared talking points for Mike G. to use during the meeting--are those available?
    c) There are also several internal emails within OGC from the last 24 hours that are probably related (including this one).
    d) Any other documents (meeting notes, emails, etc.)?
3) Are the facts correct? This is my understanding of it at this point, but I could be wrong.

I look forward to receiving your comments.

Andrew

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#22

Wholley, Michael C. (HQ-MA000)

From: Feinberg, Shari R. (HQ-MB000)
Sent: Monday, April 23, 2007 12:01 PM
To: Wholley, Michael C. (HQ-MA000)
Cc: Sefton, Keith Thomas (HQ-MA000); Falcon, R Andrew (HQ-MB000)
Subject: Records memo

Attachments: Records memo2.doc

Records memo2.doc (52 KB)

Per your request. If you would like to discuss or have any questions, please let me know.

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Issue 1: Can a videotape of a dialogue between an Agency head and certain employees that was intended solely as a frank and informal discussion between a manager and OIG employees, and that was never intended to either be recorded, was not required to be recorded or required to be made into a permanent record under the Federal Records Act (44 U.S.C. § 3101 et seq), and was mistakenly recorded, be destroyed without violating the Federal Records Disposal Act (44 U.S.C. § 3301 et seq.)?

Answer: Yes, since the videotape, made without authority, and contrary to direction by Agency management officials, was not a "record" as defined by 44 U.S.C. § 3101 [1] made "*under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.*"

The videotape did not constitute an official Government record pursuant to the Federal Records Act1 and the National Archives and Records Administration's implementing regulations. Documentary materials are records when they meet both of the following conditions: (1) They are made or received by an agency of the U.S. Government under Federal law or in connection with the transaction of agency business; and (2) they are preserved or are appropriate for preservation as evidence of the agency's organization, functions, and activities or because of the value of the information in them.2

Although the video could be construed as a documentary material pursuant to 36 CFR § 1222.12(b) (1), it is not a "record" within the meaning of the Act. With respect to the first condition, the videotape was not "made" by Agency personnel in the course of their official duties. In contrast, the contractor was specifically instructed by the Chief of Staff not to videotape the informal discussion. A subsequent individual, acting without authority, instructed the contractor to go forward and videotape the meeting.

The videotape was also not required to be preserved and was not appropriate for preservation and fails to meet the second prong of the Act. In order to be appropriate for

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1 Federal Records Act, 44 U.S.C. § 3101 et seq.

2 36 CFR § 1222.32(b).

preservation the documentary materials made or received which in the judgment of the agency should be filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain.3 The Agency, within its discretion, determined that this videotape was not appropriate for retention since it contained the recording of an informal, off-the-record meeting with the Administrator. The meeting was designed to foster an informal flow of information with the OIG employees and the Administrator.

The Agency was not required by law or policy to document this meeting. In contrast, the Agency Chief of Staff decided appropriately that the purpose of not recording this meeting was to encourage the frank and informal discussion of communication between the Administrator and OIG employees.

NARA and NASA through its NPR 1441.1D NASA Records Retention Schedule requires that the Agency shall create and maintain records of the transaction of agency business that are sufficient to a) Document the persons, places, things or matters dealt with by the agency; b) facilitate action by agency officials and their successors in office; c) make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government; d) protect the financial, legal, and other rights of the Government and persons directly affected by the Government's actions; e) document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally; and f) document important board, committee, or staff meetings.4

In conclusion, the Agency was not required to record the informal meeting with the Administrator and it does not meet any of the above requirements. Moreover, the videotape does not meet either prong of the definition of a Federal record. Nonrecord materials should be destroyed when no longer needed for reference. NARA's approval is not required to destroy such materials.5

Other Arguments6

Issue 2: The videotape meets the statutory definition of a "non-record" and may be destroyed.

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3 36 CFR 1222.12(b)(6).

4 36 CFR §1228.42(a).

5 Disposition of Federal Records: A Records Management Handbook (2000 web edition published by NARA)

6 These other arguments are presented here as alternatives. However, argument 1 is the strongest argument.

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Non-record materials are U.S. Government-owned documentary materials that are excluded from the legal definition of records (44 U.S.C. § 3301), either by failing to meet the general conditions of record status previously described or by falling under one of three specific categories: 1) Extra copies of documents preserved only for convenience of reference; 2) Stocks of publications and of processed documents; 3) Library and museum material made or acquired and preserved solely for reference or exhibition purposes. These include information copies of correspondence, directives, forms, and other documents on which no administrative action is recorded or taken. Nonrecord materials may be removed from Government agencies only with the approval of the head of the agency or the individual authorized to act for the agency on matters pertaining to agency records.7

As discussed in issue number 1, the videotape did not meet the statutory definition of record. In addition, it might meet one of the statutory exclusions inasmuch as no administrative action was taken during the meeting. Nonrecord materials should be destroyed when no longer needed for reference. NARA's approval is not required to destroy such materials.8

Issue 3: The videotape can be construed as "personal."

Personal papers are documentary materials, or other reasonably segregable portion thereof of a private or nonpublic character that do not relate to, or have an effect upon, the conduct of agency business. Personal papers are excluded from the definition of Federal records and are not owned by the Government.9

In determining that the videotape was not an agency record, such determination must be made upon consideration of the "totality of the circumstances surrounding" the creation of the record. In *Bureau of National Affairs, Inc. v. Department of Justice10,* the District of Columbia Circuit set forth the standard for agencies to assess whether a record is a personal record or an agency record. The test focuses on a variety of factors surrounding the creation, possession, control and use of the document by an agency.11 I will look at each factor in turn.

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7 36 CFR §§ 1222.34(f), 1222.42.

8 Disposition of Federal Records: A Records Management Handbook (2000 web edition published by NARA)

9 36 CFR §1222.36.

10 742 F.2d 1484 (D.C. Cir. 1984).

11 There is no provision contained in either the Federal Records Act, 44 U.S.C. § 3101 et seq. or the Records Disposal Act, 44 U.S.C. § 3301 et seq, that provides either an express

1) Creation: Was the document created by an agency employee on agency time, with agency materials, at agency expense? Yes, the document was erroneously created by an Agency employee, with agency materials, and at agency expense.

2) Content – Does the document contain "substantive" information? Does it contain personal as well as official business information? Yes, the document contains "substantive" information.

3) Purpose – Was the document created solely for an individual employee's personal convenience? Alternatively, to what extent was it created to facilitate agency business? No, it was erroneously created. Instead, its creation hindered agency business.

4) Distribution – Was the document distributed to anyone else for any reason, such as for a business purpose? How wide was the circulation? No, the videotape was not widely circulated.

5) Use – to what extent did the document's author actually use it to conduct agency business? Did others use it? The videotape was not used to conduct agency business and others did not use.

6) Maintenance – was the document kept in the author's possession or was it placed in an official agency file? No; it was not placed in an official agency file.

7) Disposition – Was the document's author free to dispose of it as his personal discretion? What was the actual disposal practice? Ordinarily, meetings of this kind are not videotaped.

8) Control – Has the agency attempted to exercise "institutional control" over the document through applicable maintenance or disposition regulations? Did it do so by requiring the document to be created in the first place? No, the Agency did not intend to create the document in the first place. Instead, it was created at the direction of an errant employee.

9) Segregation – Is there any practical way to segregate out personal information in the document from official business information? N/A

10) Revision – Was the document revised or updated after the fact for record-keeping purposes? No

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or implied private right of action. Thus, private individuals have no legal right to file a lawsuit under either of these statutes. Since the Freedom of Information Act, 5 U.S.C. §552 utilizes the statutory definition for record under the Federal Records Act, many of the FOIA cases can be analogized here.

In sum, determinations as to whether particular documents can properly be regarded as "personal records" must necessarily be made on a case-by-case basis, according to a careful weighing of all relevant considerations. Where an agency determines that its employee's creation of a document cannot "be attributed to the agency, it can properly refuse to treat the document as an "agency record" responsive to a FOIA request.12 Materials assume record status when the agency asserts control by requiring their creation or retention. The FOIA requires that an Agency disclose those "documents which the law requires for the agency to prepare or which the agency has decided for its own reasons to create."13

In the instant case, the Agency did not assert control by requiring its creation or retention.

Issue 4: Assuming it fit the statutory definition of "record" it was only a "temporary record and can be destroyed.

Assuming it was a record, it was merely a temporary record. A temporary record is one which has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by NARA. Agencies must secure NARA approval of a records schedule or apply the appropriate General Records Schedule item before destroying any temporary records or transferring permanent records to the NARA.14 NASA's Records Retention Schedule NASA Procedural Requirement (NPR) 1441.1D, Section 12. (b)(2) refers to NASAs's process for disposition of temporary records.

Pursuant to NASA's Record Retention Schedule, records of top management officials, including the Office of the Administrator, that contain substantive information may not be construed as temporary.15 With respect to nonsubstantive information, routine material containing no substantive information may be destroyed. However, routine material regarding the daily activities of the Office of the Administrator may not be construed as temporary and may not be destroyed. Consequently, this argument is not a viable one.

Conclusion

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12 *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

13 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975).

14 36 CFR § 1220.38

15 NASA Records Retention Schedule 22 (a)15 categorizes "records of official meetings" as permanent records that may not be destroyed.

DRAFT
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In conclusion, the Agency may argue that the videotape did not meet the definition of a "Federal record" as it was erroneously created. There was no legal requirement that any record be created and it was within the discretion of the Agency to destroy the non-record.

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DRAFT

#23

Wholley, Michael C. (HQ-MA000)

From: Feinberg, Shari R. (HQ-MB000)
Sent: Wednesday, April 25, 2007 1:28 PM
To: Wholley, Michael C. (HQ-MA000)
Cc: Sefton, Keith Thomas (HQ-MA000); Falcon, R Andrew (HQ-MB000)
Subject: Revised Records Memo for your review!

Attachments: Records memo3.doc

Records memo3.doc (55 KB)

ATTORNEY-WORK PRODUCT

Mike,

I have revised the memo that I initially sent to you on Monday adding more facts and making it more persuasive.

This is my conclusion:

In conclusion, the Agency has the discretion to determine what types of meetings are appropriate to document. There was no law or policy that required that this meeting be recorded. Rather, the Chief of Staff determined prior to the meeting that it was not appropriate for recording. An unauthorized recording does not meet either the statutory or regulatory requirements of a Federal record that must be created and retained. It was appropriate for the Agency to determine that this nonrecord material need not be retained.

If you have any questions or would like to discuss it further, please let me know. If it is okay with you, I would like to provide a copy to Cathy.

Shari

Shari R. Feinberg
Senior Attorney
Office of the General Counsel
NASA Headquarters
300 E Street, SW, Suite 9Z27
Washington, DC 20546
Desk: 202.358.2069
Fax: 202.358.4355

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Revised 4/25/07

Attorney-Work Product

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Issue 1: Can a videotape of a dialogue between an Agency head and certain employees that was intended solely as a frank and informal discussion between a manager and OIG employees, and that was never intended to either be recorded, was not required to be recorded or required to be made into a permanent record under the Federal Records Act (44 U.S.C. § 3101 et seq), and was mistakenly recorded, be destroyed without violating the Federal Records Disposal Act (44 U.S.C. § 3301 et seq.)?

Answer: Yes, since the videotape, made without authority, and contrary to direction by Agency management officials, was not a "record" as defined by 44 U.S.C. § 3101 **[1]** made "*under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.*"

On April 10, 2007, Administrator Griffin held a closed meeting for the staff of the NASA Office of Inspector General (OIG). The Administrator's purpose was to inform the OIG staff that he had personally reviewed a report of investigation concerning NASA Inspector General Robert Cobb and to discuss with the OIG employees what action he was going to take to address the reports findings, to listen to any concerns of the assembled OIG staff, and to express his support for a strong and effective NASA Inspector General Program.

To ensure that the nearly 200 Agency OIG personnel at all NASA Centers nationwide were included, and to ensure the desired privacy for the meeting, it was conducted using NASA's secured video teleconference (VTC) facilities. Despite a directive by the NASA Chief of Staff **prior** to the meeting that the event should not be recorded, some locations, including headquarters, nonetheless recorded the event. The Chief of Staff's direction was given in order to encourage free and open dialogue and questions to the Administrator. Despite the Chief of Staff's mandate **prior** to the meeting that it not be recorded, it was recorded erroneously.

The videotape was an unauthorized recording and should not be retained. There is no case law to support the contention that an unauthorized recording constitutes a Federal record which is required by law to be retained. The Agency's decision not to retain this unauthorized videotape recording is consistent with the National Archives and Records

Administration's (NARA) policy that nonrecord materials, such as the instant videotape recording, should be destroyed when no longer needed for reference. Moreover, NARA's approval is not required to destroy such materials.1

The unauthorized videotape recording did not constitute an official Government record pursuant to the Federal Records Act2 and NARA's implementing regulations. Documentary materials are records when they meet **both** of the following conditions: (1) They are made or received by an agency of the U.S. Government under Federal law or in connection with the transaction of agency business; and (2) they are preserved or are appropriate for preservation as evidence of the agency's organization, functions, and activities or because of the value of the information in them.3

Although the video could be construed as a documentary material pursuant to 36 CFR § 1222.12(b) (1), it is not a "record" within the meaning of the Act. With respect to the first condition, the videotape was not "made" by Agency personnel in the course of their official duties. In contrast, the contractor was specifically instructed by the Chief of Staff **prior** to the meeting not to videotape the informal discussion. A subsequent individual, acting without authority, instructed the contractor to go forward and videotape the meeting.

The unauthorized videotape was also not required to be preserved and was not appropriate for preservation and fails to meet the second prong of the Act. In order to be appropriate for preservation the documentary materials made or received which in the **judgment of the agency** should be filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain.4 The Agency, within its discretion, determined **prior** to the meeting that it would not be appropriate to record the closed meeting since it would inhibit the free and open dialogue with the Administrator. The Administrator had already made his final decision prior to the April 10, 2007, meeting with the OIG employees. The April 10, 2007, meeting was an opportunity for the Administrator to share his decision with the OIG employees and for them to freely ask questions without fear they were being recorded. No policy decisions were made at the 4/10/07 meeting. The Agency was also not required by law or policy to document this meeting.

NARA and NASA through its NPR 1441.1D NASA Records Retention Schedule requires that the Agency shall create and maintain records of the transaction of agency business

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1 Disposition of Federal Records: A Records Management Handbook (2000 web edition published by NARA)

2 Federal Records Act, 44 U.S.C. § 3101 et seq.

3 36 CFR § 1222.32(b).

4 36 CFR 1222.12(b)(6).

that are sufficient to a) Document the persons, places, things or matters dealt with by the agency; b) facilitate action by agency officials and their successors in office; c) make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government; d) protect the financial, legal, and other rights of the Government and persons directly affected by the Government's actions; e) document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally; and f) document important board, committee, or staff meetings.5 Based on the facts in this case, the Agency was not required to create and/or retain the videotape recording pursuant to either NARA's regulations or the Agency's own policy. It is also important to distinguish this case from one in which an agency decides after the fact not to retain the record in violation of the Federal Records Act. In this case, the decision not to record the meeting was made by the Chief of Staff prior to its unauthorized recording.

In conclusion, the Agency has the discretion to determine what types of meetings are appropriate to document. There was no law or policy that required that this meeting be recorded. Rather, the Chief of Staff determined prior to the meeting that it was not appropriate for recording. An unauthorized recording does not meet either the statutory or regulatory requirements of a Federal record that must be created and retained. It was appropriate for the Agency to determine that this nonrecord material need not be retained.

Other Arguments6

Issue 2: The videotape meets the statutory definition of a "non-record" and may be destroyed.

Non-record materials are U.S. Government owned documentary materials that are excluded from the legal definition of records (44 U.S.C. §3301), either by failing to meet the general conditions of record status previously described or by falling under one of three specific categories: 1) Extra copies of documents preserved only for convenience of reference; 2) Stocks of publications and of processed documents; 3) Library and museum material made or acquired and preserved solely for reference or exhibition purposes. These include information copies of correspondence, directives, forms, and other documents on which no administrative action is recorded or taken. Nonrecord materials may be removed from Government agencies only with the approval of the head of the agency or the individual authorized to act for the agency on matters pertaining to agency records.7

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5 36 CFR §1228.42(a).

6 These other arguments are presented here as alternatives. However, argument 1 is the strongest argument.

7 36 CFR §§ 1222.34(f), 1222.42.

As discussed in issue number 1, the videotape did not meet the statutory definition of record. In addition, it might meet one of the statutory exclusions inasmuch as no administrative action was taken during the meeting. Nonrecord materials should be destroyed when no longer needed for reference. NARA's approval is not required to destroy such materials.8

Issue 3: The videotape can be construed as "personal."

Personal papers are documentary materials, or other reasonably segregable portion thereof of a private or nonpublic character that do not relate to, or have an effect upon, the conduct of agency business. Personal papers are excluded from the definition of Federal records and are not owned by the Government.9

In determining that the videotape was not an Agency record, such determination must be made upon consideration of the "totality of the circumstances surrounding" the creation of the record. In *Bureau of National Affairs, Inc. v. Department of Justice*10, the District of Columbia Circuit set forth the standard for agencies to assess whether a record is a personal record or an agency record. The test focuses on a variety of factors surrounding the creation, possession, control and use of the document by an agency.11 I will look at each factor in turn.

1) Creation: Was the document created by an agency employee on agency time, with agency materials, at agency expense? Yes, the document was erroneously created by an Agency employee, with agency materials, and at agency expense.

2) Content – Does the document contain "substantive" information? Does it contain personal as well as official business information? Yes, the document contains "substantive" information.

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8 Disposition of Federal Records: A Records Management Handbook (2000 web edition published by NARA)

9 36 CFR §1222.36.

10 742 F.2d 1484 (D.C. Cir. 1984).

11 There is no provision contained in either the Federal Records Act, 44 U.S.C. § 3101 et seq. or the Records Disposal Act, 44 U.S.C. § 3301 et seq, that provides either an express or implied private right of action. Thus, private individuals have no legal right to file a lawsuit under either of these statutes. Since the Freedom of Information Act, 5 U.S.C. §552 utilizes the statutory definition for record under the Federal Records Act, many of the FOIA cases can be analogized here.

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3) Purpose – Was the document created solely for an individual employee's personal convenience? Alternatively, to what extent was it created to facilitate agency business? No, it was erroneously created. Instead, its creation hindered agency business.

4) Distribution – Was the document distributed to anyone else for any reason, such as for a business purpose? How wide was the circulation? No, the videotape was not widely circulated.

5) Use – to what extent did the document's author actually use it to conduct agency business? Did others use it? The videotape was not used to conduct agency business and others did not use.

6) Maintenance – was the document kept in the author's possession or was it placed in an official agency file? No, it was not placed in an official agency file.

7) Disposition – Was the document's author free to dispose of it as his personal discretion? What was the actual disposal practice? Ordinarily, meetings of this kind are not videotaped.

8) Control – Has the agency attempted to exercise "institutional control" over the document through applicable maintenance or disposition regulations? Did it do so by requiring the document to be created in the first place? No, the Agency did not intend to create the document in the first place. Instead, it was created at the direction of an errant employee.

9) Segregation – Is there any practical way to segregate out personal information in the document from official business information? N/A

10) Revision – Was the document revised or updated after the fact for record-keeping purposes? No

In sum, determinations as to whether particular documents can properly be regarded as "personal records" must necessarily be made on a case-by-case basis, according to a careful weighing of all relevant considerations. Where an agency determines that its employee's creation of a document cannot "be attributed to the agency," it can properly refuse to treat the document as an "agency record" responsive to a FOIA request.12 Materials assume record status when the agency asserts control by requiring their creation or retention. The FOIA requires that an Agency disclose those "documents which the law requires for the agency to prepare or which the agency has decided for its own reasons to create."13

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12 *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

13 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975).

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In the instant case, the Agency did not assert control by requiring its creation or retention.

Issue 4: Assuming it met the statutory definition of "record" it was only a "temporary record and can be destroyed.

Assuming it was a record, it was merely a temporary record. A temporary record is one which has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by NARA. Agencies must secure NARA approval of a records schedule or apply the appropriate General Records Schedule item before destroying any temporary records or transferring permanent records to the NARA.14 NASA's Records Retention Schedule NASA Procedural Requirement (NPR) 1441.1D, Section 1.2, (b)(2) refers to NASAs's process for disposition of temporary records.

Pursuant to NASA's Record Retention Schedule, records of top management officials, including the Office of the Administrator, that contain substantive information may not be construed as temporary.15 With respect to nonsubstantive information, routine material containing no substantive information may be destroyed. However, routine material regarding the daily activities of the Office of the Administrator may not be construed as temporary and may not be destroyed. Consequently, this argument is not a viable one.

Conclusion

In conclusion, the videotape did not meet the definition of a "Federal record" as it was erroneously created. There was no legal requirement that any record be created and it was within the discretion of the Agency to destroy the non-record.

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14 36 CFR § 1220.38

15 NASA Records Retention Schedule 22 (a)15 categorizes "records of official meetings" as permanent records that may not be destroyed.

#24

Fri, May 4, 2007 5:14 PM

Subject: <no subject>
Date: Friday, April 27, 2007 4:03 PM
From: Morrell, Paul (HQ-AA000) <Paul.Morrell@nasa.gov>
To: "Falcon, R Andrew (HQ-MB000)" <r.a.falcon-1@nasa.gov>

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Final

Letter/Paragraph One:

"copies of the videotapes of your meeting…were destroyed, apparently at the direction of Paul Morrell, your chief of staff, and Michael Wholley, NASA's general counsel."

Response:

- The chief of staff collected copies that were made at headquarters and, at the suggestion of the general counsel, turned the recordings over to the general counsel. He did not direct anyone to destroy any recordings.
- The general counsel, believing the recordings had been made contrary to the direction of the chief of staff and were not agency records, made the decision to destroy them.

Letter/Paragraph Two:

"According to information received by Committee staff, you planned this meeting to inform the OIG staff of the actions you were taking to discipline Robert Cobb, NASA's inspector general, in response to a report from the President's Council on Integrity and Efficiency concerning allegations of misconduct by Mr. Cobb."

Response:

- The purpose of the meeting was spelled out in the administrator's March 14 letter to Clay Johnson. The administrator wrote, "I will schedule a meeting with the employees of the NASA Office of Inspector General to inform them that I had reviewed the ROI and I have taken the actions that I believe are necessary to address the ROI's findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff and to express my support for a strong and effective Office of Inspector General."
- This purpose was reiterated on April 23 in paragraph two of the letter to Chairman Miller.
- The administrator does not have the authority to discipline the IG. (See his March 14 letter to Clay Johnson in which he requested concurrence from the chairman of the PCIE for his proposed actions.)

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Letter/Paragraph Three:

"…you apparently used the meeting – at which Mr. Cobb was present and appeared beside you – to disagree with the PCIE report's findings and to state that, in your opinion, Mr. Cobb had not abused his authority and had done nothing wrong."

Response:

- The Integrity Committee did not find any violation of law, rule or regulation, or gross mismanagement, or gross waste of funds.
- At no time during the meeting did the administrator express disagreement with the IC's findings.
- When addressing the IG staff, the administrator said the Report of Investigation and the Integrity Committee conclusions pointed to no violation of law or regulation, evidence of lack of integrity or actual conflict of interest.
- Griffin said the IC report raised concerns in his mind about management and supervisory issues relating to Cobb and that was the basis of his proposed actions to the chairman of the PCIE.
- Because the conclusions pointed to no violation of law or regulation, lack of integrity or actual conflict of interest, Griffin's recommended actions do not include removal from office.
- When the administrator addressed the IG staff, the IG was in the audience seated with his senior staff. He did not stand next to the administrator.

Letter/Paragraph Four:

"We have been informed that it is a standard practice when the OIG staff are called to an "all hands" presentation, as they were by a memorandum from Thomas J. Howard, the deputy inspector general, to tape the presentation so that staff not able to make the original meeting can later view the proceedings. Copies of the videocast were made by the video services at the Centers and perhaps at Headquarters as well. Subsequent to the meeting, it appears that directions went out from your Chief of Staff, apparently in consultation with your General Counsel, that all copies of the tape should be returned to NASA video services and/or headquarters for destruction."

Response:

- The meeting was the administrator's meeting. He said he would hold this meeting in his March 14 letter to Clay Johnson.

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#25

Donovan, Catherine (HQ-MA000)

From: Moore, Sheva (HQ-NB050)
Sent: Friday, April 27, 2007 12:15 PM
To: Sefton, Keith Thomas (HQ-MA000)
Subject: NASA TV/ Video

Attachments: sefton.doc

sefton.doc

Mr. Sefton,
I'm following through concerning our discussion. Enclosed is a letter to support your investigation.

__ Sheva Moore, NASA TV

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April 27, 2007

Dear Mr. Sellon:

On Tuesday, April 10, 2007 a request was made to Karl Bennett from Fred Brown to make 5 copies of a DVD that was recorded via VITS. I was informed that 4 DVD's were to be given to Bob Jacobs and (1) along with the original DVD was to be returned to Fred Brown. Upon completion of the dubs they were dropped off to both gentlemen. Fred received his in person (2) Total. Bob was not in his office so I slid (4) copies underneath his door. This was around 5:30pm the same day of the request.

The duplications were made on Panasonic DVD video recorders. (Brand/ Model Panasonic DMR-T6070). The program was not recorded to a computer hard drive. I made direct dubs from DVD to DVD. Therefore, once the DVD's were distributed to the following parties, I have no data or access to the data from the recordings.

Sincerely,

Sheva Moore
NASA TV

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#26 Message

Wholley, Michael C. (HQ-MA000)

From: Sefton, Keith Thomas (HQ-MA000)
Sent: Friday, April 27, 2007 4:22 PM
To: Mould, David R. (HQ-NA000)
Cc: Morell, Paul (HQ-AA000); Wholley, Michael C. (HQ-MA000); Sharp, Jason Scott (HQ-NB000)
Subject: RE: FOLLOWUP

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David

A dual medium was used: VCR tape concurrent with DVD recorder. By practice, once the DVD is found to be "good," the VHS is erased. The DVD on 4.10.07 was found to be good, and the VHS tape was erased. Both tape and DVD were recorded on "dumb" machines -- i.e. not like a TIVO, and not on a recorder -- just a manual medium in, product out, machine empty situation.

Mike Wholley is the only person who can answer how disposition of the DVDs occurred, and he is currently still on the Hill.

I am providing these facts directly, cc Paul, as I am not a "release" authority on the facts as I know them -- you all will have to sort out what to release and when.

Sincerely,
Keith

From: Mould, David R. (HQ-NA000)
Sent: Friday, April 27, 2007 4:07 PM

To: Sefton, Keith Thomas (HQ-MA000)
Subject: FW: FOLLOW UP

Keith, do you know the answer to this? Thanks
David

From: Brian Berger [mailto:bberger@hq.space.com]
Sent: Friday, April 27, 2007 2:22 PM
To: Mould, David R. (HQ-NA000)
Subject: FOLLOW UP

What was the recording medium used -- video tape or DVD? How were the recordings disposed of? Thrown in a trash can? Put through a shredder? Burned?

-----Original Message-----
From: Mould, David R. (HQ-NA000) [mailto:david.r.mould@nasa.gov]
Sent: Friday, April 27, 2007 11:08 AM
To: Brian Berger
Subject: RE: NASA IG

Brian
Will call you in a bit. Thanks.
David

From: Brian Berger [mailto:bberger@hq.space.com]
Sent: Friday, April 27, 2007 9:42 AM
To: Mould, David R. (HQ-NA000)
Subject: NASA IG

David:

Two questions and a request: how did NASA accidentally video tape Griffin's meeting with Cobb? When did the meeting take place?

Secondly, I would like to talk to Mike about the meeting.

My deadline is noon today.

Brian

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#27

Mon, May 7, 2007 10:34 AM

Subject: Draft letter
Date: Friday, April 27, 2007 4:56 PM
From: Andrew Falcon <r.a.falcon-1@nasa.gov>
To: Paul Morrell <Paul.Morrell@nasa.gov>, Keith Sefton <Keith.T.Sefton@nasa.gov>
Conversation: Draft letter

See attached.

Andrew

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Wholley, Michael C. (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Saturday, April 28, 2007 10:38 PM
To: Howard, Thomas J. (HQ-WAH10)
Cc: Sefton, Keith Thomas (HQ-MA000)
Subject: Re: Copy of IG meeting

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Tom.
Thanks. I will try to get some sleep tonight.
I have thrown away the bottle of "stupid pills !!"

Mike

Michael C. Wholley
NASA General Counsel
202 358 2450

Michael C. Wholley
NASA General Counsel
300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

----- Original Message -----
From: Howard, Thomas J. (HQ-WAH10)
To: Wholley, Michael C. (HQ-MA000); Sefton, Keith Thomas (HQ-MA000)
Sent: Sat Apr 28 18:26:36 2007
Subject: Re: Copy of IG meeting

Mike,

We have put out a request for all records related to the IG, which I believe covers all medium, but on Monday I will reconsider with our Counsel, and modify our request as approipriate. Thanks for the suggestion. Have a good weekend, Tom

! WARNING ! This email including any attachments is intended only for authorized recipients. Recipients may only forward this information as authorized. This email may contain non-public information that is "Law Enforcement Sensitive," "Sensitive but Unclassified," or otherwise subject to the Privacy Act and/or legal and other applicable privileges that restrict release without appropriate legal authority and clearance. Accordingly, the use, dissemination, distribution or reproduction of this information to or by unauthorized or unintended recipients, including but not limited to non-NASA recipients, may be unlawful.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Wholley, Michael C. (HQ-MA000)
To: Howard, Thomas J. (HQ-WAH10); Sefton, Keith Thomas (HQ-MA000)
Sent: Sat Apr 28 17:52:10 2007
Subject: Copy of IG meeting

Tom/keith
I am beating myself up over this issue. I really regret that in trying to keep it a

"closed" meeting and not thinking through the political ramifications of my destroying the discs, I have now put the Agency to a hurculean task. My bad..... Pure heart, empty head! In any event, as I was thinking over my appearance yesterday on the hill, it occurs to me that MAYBE and HOPEFULLY somebody at one of the centers had one of those little microcassette recorders and may have the audio portion. I cannot recall whether the notice to the field about trying to find a copy, but if we haven't asked foir an audio recording, we should. I hope, Tom, that one or more of the IG attendees may have recorded it and would be willing to step up to the request. (As an added bonus, I would fly at my own expense to wherever they are and fully detail their car !!) I wish I could "unring" that bell. Huge "sigh"
Mike

Michael C. Wholley
NASA General Counsel
202 358 2450

Michael C. Wholley
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300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

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#28

Donovan, Catherine (HQ-MA000)

From: Howard, Thomas J. (HQ-WAH10)
Sent: Saturday, April 28, 2007 7:27 PM
To: Wholley, Michael C. (HQ-MA000); Sefton, Keith Thomas (HQ-MA000)
Subject: Re: Copy of IG meeting

Mike,

We have put out a request for all records related to the VITS, which I believe covers all medium, but on Monday I will reconsider with our Counsel, and modify our request as approipriate. Thanks for the suggestion. Have a good weekend, Tom

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Sent from my BlackBerry Wireless Handheld

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Mike

Michael C. Wholley
NASA General Counsel
202 358 2450

Michael C. Wholley
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Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

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ARE WAIVED IN THIS

#29
Donovan, Catherine (HQ-MA000)

From: Berger, Fred (HQ-LD070)[InDyne, Inc]
Sent: Monday, April 30, 2007 4:58 PM
To: Sefton, Keith Thomas (HQ-MA000)
Cc: Stewart, Harold E. (HQ-LG020); 'Sefton, Keith (ksefton@hqnasa.gov)'; Japngie, Len A. (HQ-LD070)[InDyne, Inc]; Newell, Les (HQ-LD070)
Subject: RE: April 10th Recordings

Keith,
Per your request here's an explanation of what happened regarding the recordings at the Centers:

At about 8:15 a.m. on Wednesday, April 11, 2007, I received a call from Paul Morrell. During that phone conversation Paul asked me to contact my counterparts at the Centers to find out if those who recorded the meeting still had their recordings, or if they could retrieve them. Paul wanted me to ask them to erase videotapes or shred DVDs of their recordings.

I contacted all the video teleconferencing coordinators and operators at the participating sites and I found out that only a few sites had recorded the meeting. Those who did record the meeting eventually told me they either still had the recording, in which case they erased the videotapes or shredded the DVD recordings without having given them to their Customers, or that they retrieved the recordings and then erased the tapes or shredded the DVDs.

Fred Berger

From: Sefton, Keith Thomas (HQ-MA000)
Sent: Monday, April 30, 2007 6:56 AM
To: Berger, Fred (HQ-LD070)[InDyne, Inc]
Cc: Stewart, Harold E. (HQ-LG020); Sefton, Keith (ksefton@hqnasa.gov)
Subject: RE: April 10th Recordings

Mr. Berger

(With, of course, the concurrence of your COTR, and hopefully not as an unreasonably long tasking) Would you mind setting forth in your own words the exact chain of events concerning the recall and destruction of recordings made at NASA Centers of the April 10th ViTS?

It would be helpful to receive this recap today, if that is all possible.

Thank you,

Keith Sefton

From: Berger, Fred (HQ-LD070)[InDyne, Inc]
Sent: Thursday, April 26, 2007 2:42 PM
To: Stewart, Harold E. (HQ-LG020)
Cc: Sefton, Keith Thomas (HQ-MA000)
Subject: April 10th Recordings

Harold,
The NASA Headquarters Video Teleconferencing Service (ViTS) uses two means to record conferences on Customer request.

We use a COTS Samsung DVD recorder, model DVD-R130. This machine uses DVD-R or DVD-RW video disks only. This machine has no resident storage capability (no internal hard drive or other memory device) and it cannot retain audio or video program content.

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We also use a standard JVC model SR-S365U VHS video tape recorder for back-up recordings in case a DVD recording is faulty. This machine also lacks an internal memory capability to store program content.

Our procedure with the recordings is as follows: After a meeting has been recorded, the DVD recording is checked and, if it is not faulty, it is provided to the person who requested the recording. Then the videotape is returned to stock for erasure and reuse. That is what was done on April 10th with the videotape used for the conference in which Mike Griffin talked to the IG staff.

Please contact me if you need further information. Fred

****

The NASA Headquarters Video Teleconferencing Service is in room CD-61.
The HQ1 Room seats up to 16 people.
The HQ2 Room seats up to 60 people.

For tours or other services, contact us at:
Office Phone.....202-358-0146
ViTS Scheduling.....202-358-0073
Office E-Mail.....vits@hq.nasa.gov

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#30

Donovan, Catherine (HQ-MA000)

From: Sefton, Keith Thomas (HQ-MA000)
Sent: Monday, May 07, 2007 9:12 AM
To: Donovan, Catherine (HQ-MA000)
Subject: FW: April 10th Recordings

One more I found - Sorry.

From: McDonald, Mike T. (MSFC-NNM04AA02C)[HONEYWELL]
Sent: Tuesday, May 01, 2007 11:01 AM
To: Berger, Fred (HQ-LD070)[InDyne, Inc]; Stewart, Harold E. (HQ-LG020); Sefton, Keith Thomas (HQ-MA000); Schultz, John J. (ARC-EX)[PLANNERS COLLABORATIVE]; Mongalier, Melissa J. (GRC-PBM0)[NCI]
Cc: Newell, Les (HQ-LD070); 'Sefton, Keith (ksefton@hqnasa.gov)'
Subject: RE: April 10th Recordings

Fred and all,

The video tape (VHS) I used was brought back to me by Karen Vansant of the MSFC IG's office the very next morning after it was recorded. Karen witnessed me as I took the tape out of it's case, laid it on the concrete floor in the equipment room and hit it several times with a piece of oak trim that is approximately 40 X 5 1/2 ". The tape burst into many pieces and the actual tape itself was cut and torn in many places. I then placed it in the trash can here in my office. That afternoon, I took the trash, tied the BLACK bag in a knot, and placed it in a larger canister in the hallway of my building. That canister is carried out by the cleaning crew to the dumpsters outside of building 4200 at the loading docks. It is long gone.

Mike McDonald / MSFC VITS

From: Berger, Fred (HQ-LD070)[InDyne, Inc]
Sent: Tuesday, May 01, 2007 9:46 AM
To: Stewart, Harold E. (HQ-LG020); Sefton, Keith Thomas (HQ-MA000); Schultz, John J. (ARC-EX)[PLANNERS COLLABORATIVE]; Mongalier, Melissa J. (GRC-PBM0)[NCI]; McDonald, Mike T. (MSFC-NNM04AA02C)[HONEYWELL]
Cc: Newell, Les (HQ-LD070); 'Sefton, Keith (ksefton@hqnasa.gov)'
Subject: RE: April 10th Recordings

Harold,
I will forward your request to the three ViTS Coordinators at the Centers where the meeting was recorded on videotape.

==========

To: John Schultz, Ames Research Center
Melissa Mongalier, Glenn Research Center
Mike McDonald, Marshall Space Flight Center

John, Melissa, and Mike,
If possible, if you still have the videotape you used to record the April 10th IG ISSUES ViTS conference, please FedEx your tape overnight (retain the Tracking Number) to:

Justin Jackson (256) 544-8474
MSFC AS-50
Building 4200
Huntsville, Al 35812

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If you cannot ship the tape, please explain why. Thank you.
Fred

From: Stewart, Harold E. (HQ-LG020)
Sent: Monday, April 30, 2007 7:55 PM
To: Berger, Fred (HQ-LD070)[InDyne, Inc]; Sefton, Keith Thomas (HQ-MA000)
Cc: Newell, Les (HQ-LD070); 'Sefton, Keith (ksefton@hqnasa.gov)'
Subject: RE: April 10th Recordings

Fred,

Would it be possible to have the Center teleconferencing coordinators ship the erased videotapes to me so that I can have them forensically examined?

If so, my address is:

Harold Stewart
NASA HQ
300 E Street SW
OSPP Suite 9R82
Washington, DC 20546-0001

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#31

BART GORDON, TENNESSEE
CHAIRMAN

RALPH M. HALL, TEXAS
RANKING MEMBER

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE AND TECHNOLOGY
SUITE 2320 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6375
TTY: (202) 226-4410
http://science.house.gov

April 18, 2007

Dr. Michael Griffin
Administrator
National Aeronautics and Space Administration
300 E St., N.W.
Washington, D.C. 20007

Dear Administrator Griffin:

I have been informed that on or about April 10, 2007, you addressed the employees of NASA's Office of Inspector General (OIG). This purpose of this meeting was to discuss the implementation of the management actions you had proposed in response to a report by the President's Council on Integrity and Efficiency (PCIE) concerning misconduct allegations against Robert Cobb, NASA's inspector general.

It is our understanding that your presentation and the follow-up questions and answers were videotaped so that they would be available for viewing by OIG staff at headquarters and the NASA Centers who might not have been able to attend the actual event. However, we have also been told that, after the videotapes were delivered to the Centers for viewing, someone at headquarters ordered that they be returned and/or destroyed.

As you know, the Committee, pursuant to its authority under Rules X and XI of the United States House of Representatives has been reviewing the PCIE report concerning Inspector General Cobb and the follow-up actions being undertaken. It is imperative that no agency records, as defined in the attached Appendix, related to the Committee's investigation be destroyed. I also must remind you that under18 U.S.C. 1505, it is a criminal offense to obstruct a Congressional investigation.

Therefore, by this letter, I am requesting that you provide to the Committee a copy of the videotape of the April 10 presentation, and any other records related to the videotape described above to the Committee offices in B-374 Rayburn House Office Building by Friday, April 20, 2007.

Dr. Griffin
Page 2
April 18, 2007

If your staff has any questions or needs additional information, please contact Dr. Dan Pearson, Staff Director of the Investigations and Oversight Subcommittee, at (202) 225-4494.

Thank you for your prompt attention to this matter.

Sincerely,

BRAD MILLER
Chairman
Subcommittee on Investigations and Oversight

Cc: The Honorable F. James Sensenbrenner Jr.

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

BART GORDON, TENNESSEE
CHAIRMAN

RALPH M. HALL, TEXAS
RANKING MEMBER

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE AND TECHNOLOGY
SUITE 2320 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6375
TTY: (202) 226-4410
http://science.house.gov

April 18, 2007

Mr. Robert Cobb
Inspector General
National Aeronautics and Space Administration
Code W
300 E St., N.W.
Washington, D.C. 20546

Dear Mr. Cobb:

I have been informed that on or about April 10, 2007, Michael Griffin, Administrator of the National Aeronautics and Space Administration (NASA) addressed the employees of NASA's Office of Inspector General (OIG). The purpose of the meeting was to discuss the implementation of the management actions Mr. Griffin had proposed in response to a report by the President's Council on Integrity and Efficiency (PCIE) concerning misconduct allegations against you.

It is our understanding that Administrator Griffin's presentation and the follow-up questions and answers were videotaped so that they would be available for viewing by OIG staff at headquarters and the NASA Centers who might not have been able to attend the actual event. However, we have also been told that, after the videotapes were delivered to the Centers for viewing, someone at headquarters ordered that they be returned and/or destroyed.

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Mr. Cobb
Page 2
April 18, 2007

If your staff has any questions or needs additional information, please contact Dr. Dan Pearson, Staff Director of the Investigations and Oversight Subcommittee, at (202) 225-4494.

Thank you for your prompt attention to this matter.

Sincerely,

BRAD MILLER
Chairman
Subcommittee on Investigations and Oversight

Cc: The Honorable F. James Sensenbrenner Jr.

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2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

National Aeronautics and
Space Administration

Office of Inspector General
Washington, DC 20546-0001

APR 20 2007

The Honorable Brad Miller
Chairman, Subcommittee on Investigations and Oversight
Committee on Science and Technology
House of Representatives
Washington DC 20515

Dear Mr. Chairman:

This is in response to your April 18, 2007, letter requesting that the National Aeronautics and Space Administration (NASA) Office of Inspector General (OIG) provide the Committee a copy of the videotape and other records related to the videotape of the NASA Administrator's April 10, 2007, meeting with NASA OIG staff. Our response relates to records within the possession of the Office of Inspector General.

In response to your request, we asked our senior executives to check with their respective staff to see if anyone had a copy of the videotape or any related records. We did not ask staff to provide emails or other records they may have created reflecting on the substance of the meeting.

Based on the responses, we do not have a copy of the videotape in the OIG. OIG staff at Marshall Space Flight Center (MSFC) and at Glenn Research Center (GRC) reported that they briefly possessed a videotape of the meeting. However, on April 11, 2007, NASA MSFC and GRC videoconferencing staff asked OIG staff to return the tape(s). The OIG MSFC staff member returned the tape to a MSFC videoconference employee and witnessed him destroy the tape. OIG GRC staff reported that on April 11, 2007, a GRC videoconference employee picked up the videotape and said he was going to destroy it.

To date, we have obtained and are providing the following documents related to the videotape: (1) Deputy Inspector General's April 9, 2007, email to all OIG staff announcing the April 10, 2007, meeting; (2) MSFC OIG employee's notes regarding the videotape; (3) GRC OIG employee receipt (with identifiers) indicating videotape was returned to Joe Fronek, GRC employee; (4) GRC OIG employee receipt (without identifiers) indicating that videotape was returned to Joe Fronek, GRC employee; (5) NASA OIG Assistant Inspector General for Investigations April 18, 2007, email about conversations with NASA Chief of Staff regarding videotape(s); and (6) Email(s) from OIG staff inquiring about availability of videotape(s).

Please contact me or the NASA OIG Executive Officer, Madeline Chulumovich at 358-1220, if you or your staff have any questions or need additional information on this matter.

Sincerely,

Thomas J. Howard
Deputy Inspector General

cc:
The Honorable F. James Sensenbrenner Jr.

National Aeronautics and Space Administration
Headquarters
Washington, DC 20546-0001

April 23, 2007

Reply to Attn of: OLIA

The Honorable Brad Miller
Chairman
Subcommittee on Investigations and Oversight
Committee on Science and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I have been asked by Administrator Griffin to respond to your letter of April 18, 2007, in which you request a video recording of an April 10 meeting between the NASA Administrator and employees of the NASA Office of Inspector General (OIG). A diligent search was conducted and no such recording or associated materials, other than the attachments and some additional materials in the possession of the Office of the Inspector General that will be provided separately by that organization, exist.

The April 10, 2007, meeting was a closed meeting held by Administrator Griffin for the staff of the NASA OIG. The Administrator's purpose was to inform the OIG staff that he had personally reviewed a report of investigation concerning NASA Inspector General Robert Cobb and he was taking what he believed to be the actions necessary to address the report's findings, to listen to any concerns of the assembled OIG staff, and to express his support for a strong and effective NASA Inspector General program.

To ensure that the nearly 200 Agency OIG personnel at all NASA Centers nationwide were included, and to ensure the desired privacy for the meeting, it was conducted using our secure video teleconference (VTC) facilities. Despite a directive by the NASA Chief of Staff prior to the meeting that the event should not be recorded, some locations, including Headquarters, nonetheless recorded the event. The Chief of Staff's direction was given in order to encourage free and open dialogue and questions to the Administrator.

Following the meeting, the Chief of Staff contacted the NASA headquarters' VTC coordinator to inquire why the meeting had been recorded. At his request, all Headquarters copies of the meeting were provided to the Chief of Staff on the morning of April 11, 2007. The Chief of Staff then discussed the matter of the recordings with the Agency General Counsel. The General Counsel believed that this was an unauthorized

recording and should not be retained. Accordingly, the video copies at Headquarters were destroyed by the General Counsel on April 11, 2007.

In addition, the VTC coordinator, a contractor, on his own initiative and without being requested to do so, sent a message instructing all Centers that had recorded the meeting to retrieve and destroy all copies.

Upon receipt of your request on April 18, 2007, the Office of the General Counsel issued the attached notice directing the preservation of any remaining copies of the unauthorized recordings and instructed that they be forwarded for transmittal to the Subcommittee. Our search has failed to identify any remaining copies, and NASA does not believe that any copies exist – or have existed since April 11, 2007.

The statements made herein represent our best understanding of the facts as we have been able to ascertain them. We would be happy to provide you with a briefing on the conduct of the meeting in question if you have any questions or concerns.

Sincerely,

Brian E. Chase
Assistant Administrator
for Legislative and Intergovernmental Affairs

BART GORDON, TENNESSEE
CHAIRMAN

RALPH M. HALL, TEXAS
RANKING MEMBER

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE AND TECHNOLOGY
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April 25, 2007

Dr. Michael Griffin, Administrator
National Aeronautics and Space Administration
300 E St., N.W.
Washington, D.C. 20007

Dear Administrator Griffin:

I am in receipt of an April 23, 2007, letter from Brian E. Chase, the National Aeronautics and Space Administration (NASA) assistant administrator for legislative and intergovernmental affairs. Mr. Chase stated that all copies of the videotapes of your meeting with employees of the Office of the Inspector General (OIG) and requested by the Subcommittee on Investigations and Oversight on April 18, were destroyed, apparently at the direction of Paul Morrell, your chief of staff, and Michael Wholley, NASA's general counsel.

According to information received by Committee staff, you planned this meeting to inform the OIG staff of the actions you were taking to discipline Robert Cobb, NASA's inspector general, in response to a report from the President's Council on Integrity and Efficiency (PCIE) concerning allegations of misconduct by Mr. Cobb. That report determined that Mr. Cobb had abused his authority in his treatment of staff and demonstrated an appearance of a lack of independence from top officials at NASA in his work in violation of the *Quality Standards for Federal Offices of Inspector General* promulgated by the PCIE.

Additionally, you apparently used the meeting – at which Mr. Cobb was present and appeared beside you – to disagree with the PCIE report's findings and to state that, in your opinion, Mr. Cobb had not abused his authority and had done nothing wrong. This is particularly troubling because, under Executive Order 12993, only the PCIE is tasked to investigate allegations against inspectors general and their staff. In Mr. Cobb's case, the inspector general of the Housing and Urban Development spent six months to investigate over 70 allegations of misconduct by Mr. Cobb. There is no evidence that anyone in NASA conducted such an investigation beyond studying the facts presented in the heavily redacted version of the HUD Inspector General's report that was delivered to NASA – nor would it have been proper to do so – before drawing the opposite conclusion.

Your presentation to the staff of OIG was videocast to offices throughout the NASA complex including Marshall Space Flight Center, Johnson Space Center and Stennis Space Center. We have been informed that it is a standard practice when OIG staff are called to an "all-hands" presentation, as they were by a memorandum from Thomas J. Howard, the deputy inspector general, to tape the presentation so that staff not able to make the original meeting can later view the proceedings. Copies of that videocast were made by the video services at the Centers and perhaps at Headquarters as well. Subsequent to the meeting, it appears that directions went out from your Chief of Staff, apparently in consultation with your General Counsel, that all copies of the tape should be returned to NASA video services and/or headquarters for destruction. The letter from Mr. Chase claims that all copies were destroyed.

The only shred of a rationale offered for the recall and destruction of these tapes in Mr. Chase's letter was that the taping of your presentation was unintentional and "unauthorized." It is difficult for us to fathom why other all-hands videocasts are routinely taped, but somehow your presentation needed special authorization. Even if the taping had been unauthorized—whatever that means in this context—to then destroy the records of that session probably violates the government records statutes that attach to NASA and all government agencies. More importantly, your counsel and you yourself must be aware of the ongoing oversight work of the Congress in the matter of Mr. Cobb's case. That interest assuredly extends to your own role in this situation as well as that of your General Counsel. To destroy the records of what you said to the NASA OIG staff, which was one of the steps you publicly promised you would take in response to the PCIE investigation, appears on its face to be nothing less than the destruction of evidence.

Inspectors general are tasked by law to provide "independent and objective units" to conduct and supervise program audits and investigations of their agencies, provide leadership and recommend policies to prevent and detect fraud and abuse; and keep both the head of the agency and Congress informed about progress, problems and deficiencies in the agencies' programs. 5 U.S.C. Appendix 3. As the PCIE stated in its *Quality Standards*, "[I]ndependence is a critical element of objectivity. Without independence, both in fact and in appearance, objectivity is impaired." Section II.A. The allegations against Mr. Cobb came from his own staff. Your role in disciplining and defending Mr. Cobb has eroded any vestige of independence for Mr. Cobb or, indeed, his own staff. We have been told that your presentation to OIG staff was no simple pep talk. Allegations have come to us that you told OIG staff what you thought was worthwhile work and what was not. If true, such a directive from the head of an agency to its inspector general would be unprecedented and highly improper. What OIG employee would believe that his work would be independent in any meaningful fashion as long as Mr. Cobb, who now owes his continued employment at NASA to you, is the Inspector General and after you have clearly communicated what you expect the office to produce?

Dr. Griffin
Page 3
April 25, 2007

By this letter, I am requesting all records as defined in the attached Appendix relating to the following:

1. Your statement and/or "determination" that Mr. Cobb had not abused his authority or demonstrated the appearance of a lack of independence as stated in the January 22, 2007, report of the Integrity Committee of the PCIE.

2. Your meeting with the employees of the Office of Inspector General on April 10, 2007, including all notes or other records of that actual meeting kept by any NASA staff member.

3. The taping of, and destruction of, all video records of the April 10, 2007, meeting, including the "determination" that the video record of that meeting was "unauthorized."

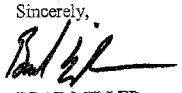
We also ask that you instruct your staff to do a thorough search for any digital records that may remain of your presentation. An allegation that has come to us is that five compact disks containing the presentation were delivered for destruction to Mr. Wholley's office. This suggests that the presentation may have existed in a digital format and may survive on a server or other computer disk. These documents are to be delivered to the Subcommittee offices at Rayburn House Office Building, Room B-374, by 5 p.m. on Friday, May 4, 2007

Finally, I am asking that the following persons be made available promptly for staff interviews: Paul Morrell, Michael McDonald, Joe Fronek, and the person in the "VTS taping room" who actually recorded the meeting.

Please have your staff contact Dr. Dan Pearson, Investigations and Oversight Subcommittee staff director, at (202) 225-4494, or Edith Holleman Subcommittee counsel, at (202) 225-8459, to schedule the interviews and arrange for delivery of documents.

Your prompt attention to this matter is greatly appreciated.

Sincerely,



BRAD MILLER
Chairman
Subcommittee on Investigations and Oversight

cc: The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Investigations and Oversight

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

BART GORDON, TENNESSEE
CHAIRMAN

RALPH M. HALL, TEXAS
RANKING MEMBER

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON SCIENCE AND TECHNOLOGY

SUITE 2320 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6301
(202) 225–6375
TTY: (202) 226–4410
http://science.house.gov

April 25, 2007

Thomas J. Howard, Deputy Inspector General
National Aeronautics and Space Administration
Office of the Inspector General
Code W
300 E St., N.W.
Washington, D.C. 20546

Dear Mr. Howard:

Thank you for your letter of April 20, 2007, concerning the destruction of video records of the April 10, 2007, mandatory, "all hands" meeting between Michael Griffin, administrator of the National Aeronautics and Space Administration (NASA), and the employees of NASA's Office of Inspector General.

To further the Committee's investigation of this matter, I am requesting that you produce the following records, as defined in the attached Appendix:

1. All records relating to the April 10 meeting with Administrator Griffin, including any notes or other documents made by OIG employees who attended the meeting or viewed it via a video record.

2. All records relating to the destruction of the video records of the April 10 meeting.

Additionally, I am requesting that you make yourself, Kevin Winters and Michael Campbell available for an interview with Committee staff within the next week. Please contact Dr. Dan Pearson, Investigations and Oversight Subcommittee staff director, at (202) 225-4494, or Edith Holleman Subcommittee counsel, at (202) 225-8459, to make arrangements for those interviews. The records should be provided by 5 p.m. on Friday, May 4, 2007.

Your prompt attention to this matter is greatly appreciated.

Sincerely,

BRAD MILLER
Chairman
Subcommittee on Investigations
and Oversight

cc: F. James Sensenbrenner
Ranking Member
Subcommittee on Investigations and Oversight

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

National Aeronautics and
Space Administration

Office of Inspector General
Washington, DC 20546-0001

MAY 4 2007

The Honorable Brad Miller
Chairman, Subcommittee on Investigations and Oversight
Committee on Science and Technology
House of Representatives
Washington DC 20515

Dear Mr. Chairman:

This is in response to your April 25, 2007, letter requesting that the National Aeronautics and Space Administration (NASA) Office of Inspector General (OIG) produce the following records: (1) All records relating to the April 10 meeting with Administrator Griffin, including any notes or other documents made by OIG employees who attended the meeting or viewed it via a video record and (2) All records relating to the destruction of the video records of the April 10 meeting.

In response to your request, we asked our senior executives to check with their respective staff and have staff provide copies of and preserve any record(s) that they possess falling within the scope of your request, including personal handwritten notes; voice mails, emails, and records on home computers/personal email accounts; however remotely related. Based on the responses, we are enclosing non-privileged records including paper records and one micro-cassette that were within the possession and control of OIG personnel and identified as responsive. The records are organized by OIG office—Audits, Investigations, Legal, Management and Planning, and immediate office of the Inspector General.

Please contact me or Madeline Chulumovich, Executive Officer, at 358-1220, if you or your staff have any questions or need additional information on this matter.

Sincerely,

Thomas J. Howard

Thomas J. Howard
Deputy Inspector General

cc:
The Honorable F. James Sensenbrenner Jr.

National Aeronautics and Space Administration
Headquarters
Washington, DC 20546-0001

May 8, 2007

Reply to Attn of: OLIA

The Honorable Brad Miller
Chairman
Subcommittee on Investigations and Oversight
Committee on Science and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Miller:

Your April 25, 2007, letter has been referred to me for a reply. Documents responsive to your request are enclosed with this letter, other than those being provided by the Office of Inspector General (OIG) under separate cover.

There are several matters raised in your letter that require clarification. I understand that these matters may have been transmitted to your staff as allegations regarding the April 10th meeting with the OIG staff.

The Administrator did not call the meeting to inform OIG staff of the actions he was taking to discipline Robert W. Cobb. The Administrator does not have the authority to take disciplinary action against the Inspector General. Rather, as I stated in the April 23 letter:

> The April 10, 2007, meeting was a closed meeting held by Administrator Griffin for the staff of the NASA OIG. The Administrator's purpose was to inform the OIG staff that he had personally reviewed a report of investigation concerning NASA Inspector General Robert Cobb and he was taking what he believed to be the actions necessary to address the report's findings, to listen to any concerns of the assembled OIG staff, and to express his support for a strong and effective NASA Inspector General program.

The Chief of Staff, prior to the meeting, directed that the meeting not be recorded. He did so to accomplish the stated purpose of the meeting, because it was important to encourage free and open dialogue and questions with OIG staff. Despite this direction, the meeting was recorded and some copies were made. The Chief of Staff collected the copies existing at Headquarters and delivered them to the General Counsel, but did not direct that they be destroyed, and did not deliver them to the General Counsel for

destruction. The General Counsel asked the Chief of Staff to leave the disks with him, and later independently made the decision to destroy them.

The Administrator's comments at the meeting have been mischaracterized. The Integrity Committee did not find any violation of law, rule or regulation, gross mismanagement, or gross waste of funds. Consistent with this finding, when addressing the OIG staff, the Administrator stated that the Report of Investigation (ROI) and the conclusions of the Integrity Committee pointed to no violation of law or regulation, evidence of lack of integrity, or actual conflict of interest. He also said that Mr. Cobb did not abuse the power of his office, but that the ROI raised concerns in his mind about management and supervisory issues relating to Mr. Cobb. These concerns were the basis of the actions Dr. Griffin proposed to the chairman of the President's Council on Integrity and Efficiency. Finally, during the meeting, Mr. Cobb was in the audience, seated with his senior staff; he did not stand next to the Administrator.

The Administrator did not tell the OIG staff what work was worthwhile and what work was not. He was asked by an audience member for his opinion on what work the OIG performed that was most beneficial to him. Dr. Griffin prefaced his answer by saying that the OIG is independent and had the authority and responsibility to investigate whatever in its opinion was necessary. Dr. Griffin then identified fraud, waste and abuse as a useful area of focus, in contrast to assessments of program management decision-making, which was more a matter of opinion and less prone to factual assessment, but again specifically reiterated that the Inspector General should make his own determination of what should be investigated.

You have requested three categories of documents. The first category seeks documents related to the Administrator's statement or determination that "...Mr. Cobb had not abused his authority or demonstrated an appearance of lack of independence, as stated in the January 22, 2007 report of the Integrity Committee of the PCIE." While the Administrator did not make such a statement at the OIG meeting, he did say that Mr. Cobb did not abuse the power of his office. The second category seeks documents relating to the meeting of April 10, including notes of NASA staff present. While NASA staff did not take notes of the meeting, it is possible that the OIG staff did. If OIG staff took notes, the OIG will provide them under separate cover. With respect to the third category, records relating to the taping of, and destruction of, video records of the April 10, 2007, meeting, including any determination that the taping was unauthorized, the responsive documents are also provided.

Finally, we have explored whether any residual digital recording of the meeting remains on NASA equipment and have not found any to date. However, we are continuing to look into the possibility of recovering the recording, and, should this prove possible, we will provide the recording or any fragment of it that can be recovered.

Sincerely,

Brian E. Chase
Assistant Administrator
for Legislative and Intergovernmental Affairs

cc: The Honorable F. James Sensenbrenner Jr.

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