

IT'S NOT JUST THE EMAILS DOJ LOST, IT'S THE BACKUP DOCUMENTATION

We've been talking quite a bit about John Yoo and Patrick Philbin's emails on the torture memos that OLC deleted: with a rebuttal of John Yoo's claims there were no email, a report on the National Archives' attempts to learn what happened, and a catalog of damning facts we learned from the few emails left over.

But it's not just the emails that are missing. It's also some of the backup documentation. Some of the documents that went into the production of the torture memos—and should have been reviewed by OPR over the course of its investigation—disappeared some time in the last 5 years.

As I reported last September, after some delay in a FOIA response, Acting head of OLC, David Barron confessed that OLC could not find all of the documents that it had first listed on a 2006 FOIA response.

The problem, as Barron explained in his declaration, seems to stem from three things: CIA, not OLC, did the original FOIA search in 2005 and at that time did not make a copy of the documents responsive to FOIA; for long periods OPR had the documents, lumped in with a bunch of other torture documents, so it could work on its investigation; the documents got shuttled around for other purposes, as well, including other investigations and one trip to the CIA for a 2007 update to the FOIA Vaughn Index. [Here's the 2007 Vaughn Index and here's the Vaughn Index that accompanied Barron's declaration last September.]

And, somewhere along the way, at least 10 documents originally identified in 2005 as responsive to the FOIA got lost.

Poof!

The 10 Missing Documents

Here's a list of the short descriptions of what disappeared:

- Document 6, 07/25/2002, 46 [or 60 or 59] page Top Secret [or Secret] memo providing legal advice
- Document 20, 09/12/2003, 1 page Top Secret memo requesting legal advice
- Document 47, 07/07/2004, 1 page Top Secret memo providing legal advice
- Document 77, 08/16/2004, 2 page Top Secret memo providing legal advice
- Document 142, undated 2 page Top Secret memo requesting legal advice
- Document 155, undated 3 page Top Secret draft memo with attached handwritten notes requesting legal advice
- Document 172, undated 5 page Top Secret memo requesting legal advice
- Document 175, undated 6 page Top Secret draft memo providing legal advice
- Document 177, undated 10 page Top Secret draft memo providing legal advice
- Document 181, undated 127 page Top Secret draft memo providing legal advice

Why did CIA do the FOIA responses?

Now, before I get into why this is troubling in terms of the OPR Report, let me just challenge a claim Barron made in his declaration. He explained that CIA, rather than OLC, had done the first and second FOIA searches this way:

CIA attorneys were initially given access to the OLC Sensitive Compartmented Information Facility ("SCIF") in 2005 to search for documents responsive to the FOIA request at issue in this litigation. CIA attorneys conducted the search because no OLC attorneys assigned at the time to the processing of FOIA requests had the clearances needed to access and review the documents.

It's not entirely clear when CIA would have been rifling through OLC's SCIF drawers in 2005 (and Barron apparently doesn't feel like telling us). But it would have come after Judge Alvin Hellerstein ordered the CIA to respond to the FOIA on February 2, 2005 (they had been refusing to respond to his order to do so from the previous fall). And they would have done it over the next year and a half. In any case, it would have happened after Daniel Levin wrote his unclassified torture memo, about which the OPR Report explains,

Virtually all of OLC's attorneys and deputies were included in the review process,

And it would have happened during or after the drafting of the Bradbury memos, about which the OPR Report explains,

Bradbury circulated drafts of his memoranda widely within the Department.

Granted, the OPR Report doesn't say the Bradbury Memos were circulated widely within OLC, but

when they had an incentive to make the claim, DOJ later claimed that the torture memos, which would have been the same compartment as all the FOIA documents, were widely circulated. It seems unlikely that Levin's memo was reviewed by "virtually all of OLC's attorneys," but that the following year they couldn't find a single OLC lawyer to put together a FOIA response.

And what seems even more curious is that rather than invite CIA to OLC's SCIF to do the updated FOIA response in 2007—at a time when the documents were under investigation—DOJ would instead **send all the documents over to CIA** for them to do it.

In 2007, the documents were recalled from OPR by OLC so that they could be sent to the CIA for processing and for purposes of updating the unclassified Vaughn Index submitted in this matter.

It's sort of funny that DOJ took fewer cautions with these documents **after** they were actively under investigation than they did beforehand. Here, DOJ seems to have said to the CIA, see if you can't make some of these documents accidentally blow into the Potomac on your way back to DOJ...

Three Troubling Documents

Now, it's hard to tell what disappeared, since we don't actually get to see either the documents that disappeared or those the DOJ thinks might be close matches. But three of the documents, in particular, trouble me.

Document 6, 07/25/2002, 46 [or 60 or 59] page Top Secret [or Secret] memo providing legal advice

Here's the longer description of this document submitted in the 2007 FOIA response:

Document No. 6 is a 60-page document dated 25 July 2002 that consists of a 3-page memorandum and six attachments of 2 pages, 7 pages, 10 pages, 13 pages, 13

pages, and 12 pages, respectively. It is classified SECRET.

The memorandum and attachments contain confidential client communications from the CIA on a matter in which it requested legal advice from OLC.

Aside from the fact that DOJ has said, at different times, this packet of information was 46, 60, and 59-pages long (and that the same FOIA claims it is classified both Top Secret and Secret), the questions about this document alarm me because I'm fairly certain this is the packet of JPRA information sent OLC in the last days of drafting of the first torture documents. It's going to take me a full post to explain the many reasons questions about this document's provenance is problematic—tune in next post for the next installment of disappearing evidence!

Document 77, 08/16/2004, 2 page Top Secret memo providing legal advice

Here's the longer description of this document from 2007:

Document No. 77 is a 2-page memorandum dated 16 August 2004 from OLC to the CIA. It is classified TOP SECRET. The memorandum provides OLC's legal advice on a matter of interest to the CIA. It also contains confidential client communications from the CIA.

This document comes from a period in 2004 when OLC was approving each use of torture and there were at least three detainees who were undergoing torture. Concerns about at least one of these detainees contributed to the urgency, in 2005, behind the Bradbury documentation. So it's possible that this letter is a torture approval that CIA wouldn't want OPR to know about.

Document 155, undated 3 page Top Secret draft memo with attached handwritten notes requesting

legal advice

Here's the longer description:

Document No. 155 is a 3-page undated draft memorandum with attached handwritten notes from the CIA to OLC. It is classified TOP SECRET.

The draft memorandum and notes contains confidential client communications from the CIA to OLC on a matter in which the CIA requested legal advice from OLC.

Now, given the number of undated memos in this FOIA, any guess we make about these documents would be a wildarsed one. So while I can't say what this document is, mostly I include this document because of my concern that something **like it** remains in dispute. The OPR Report notes that John Bellinger believes CIA brought a draft advance declination—a Get Out of Jail Free Card—to DOJ in 2002; John Rizzo disputes that.

Bellinger told us that he received a telephone call from CIA attorneys in the Spring of 2002 informing him that Abu Zubaydah had been captured and the CIA wanted to use an aggressive interrogation plan to question him. Bellinger said the CIA wanted a Department of Justice criminal declination in advance of the interrogation because of concerns about the application of criminal laws, in particular the torture statute, to their actions. Bellinger said that he arranged a meeting between Department attorneys Yoo and Chertoff and the CIA, and that he thought the CIA attorneys may have even brought a draft declination memorandum to the meeting. However, Rizzo disputed that the CIA had ever drafted a proposed declination memorandum.

Again, I don't really have any reason to believe

that Document 155 really is the draft advance declination that Bellinger says existed but Rizzo says does not. But if Bellinger is right—if the CIA really did put down in writing that it wanted DOJ to give it a Get Out of Jail Free card before it started torturing anyone—the document would be critical to OPR's investigation not just for its very existence, but for the choice of words CIA chose to use in it.

But given the way documents had a way of disappearing between OLC and OPR and CIA, we can never say definitively whether it once existed or not.

Missing Torture Documents Timeline

2005: CIA attorneys given access to OLC SCIF to do FOIA response

May 15, 2006: Vaughn Index reflecting CIA search submitted

Early 2007: A collection of documents, including responsive documents, transported to OPR's SCIF

2007: OLC recalled documents and sent them to CIA to update the Vaughn Index

June 7, 2007: Updated Vaughn Index released

July 2007: Documents returned to OLC SCIF

Shortly after July 2007: Set of documents transferred to OPR

July 2007 to March 2009: Documents at OPR, but certain documents recalled on several occasions

Late 2007 or early 2008: An OLC lawyer attempted to reconstruct the Vaughn Index, identifying 150 of 181 documents

March 2009: OPR returned the documents

June to September 2009: OLC, SDNY and CIA lawyers search try to recreate the Vaughn Index/find the documents

June to July 2009: OLC attorney attempts to reconstruct the Vaughn Index

July 19, 2009: Two CIA attorneys attempt to help OLC reconstruct the Vaughn Index

July 20, 2009: OPR searches its SCIF, finds no documents

July 2009: CIA searches its Office of General Counsel files

August 31, 2009 to September 7, 2009: Three OLC attorneys search SCIF

September 21, 2009: Barron admits documents have gone missing