



July 1, 2020

INFORMATION MEMORANDUM FOR SECRETARY ROSS

A handwritten signature in black ink that reads "Peggy E. Gustafson".

FROM: Peggy E. Gustafson
Inspector General

SUBJECT: The Department Is Actively Preventing OIG from Completing
an Evaluation

This memorandum expresses my deep concern that the Department is failing to identify specific privileges and provide privilege markings to a U.S. Department of Commerce Office of Inspector General (OIG) evaluation, while claiming amorphous and generalized privileges, which effectively prevent us from publicly releasing the evaluation that is otherwise ready for release. Under the Inspector General Act of 1978, as amended, 5 U.S.C. App. (IG Act), OIG is an “independent and objective” unit created “to conduct and supervise audits and investigations relating to the programs and operations” of the Department.¹ To promote and maintain this independence, the IG Act prohibits you or your staff from preventing OIG from carrying out or completing our work.² Further, “[i]t is Department policy that all employees fully cooperate with the OIG” in its evaluations.³ This policy requires that all Department employees “shall make every effort to assist the OIG.”⁴ As described below, that full cooperation and assistance is absent here.

As you know, on September 6, 2019, the National Oceanic and Atmospheric Administration (NOAA) issued an unsigned statement (Statement) that rebuked the NOAA National Weather Service’s Birmingham, Alabama, office for a September 1, 2019, tweet about Hurricane Dorian. On September 7, 2019, I issued a memorandum to the acting head of NOAA to notify him that our office was

¹ IG Act, § 2(1).

² *Id.*, § 3(a).

³ U.S. Department of Commerce Office of the Secretary, October 19, 2006. *Inspector General Inspections and Evaluations*, DAO 213-2. Washington, DC: DOC OS, section 4.03.

⁴ *Id.*

examining the circumstances surrounding the unsigned Statement and instituting a preservation hold on relevant documents.⁵ We conducted our work in accordance with the *Council of the Inspectors General on Integrity and Efficiency Quality Standards for Inspection and Evaluation* with the objective of providing an independent account of the events that transpired in the interest of transparency and good government.

To conclude this work, on June 26, 2020, my office issued to you our final report *Evaluation of NOAA's September 6, 2019, Statement About Hurricane Dorian Forecasts* (OIG-20-032-I). When we transmitted the final report to you, we understood, based on our October 30, 2019, agreement with NOAA, that the Department and its interagency stakeholders would identify potentially privileged material in the report, as the Department acknowledged that it would do within 48 hours. If specific privilege claims were timely made, it would be foreseeable that some limited information should be redacted from the final report prior to being posted on OIG's public website.

However, rather than constructive dialogue, OIG was met with a lack of cooperation, receiving a response that incorrectly stated that OIG had rejected suggested redactions to certain appendixes several months ago when there was time to "properly discuss" the redactions. The Department now attempts to shift blame by indicating that, because of OIG's drafting approach, "there is now no meaningful way to redact the privileged materials we previously identified." This position is without merit as it suggests that the Department has a role in how OIG drafts its reports and what evidence is relied upon. On the contrary, the Department has no part in determining how or when OIG conducts its oversight work or structures its reports. To expect otherwise is contrary to the IG Act and an unacceptable intrusion on OIG's independence.

While the Department identified draft privilege redactions to some of the report appendixes months ago before the report was finalized—and before they had seen the report—they have now refused to identify specific proposed privilege redactions to the final report and appendixes. Instead, the Department relies on only amorphous claims of privilege that would not withstand scrutiny. To the extent any material is potentially privileged, it should be specifically claimed by the Department and its stakeholders, not OIG—a party that does not own the privileges. OIG cannot be expected to blindly divine the position of the Department and interagency stakeholders without specific privilege claims to specific portions

⁵ DOC Office of Inspector General, September 7, 2019. *Request for Information to Acting Under Secretary Neil Jacobs from the Inspector General*, OIG-19-025-M. Washington, DC: DOC OIG.

of the report. To expect OIG to step into the Department's role and proactively apply redactions is an inappropriate intrusion of OIG independence and an abdication of responsibility by the Department.

Further, we are concerned that your staff has distorted previous discussions of potential redactions to report appendixes and the agreed-upon privilege review process by creating a self-serving narrative in their communications with us. Notably communications were consistently collegial, until OIG transmitted the final report for a privilege review and subsequent issuance of the final report to you. This tone shift appears to be directly linked to the content of our report and the findings of responsibility of the high-level individuals involved. I am concerned that the substance of our report and findings has resulted in this retaliatory posturing.

The final publication of our evaluation has been delayed, thwarted, and effectively estopped by the Department's refusal to identify specific areas of privilege. Additionally, your staff has refused to engage in any meaningful discussion to identify proposed privilege redactions, indicating that such discussions would not be fruitful. To allow the Department's all-encompassing and opaque assertion of privilege to stand is to effectively grant the Department a pocket veto over the completion and issuance of final OIG work, which is clearly contrary to the IG Act, OIG independence, and good government. It also violates Department policy to cooperate fully with OIG.

As a result of the actions by your staff, OIG's oversight mission and ability to post the full evaluation report on its public website—as required by Section 8M of the IG Act—has been halted by the Department's refusal to identify specific privilege claims. In order to substantially comply with Section 8M of the IG Act, my office has publicly posted only a preliminarily redacted version of the transmittal memorandum summarizing the final report in order to make public a summary of our conclusions.

In order to address this impasse, I request that you direct your staff to provide formal privilege markings—that are precise and unambiguous and include the privilege being claimed—to the report and its appendixes; that is, if the Department or any equity holder in the matter intends on asserting such privilege. In the alternative, I request that you confirm that the Department seeks no privilege redactions and consequentially acknowledges that the report will be posted without redaction for privilege, without objection from the Department.

My office expects to receive precise and unambiguous markings of proposed redactions for specified privileges no later than 3:00 p.m. (EST) on July 9, 2020. I look forward to your cooperation with this request as well as your staff's full and earnest assistance to OIG on the matters discussed in this memorandum.

If you have any questions concerning this memorandum, please contact me at (202) 482-4661.

cc: Karen Dunn Kelley, Deputy Secretary of Commerce