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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Email	[FOIA Status with attachments] [92 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/19/2025 JLS] - To: Brett Kavanaugh - From: Catherine S. Anderson	92	10/16/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Correspondence [Folder 2] [9]

FRC ID:

9798

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

Records Not Subject to FOIA

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
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2017-0345-F

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This document was prepared on Friday, September 19, 2025

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Withdrawn/Redacted Material **SUPERSEDED**

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
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Catherine S. Anderson

10/16/2001 05:09:15 PM

Record Type:Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: FOIA Status of OA

Brett: I am sending you the following materials in response to OLC's request:



EOPfoia.doc

LORI, ✓
PLEASE MAKE
COPY + HAVE
THIS PACKAGE
DELIVERED TO
PAUL COLBORN
AT OLC. His
phone is 514-2046

1. A hard copy of the attached chart that I prepared some time ago on FOIA/Privacy Act in the EOP. If you want to print the chart, you need to do so on legal size paper. The first column names the EOP office or council; the second column cites any applicable FOIA/Privacy Act cases in which a court specifically addressed FOIA/PA applicability; the third column cites the authorizing legislation for each of the offices and councils of the EOP; the fourth and fifth columns identify whether the office or council has any politically appointed, Senate confirmed (PAS) positions and/or Title 5 employees; and the sixth column summarizes any independent statutory authority cited in the relevant case law or authorizing legislation. As you will see from the chart, all of the offices and councils that were found to be subject to the FOIA/PA have PAS's, were created by statute, and exercise substantial independent authority. Conversely, no office or council not headed by a PAS and not created by statute (as opposed to Reorganization Plan/Executive Order) has been found to be subject to the FOIA. NSC and CEA fall somewhere in the middle. Although both were created by statute, neither was found to exercise substantial independent authority. In my opinion, OA is more analogous to those EOP offices and councils that were found NOT subject to FOIA: OA has no PAS's, was not created by statute, and exercises no substantial independent authority. Note: My guess is that OA began to operate on the assumption that it was subject to FOIA because most of its employees are Title 5 employees, and because its function is to provide support to other EOP offices and councils in addition to WHO. As the FOIA case law relevant to the EOP evolved over the years, however, the courts did not place much, if any, emphasis on the existence or non-existence of Title 5 employees (CEA/NSC). More importantly, the courts began to focus less on "sole function" and more on whether an EOP entity exercises substantial authority independent of the President.
2. OA's Mission Statement and Background, which was included as part of the EOP's Fiscal Year 2002 Congressional Budget Submission for the following accounts: Compensation of the President, White House Office, Special Assistance to the President, Official Residence of the Vice President, Office of Administration, Office of Policy Development, National Security Council, Council of Economic Advisers, and Unanticipated Needs. This should provide OLC with more detail regarding OA's mission, which has remained relatively unchanged but for the recent creation of an EOP Chief Financial Officer (CFO) within OA. See 31 U.S.C. 901. For purposes of section 902 of the CFO Act only, the President has designated the Director of OA as 'the head of the agency' with respect to the EOP.
3. Memorandum to Margaret McKenna from Patrick Apodaca dated June 28, 1978, subject: Applicability of the FOIA to White House Documents, finding that because OA performs functions for other offices within the EOP and there are no identifiable units within the OA which function solely to serve the President, it is reasonable to conclude that OA is an agency subject to the FOIA. This is the only document of which I am aware that concludes that OA is subject to the FOIA. As stated above, however, I think that subsequent case law supports a different conclusion.
4. Letter, including background material, to Dawn E. Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, from Christopher Cerf, White House Counsel's Office, dated September 16, 1994, requesting OLC's informal advice on whether WHO records in the custody of OA are subject to FOIA. OA has no record of an OLC response.

As you will see from the materials, except for the Apodaca memorandum, most of the documents assume that OA is subject to the FOIA and focus instead on the applicability of FOIA to WHO documents in OA's custody. In any event, to the extent that OLC does not already

have copies, the materials may be helpful.

Let me know if you need any additional information. After OLC has an opportunity to review the materials, it may be helpful to meet with them to discuss further. Kate

FOIA/Privacy Act in the EOP

EOP Office/Council	FOIA/PA Applicability Cases	Authorizing legislation	PAS	Title 5 Ee's	Independent Authority /Notes
WHO	Alexander v. FBI ¹ (yes) Barr v. EOP ² (no) Jones v. EOP ³ (no) Tripp v. EOP ⁴ (no) Broaddrick v. EOP ⁵ (no) Flowers v. EOP ⁶ (no) Falwell v. EOP ⁷ (no) Sculimbrene v. Reno ⁸ (no) National Security Archive v. Archivist of the US ⁹ (no) Sweetland v. Walters ¹⁰ (no) Kissinger v. Reporter's Comm. For Freedom of the Press ¹¹ (no)	Reorg. Plan No.1 of 1939 and EO 8248	NO	NO	NO
OVP	Meyer v. Bush (Task Force on Regulatory Relief) ¹² (no)		NO	NO	NO
CEA	Rushforth v. CEA ¹³ (no)	Employment Act of 1946 ¹⁴ Reorg. Plan No. 9 of 1953	YES	YES	NO

¹ 971 F. Supp. 603, 607 (D.D.C. 1997) (Lamberth, J.) (holding that the EOP was an agency subject to the Privacy Act).

² No. 99-1695, slip. op. at 6 (D.D.C. Aug. 9, 2000) (holding that the EOP was not an agency subject to the Privacy Act).

³ No. 00-307, slip. op. at 14 (D.D.C. Mar. 12, 2001) (Office of the President/White House Office was not an agency subject to the Privacy Act).

⁴ 200 F.R.D. 140, 146 (D.D.C. Apr. 5, 2001) (holding that the Office of the President/White House Office was not an agency subject to the Privacy Act.)

⁵ 139 F. Supp. 2d 55, 60 (D.D.C. 2001) (holding that the Office of the President was not an agency subject to the FOIA or the Privacy Act).

⁶ 142 F. Supp. 2d 38 (D.D.C. 2001) (holding that inasmuch as the EOP was not an agency under the FOIA, the EOP was not an agency subject to the Privacy Act.)

⁷ 113 F. Supp. 2d 967, 969-70 (W.D. Va. 2000) (holding that the Office of the President was not an agency subject to the Privacy Act).

⁸ No. 99-2010, slip. op. at 15 (D.D.C. Feb. 16, 2001) (holding that the White House Office was not subject to the terms of the Privacy Act).

⁹ 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990) (holding that the White House was not an agency for purposes of FOIA).

¹⁰ 314 U.S. App. D.C. 9, 60 F.3d 852, 855 (D.C. Cir. 1995) (holding that the Executive Residence was not an agency as defined in the FOIA).

¹¹ 445 U.S. 136, 156, 100 S. Ct. 960, 972, 63 L. Ed. 2d 267 (1980) (holding that the Office of the President was not subject to the FOIA).

¹² 299 U.S. App. D.C. 86, 981 F. 2d 1288, 1293 n.3 (D.C. Cir. 1993) (holding that individuals employed in the White House Office were considered part of the President's immediate personal staff and thus are exempt from the FOIA).

¹³ 246 U.S. App. D.C. 59, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (holding that CEA, whose sole function is to advise and assist the President, was not an agency for purposes of FOIA).

¹⁴ 15 U.S.C. § 1023.

OPD¹⁵	None	EO's 12,859 (DPC, 1993) ¹⁶ and 12,835 (NEC, 1993)	NO	NO	NO
NSC	Armstrong v. EOP ¹⁷ (no)	National Security Act of 1947, as amended by the National Security Amendments Act of 1949 ¹⁸ Reorg. Plan No.4 of 1949, EO 12,333 (19--)	NO ¹⁹	YES	NO
PFIAB	None	EO 12,863 (1993), as amended by EO 13,070 (1997) ²⁰	NO	NO	NO
OMB	<i>Sierra Club v. Andrus</i> (yes) ²¹	The Budget and Accounting Act of 1921 Reorg. Plan No. 1 of 1939 Reorg. Plan No. 2 of 1970 and EO 11541 ²²	YES	YES	YES; statutory offices (OFFM, OFPP, OIRA) have numerous independent management, coordina- tion, and administrative functions
ONDCP	None	The Anti-drug Abuse Act of 1988 ²³	YES	YES	YES; independent statutory authority to oversee and coordinate the efforts of federal drug control agencies and programs

¹⁵ OPD currently consists of the Domestic Policy Council (DPC), the Office of National Aids Policy, and the National Economic Council (NEC).

¹⁶ See also Reorg. Plan No. 2 of 1970 related to its predecessor the Domestic Council and Reorg. Plan No. 1 of 1977 abolishing the Domestic Council and transferring its functions to the Domestic Policy Staff.

¹⁷ 319 U.S. App. D.C. 330, 90 F. 3d 553, 567 (D.C. Cir. 1996) (holding NSC was not an agency under the FOIA).

¹⁸ 50 U.S.C. § 401

¹⁹ Although some members from the President's Cabinet who are PAS's serve on the Council, NSC as an entity has no PAS's.

²⁰ PFIAB was first established by President Eisenhower in 1956 and has been utilized by all presidents since then except Carter. See, e.g., EO 11460 establishing PFIAB in the EOP(1969), and EO 11984 (1977) abolishing PFIAB in EOP.

²¹ 189 U.S. App. D.C. 117, 581 F.2d 895, 902 (D.C. Cir. 1978) (finding that OMB is not totally exempt from FOIA by its definition of agency).

²² First established in 1921 as the Bureau of the Budget. 31 U.S.C. 16 (1921). OMB includes three statutory offices: the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Information and Regulatory Affairs. OMB carries out numerous, OMB-specific, statutory responsibilities, and exercises various delegated authorities. These include more than 200 statutory provisions, including the Budget and Accounting Act, the Budget Enforcement Act, the Antideficiency Act, the Balanced Budget Act, the Impoundment Control Act, the Government Performance and Results Act (GPRA), the Chief Financial Officers Act (CFOs Act), the Government Management Reform Act, the Federal Acquisition Streamlining Act, the Office of Federal Procurement Policy Act, the Paperwork Reduction Act, the Clinger-Cohen Act, the Federal Credit Reform Act, and the Government Paperwork Elimination Act (GPEA).

OSTP	<i>Soucie v. David</i> (yes) ²⁴	The National Science and Technology Policy, Organizations, and Priorities Act of 1976 ²⁵	YES	YES	YES; independent statutory authority to evaluate federal scientific programs, initiate and support research, and award scholarships
USTR	None	The Trade Expansion Act of 1962 ²⁶ and EO 11075 (1963); The Trade Act of 1974 ²⁷ and EO 11846; Reorg. Plan No. 3 of 1979 and EO 12188; Omnibus Trade and Competitiveness Act of 1988 ²⁸ Uruguay Round Agreements Act ²⁹	YES	YES	YES; statutory authority to negotiate trade agreements, develop and implement U.S. trade policy, both domestic and international, and responsible for bilateral and multilateral direct investment matters
CEQ	<i>Pacific Legal Foundation v. CEQ</i> (yes – Sunshine Act) ³⁰	The National Environmental Policy Act of 1969 ³¹ The Environmental Quality Improvement Act of 1970 ³² and EO 11514	YES	YES	YES; independent authority under NEPA to issue guidelines to other federal agencies, coordinate federal programs, and oversee certain activities of other federal agencies
OA	OA has never argued that it is not subject to FOIA	Reorg. Plan No. 1 of 1977 and EO 12028, as amended by EO 12122 (1979)	NO	YES	NO independent policy function or statutory authority; only other function is to provide administrative support “on behalf of” the non-WHO components

²³ 21 U.S.C. § 1501 (1988). The ONDCP Reauthorization Act of 1998 reauthorized ONDCP through Sept. 30, 2003. See also 90 Stat. 242 (1976) and Reorg. Plan No. 1 of 1977 related to its predecessor, Office of Drug Abuse Policy.

²⁴ 145 U.S. App. D.C. 144, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (holding that OST was subject to FOIA because it had independent authority to evaluate federal scientific programs, initiate and support research, and award scholarships).

²⁵ 42 U.S.C. § 6611 *et seq.* (1976). See also Reorg. Plan No. 2 of 1962 establishing its predecessor OST, which was then abolished by Reorg. Plan No. 1 of 1973.

²⁶ 19 U.S.C. 1801 *et seq.* (1962) (establishing a Special Trade Representative).

²⁷ 19 U.S.C. § 2171 (1974) (establishing the Office of Special Trade Representative in the EOP).

²⁸ 19 U.S.C. § 2902 *et seq.* (1988).

²⁹ 19 U.S.C. § 3501 *et seq.* (1995).

³⁰ 205 U.S. App. D.C. 131, 636 F.2d 1259, 1262-63 (D.C. Cir. 1980) (holding CEQ was an agency because of its independent authority to issue guidelines to federal agencies, coordinate federal programs, and oversee certain activities of other federal agencies).

³¹ 42 U.S.C. 4321 *et seq.* (1969).

³² 42 U.S.C. 4372 (1970).

**Executive Office of the President
Office of Administration**

Mission Statement and Background

The Office of Administration (OA) was created by Reorganization Plan No. 1 of 1977, and formally established by Executive Order 12028, on December 12, 1977. OA provides customer-based administrative services to all entities within the Executive Office of the President (EOP), including direct support services to the President. Specifically, OA provides facilities and financial management services, general administrative services, human resources management, information management and technology systems, library and records management services, and security management. OA is comprised of the following:

Office of the Director. The Office of the Director provides leadership and overall management of the agency's staff, services, and resources. This office ensures that customer and administrative priorities are addressed and that the objectives of OA's customer-oriented mission are fulfilled.

General Counsel (GC). The GC serves as counsel to the Office of Administration. The General Counsel's Office provides legal advice in a wide range of substantive areas including general administrative law, ethics, federal procurement, employment law, legal aspects of budgetary and congressional matters, federal record keeping, and information technology management. GC advises other EOP components in areas related to OA's administrative support mission, particularly in cases where EOP components do not have counsel with expertise in government agency law. In addition, GC manages ongoing litigation and provides litigation support to the Justice Department related to OA's mission or uniquely within OA's expertise.

Equal Employment Opportunity (EEO). The EEO promotes diversity and offers programs to prevent discrimination in the workplace. EOP entities receive a variety of services, including dispute resolution, employee counseling, complaint investigation, and EEO/Civil Rights training.

Security (SEC). The SEC manages personnel, computer, and information security for the EOP complex. SEC directs the background investigation process and briefs employees on the requirements and guidelines for handling classified material. SEC coordinates internet and technology safeguards, oversees access to the EOP complex, and pre-screens candidates for employment based on security guidelines.

Operations and Legislative Liaison Division (OLL). The OLL provides advice and assistance on issues relating to the operations, procedures, and practices of OA. In addition, OLL provides support and guidance on congressional matters. OLL directs the EOP Small and Disadvantaged Business Utilization program, and is responsible for administering OA's customer service support functions.

Financial Management Division (FMD). The FMD provides EOP entities with financial services, including budget formulation, execution and analysis; centralized accounting support; and coordinated internal controls reporting. FMD serves as the custodian of the official financial

records of the EOP. FMD's travel unit reviews all EOP travel vouchers in accordance with GSA regulations, and provides travel advisory assistance to all employees.

Human Resources Management Division (HRM). The HRM provides the EOP with human resource management services. These services include payroll processing, recruitment and placement, internal staffing, employee benefits counseling and enrollment, general employee and management advisory services, employee development and training, and position management. HRM maintains the automated human resource management systems and manages the EOP Drug Free Workplace Program.

General Services Division (GSD). The GSD provides common administrative services to the EOP. The Mail/Messenger Branch provides interoffice mail delivery, messenger service throughout the EOP complex, and deliveries throughout the metropolitan area. The Publishing Branch prepares documents and visual aids, oversees the operation of two large-scale duplicating shops, and assists the EOP entities in preparing and designing publications. The Procurement Branch negotiates contracts and procures goods and services on behalf of EOP entities. The Property and Supply Management Branch provides office supplies to EOP clients. This branch also maintains an off-site warehouse and security screening facility known as the Remote Delivery Site (RDS). The GSD also coordinates equipment repair, property disposal and miscellaneous services requested by our EOP clients.

Facilities Management Division (FAC). The FAC manages space use, rent allocation, repairs, and renovations in the White House complex. FAC is the principal liaison between EOP entities and the General Services Administration (GSA). The Preservation Office oversees the restoration of the Dwight D. Eisenhower Executive Office Building (EEOB) to preserve its historical and architectural integrity. It also directs and manages the EEOB Tour Program, the receipt of gifts, and loans of materials and furnishings. The Telecommunications Service Office (TSO) is responsible for administering the EOP telephone system and the cable infrastructure in EOP buildings and provides a single point of contact for the EOP-user community for these systems.

Information Systems and Technology Division (IST). IST is the primary office within the EOP responsible for leading and implementing the EOP information technology (IT) vision and initiatives. IST oversees the Information Technology Architecture (ITA) and ensures adherence to the Information Technology Architecture Implementation Plan that incorporates industry best practices and guidelines from other federal agencies. In addition, IST plans, develops and maintains application systems to support EOP-specific missions, provides customer support services to all of the agencies within the EOP, manages the information and communications infrastructure, and supports the operation and maintenance of the computer network, electronic mail systems, and standard desktop computer systems. IST operates and maintains the EOP Data Center (24 hours a day, 7 days a week), which includes the central computing facilities and other systems that provide the EOP with administrative and mission critical services. These services include: financial management, procurement, human resources, and records management.

Library and Research Services Division (LRS). The LRS provides research materials and services for the EOP. LRS's three libraries maintain a permanent collection of 65,000 print volumes, 760,000 microfiche sheets, 7,950 microfilm rolls, more than 900 journal and newspaper subscriptions, as well as on-line database, internet, and CD-ROM resources. LRS provides virtual library service to all EOP desktops via the intranet Library home page.

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PRESIDENTIAL AND EXECUTIVE OFFICE FINANCIAL ACCOUNTABILITY ACT OF 1997

SEC. 2. CHIEF FINANCIAL OFFICER IN THE EXECUTIVE OFFICE OF THE PRESIDENT.

(a) IN GENERAL- Section 901 of title 31, United States Code, is amended by adding at the end the following:

`(c)(1) There shall be within the Executive Office of the President a Chief Financial Officer, who shall be designated or appointed by the President from among individuals meeting the standards described in subsection (a)(3). The position of Chief Financial Officer established under this paragraph may be so established in any Office (including the Office of Administration) of the Executive Office of the President.

`(2) The Chief Financial Officer designated or appointed under this subsection shall, to the extent that the President determines appropriate and in the interest of the United States, have the same authority and perform the same functions as apply in the case of a Chief Financial Officer of an agency described in subsection (b).

`(3) The President shall submit to Congress notification with respect to any provision of section 902 that the President determines shall not apply to a Chief Financial Officer designated or appointed under this subsection.

`(4) The President may designate an employee of the Executive Office of the President (other than the Chief Financial Officer), who shall be deemed 'the head of the agency' for purposes of carrying out section 902, with respect to the Executive Office of the President.'

(b) PLAN FOR IMPLEMENTATION- Not later than 90 days after the date of the enactment of this Act, the President shall communicate in writing to the Chairman of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman of the Committee on Governmental Affairs of the Senate a plan for implementation of the provisions of, including the amendments made by, this Act.

(c) DEADLINE FOR APPOINTMENT- The Chief Financial Officer designated or appointed under section 901(c) of title 31, United States Code (as added by subsection (a)), shall be so designated or appointed not later than 180 days after the date of the enactment of this Act.

(d) PAY- The Chief Financial Officer designated or appointed under such section shall receive basic pay at the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(e) TRANSFER OF FUNCTIONS- (1) The President may transfer such offices, functions, powers,

or duties thereof, as the President determines are properly related to the functions of the Chief Financial Officer under section 901(c) of title 31, United States Code (as added by subsection (a)).

(2) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office the functions, powers, or duties of which are transferred under paragraph (1) shall also be so transferred.

(f) SEPARATE BUDGET REQUEST- Section 1105(a) of title 31, United States Code, is amended by inserting after paragraph (30) the following new paragraph:

'(31) a separate statement of the amount of appropriations requested to carry out the provisions of the Presidential and Executive Office Financial Accountability Act of 1997.'

(g) TECHNICAL AND CONFORMING AMENDMENTS- Section 503(a) of title 31, United States Code, is amended--

(1) in paragraph (7) by striking 'respectively.' and inserting 'respectively (excluding any officer designated or appointed under section 901(c)).'; and

(2) in paragraph (8) by striking 'Officers.' and inserting 'Officers (excluding any officer designated or appointed under section 901(c)).'.

Amend the title so as to read:

A bill to provide for a Chief Financial Officer in the Executive Office of the President.

I. BACKGROUND AND NEED FOR LEGISLATION

A. BACKGROUND

All Federal institutions must be accountable to the citizens and taxpayers of this Nation for their financial management. This is no less true of the White House than it is of any other department or agency. The Chief Financial Officers Act of 1990 put in place a system of financial accountability. H.R. 1962 will help improve financial management and accountability at the White House by bringing it within the scope of this system of accountability. Specifically, the bill will ensure that the Executive Office of the President must comply, unless exemptions are made, with section 902 of the Chief Financial Officers Act of 1990 (31 U.S.C. 901).

The Executive Office of the President is a collection of disparate agencies and offices. Executive Order 8248, of September 8, 1939, established the divisions of the Executive Office and defined their functions. Various agencies had been transferred to the Executive Office of the President by the President's Reorganization Plans I and II of 1939 (5 U.S.C. App.), effective July 1, 1939, under authority of the Reorganization Act of 1939 (5 U.S.C. 133-133r, 133t note).

The Presidential and Executive Office Accountability Act, P. L. 104-331, ensures that those offices constituting the Executive Office of the President are subject to the same laws as Congress and the rest of the country. In that spirit, H.R. 1962 applies the Chief Financial Officers Act (CFO Act) to the Executive Office of the President. It directs the President to appoint or designate a Chief Financial Officer (CFO) and, to the fullest extent practicable, stipulates compliance by the Executive Office of the President with the

requirements of section 902 of the CFO Act. The CFO Act allows departments and agencies flexibility in setting up the Office of the Chief Financial Officer. The Executive Office of the President would have similar flexibility, so long as accountability is retained and reports are produced by a CFO. The CFO should hold a position in the organization sufficiently elevated to ensure that the President--as the individual with ultimate responsibility for the Executive Office of the President--is aware of the activities, findings, and recommendations of the CFO.

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June 28, 1978

Nelson

MEMORANDUM FOR MARGARET MCKENNA

FROM: PATRICK APODACA

SUBJECT: Applicability of the FOIA to White House Documents

This will address questions you raised concerning the applicability of the Freedom of Information Act to White House documents which are currently in or may in the future be placed in the custody of the Office of Administration. I have discussed the problem with individuals who worked on the OMB reorganization staff when OA was created and there appears to have been no formal consideration of these issues at that time.

Applicability of the FOIA will depend on whether 1) the Office of Administration is an "agency"; and 2) whether the documents in question are "agency records".

The term "agency" specifically includes the Executive Office of the President but has been interpreted to exclude the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. Soucie v. David, 448 F.2d 1067 (C.A.D.C. 1971); House of Rep. 93-1380, pp. 14-15. OA performs functions for other offices within the EOP and there are no identifiable units within the OA which function solely to serve the President. Accordingly, it is reasonable to conclude that the Office of Administration is an "agency" subject to the Act.

The FOIA applies to "agency records" but the Act defines neither "record" nor "agency records". The question is whether OA's involvement with White House documents in its custody is sufficient to deem them agency records subject to the Act.

Exclusive White House ownership of the documents under consideration would preclude any argument that the documents are agency records. However, because of OA's custody of

the documents and certain services which it performs with respect thereto, it becomes necessary to analyze under what circumstances the Office of Administration's possessory interest could rebut an argument that it is merely acting as a bailee for the White House and thereby make these "agency (OA) records" subject to the Act. 1/

For purposes of this analysis, documents that are currently in or might be placed in OA custody can be divided into the following categories:

1. Documents which are in OA's possession only for a short period of time while a service with regard to them is being performed, e.g., messenger service, duplication.
2. Documents in the form of ADP applications, the control of and access to which is restricted exclusively to White House staff. No such systems presently exist.
3. Documents whose information is available to OA personnel for the purpose of performing a related support function, e.g., payroll processing, accounting, correspondence tracking, etc., and documents (including copies of White House documents retained by OA) created by OA relative to or incidental to functions it performs for the White House, e.g., catalog of information systems, status reports, computer printouts, etc. 2/

1/ There is no written agreement between the White House and OA establishing the exact scope of authority which the latter may exercise in regard to any of the documents in its possession. It appears to be informally established that OA may not disclose to a third party any documents or information transferred to it from the White House without the latter's express approval.

2/ Specifically exempted from the FOIA are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). This exemption would afford considerable but not absolute protection from disclosure of White House personnel records in the OA computer system. The exemption would not preclude judicial review of a record to determine whether, on balance, an individual's privacy interest outweighs the public's interest in obtaining disclosure.

OA's limited possession of Category One documents amounts to only a bailment, and not ownership. Accordingly, these are not "agency records" subject to FOIA.

Analyzing the opposite extreme, it would appear that OA's dominion and control over Category Three documents is sufficiently extensive to rebut a bailment theory and strongly suggest that these are agency documents. With regard to documents actually generated by OA and in its possession, it is clear that these constitute OA documents subject to the Act. There remains, however, a question of whether White House documents to which OA has regular access and use might not be restricted in the manner described below to minimize the risk of compelled disclosure under the Act.

The most difficult question arises with respect to Category Two documents. If the information involved in creating these records were inputted and accessed exclusively by White House staff, the risk of exposure to FOIA would be minimal. In other words, OA would merely provide the White House with computer facilities but would not itself become involved in creating the computer records. However, I understand that it may be necessary for OA personnel to become involved in at least a transformation process in creating these records. For example, raw data would be provided to OA (either orally or in writing) which OA staff would then transform to a computer usable form. Under these circumstances, it is unclear whether the documents would constitute agency records, but there is a significant risk that they would be subject to FOIA.

The risk that any Category Two documents would be subject to FOIA could be effectively minimized or eliminated by implementing certain safeguards. A written agreement between OA and the White House could be effected making explicit OA's restricted possessory interest over documents and making clear that ownership and control, in spite of OA's limited interest, remains in the White House. In addition, as has already been suggested, the elimination of OA staff access or involvement with these documents at any step in the process would seem to create a very strong presumption that the documents are not agency records.

As an alternative to the Office of Administration, use of White House Communication Agency (WHCA) facilities is under consideration. The FOIA risks attendant to having WHCA

service the White House are fewer than if services were to be provided by OA.

While not clear from doubt, a persuasive argument can be made that WHCA is not an "agency" subject to FOIA. Technically, WHCA is a field operation of the Defense Communication Agency (DCA), Department of Defense. DCA may exercise discretion concerning administrative matters (e.g., assignment of personnel) but the day-to-day control and operation is clearly directed by the Director of the White House Military office, a White House staff person. Consistent with the purpose for which WHCA was created, its personnel are assigned to the White House exclusively to provide communications and transportation assistance and support to the President. It would therefore appear that WHCA is an entity whose sole function is to advise and assist the President and not an agency subject to FOIA.

In summary, applicability of FOIA to White House documents will depend on the extent to which the Office of Administration is able to exercise control over them. Documents in OA's custody for a temporary period while OA is performing a specific service are not subject to the Act. Where custody is of a more permanent nature there may be a significant risk of compelled disclosure, unless OA's control, use and access is restricted. Although not entirely clear, WHCA would not appear to be an "agency" under FOIA and any risks of public disclosure would be fewer for documents in its custody.

cc: Val Giannini

THE WHITE HOUSE

WASHINGTON

September 16, 1994

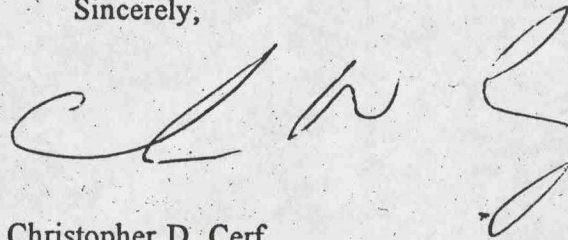
DAWN E. JOHNSEN
Deputy Assistant Attorney General
Office of Legal Counsel, Department of Justice
10th & Constitution Ave., N.W., Room 5224
Washington, DC 20530

Dear Dawn,

Marvin Krislov and I believe that we would profit from OLC's informal advice concerning a recurring FOIA matter. The EOP Office of Administration has physical custody of a large volume of sensitive White House records. While these records fall into a number of miscellaneous categories, they include personnel records and records of financial transactions (e.g. travel expenditures) involving the White House. As the enclosed material suggests, we have always taken the position that such materials are not subject to FOIA notwithstanding the fact that OA itself is "FOIAable."

We would be most grateful if OLC could assist us in looking at this issue. Our objective is to make sure we have taken all available steps to enhance our position in the event the issue is ever litigated.

Sincerely,

A handwritten signature in dark ink, appearing to read 'CD Cerf', written in a cursive style.

Christopher D. Cerf

Enclosure

cc: Marvin Krislov



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

September 12, 1994

MEMORANDUM FOR CHRISTOPHER D. CERF
GENERAL COUNSEL

FROM: BRUCE L. OVERTON *BO*
COUNSELOR

SUBJECT: Resource Materials for a Review of the Office of
Administration FOIA Policy with respect to
Requests for White House Office Data

Attorney Work Product

Attached is a set of memoranda and background documents that can be forwarded to the Office of Legal Counsel, Department of Justice, to obtain its views on the disclosure policy of the Office of Administration (OA) in those instances when information or records of the White House Office (WHO) in OA's custody are requested under the Freedom of Information Act (FOIA). These documents set forth the primary issues in the three areas where requests most frequently intersect OA and WHO operations: data resident on computers maintained and operated by OA, travel documents processed by OA's Financial Management Division, and personnel records kept since 1993 by OA's Personnel Management Division.

There are unique agreements in each of these areas that augment the general premise that OA performs its administrative support as an agent of the WHO and that it has no effective control over the information or the records. Accordingly, the policy has been that these are not "agency records" of OA and not subject to disclosure under the FOIA. One area which has not been given such separate treatment is procurement. In part, this may be explained by the fact that contract award documentation routinely is shared at debriefing sessions with unsuccessful vendors and, hence, has been viewed as being more in the public domain, with the exception of proprietary information. On occasion, sensitive procurement actions have been taken by the White House Administrative Office without the involvement of OA's procurement unit. Less frequently, OA contracting officers have been expressly delegated the authority to perform a procurement under the direction of the White House Administrative Office. In these latter instances, physical custody of the contract documentation has often been maintained by WHO.

cc: Stuart A. Bender

Attachments

CONTENTS FORWARDED TO
THE OFFICE OF LEGAL COUNSEL (DOJ)

- TAB 1 Memorandum to John A. Cressman from OA General Counsel, dated November 26, 1993, including the attachment outlining the FOIA's applicability to Official Personnel Folders belonging to former White House Office staff.
- TAB 2 Memorandum to Gregory S. Walden from OA General Counsel, dated August 1, 1992, discussing the FOIA treatment of WHO travel vouchers, and including an exchange of May 1981 memoranda on the transfer of WHO accounting functions and related data.
- TAB 3 Memorandum to John F.W. Rogers, Deputy Assistant to the President, from Fred F. Fielding, Counsel to the President, dated March 2, 1982 and forwarding the views of the Office Legal Counsel with respect to the applicability of the FOIA to WHO information maintained on OA operated computers.
- TAB 4 Memorandum for Anne D. Neal, OA General Counsel from the Office of Legal Counsel with respect to the applicability of the Privacy Act to WHO data resident on OA operated computers.
- TAB 5 Memorandum of Understanding dated May 1979 between the Special Assistant to the President for Administration and the Director of the Office of Administration treating WHO information.
- TAB 6 Executive Order 12028, as amended by E.O. 12122, setting forth the responsibilities of the Office of Administration, particularly Section 3 outlining the nature of support performed for the White House Office.

Tab

1



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

November 26, 1993

MEMORANDUM FOR JOHN A. CRESSMAN
ASSISTANT DIRECTOR

FROM: BRUCE L. OVERTON *BL*
GENERAL COUNSEL

SUBJECT: Requests Under the Freedom of Information Act for
Payroll/Personnel Information Maintained on White
House Office Staff

Privileged Attorney/Client Communication

A significant issue regarding the nature and disposition of information maintained by the Personnel Management Division (PMD) has come up in the context of the attached request under the Freedom of Information Act (FOIA). The request is for information regarding the salaries, refunds, appointments, and raises, etc. received by individuals on the White House Office payroll which PMD services. In addition, other information regarding conflict of interest reviews, not maintained by PMD, were also requested. Because this request raises important issues of information disclosure policy within the Executive Office of the President, and, in particular, between the Office of Administration and the White House Office, it is important to brief you prior to recommending a final course of action.

Issue

Is information maintained on employees of the White House Office (WHO) by OA's Personnel Management Division subject to disclosure under FOIA?

Discussion

The FOIA requires an agency to disclose information from its "agency records" unless it is subject to one of the express exemptions from disclosure contained in the Act. 5 U.S.C. 552(b).¹ The threshold question in responding to any FOIA

¹ One of these exemptions would, in part, be applicable here. Exemption b(6) allows an agency to withhold information in personnel files where the disclosure "would constitute a clearly unwarranted invasion of personal privacy." However, employee payroll/personnel information is generally subject to disclosure by regulation of the Office of Personnel Management (OPM) which exercises ultimate control over the Official Personnel Files

request, and in particular at the EOP, is whether the document is an agency record. As a general rule, most documents in the custody and control of OA would be considered agency records. This is so even if they were originally generated by an outside entity, like the WHO, that is not subject to the FOIA. U.S. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989). (i.e. Unreported decisions generated by the Federal District Courts in the files of the Justice Department were found to be subject to disclosure under the Act.) The principle consideration is whether the information has come into the agency's possession in the conduct of its official duties. Id. at 145. Lower courts have developed caselaw in this area which fleshes out the meaning of custody and control.

In the context of OA, and the services it provides the EOP component agencies, these cases have added significance. For example, in the course of providing basic records management services for five EOP components, OA receives hundreds of boxes of records, transfers them to the Washington Records Center, and retrieves them upon request by the originating agency. In the view of this office, this activity has never constituted sufficient "custody and control" over the records to transform the contents of these boxes into OA's agency records. This is consistent with the caselaw. Nat'l Security Archive v. Archivist of the U.S., 909 F.2d 541 (D.C. Cir. 1990) As a practical matter, to determine otherwise would make OA subject to responding to every FOIA request for these materials that ought to be directed to the EOP component that truly has access to the information.

In the case of WHO personnel information the facts are significantly different. There is no question that OA has access to the actual information, e.g. payroll data, compensation level, refunds, appointment dates, and the OPF. This information has entered into OA's "information stream" in order for it to deliver personnel services to WHO. However, because of the unique wording of Executive Order 12028 under which we provide services, and historical agreements regulating the terms under which OA has access, the legal argument may be made that these are not OA's

(OPF) of most federal employees. OPM's regulation expressly allows the release of the employee's name, position title, grade, annual salary rates (including awards and bonuses), duty station, and position description. 5 CFR 293.311. The OPFs, and the information contained therein, of employees appointed to WHO staff under Title 3, United States Code, have been recognized by OPM to be in a special category. (See MOU referenced in Background.)

agency records, and consequently, not subject to requests under the FOIA.

Section 3(a) of E.O. 12028 reads in pertinent part:

The Office of Administration shall provide common administrative support and services to all units within the Executive Office of the President, except for such services provided primarily in direct support of the President. The Office of Administration shall, upon request, assist the White House Office in performing its role of providing those administrative services which are primarily in direct support of the President.

The effect of this section is to establish an agency/principal relationship whereby OA performs certain tasks as the agent for the White House Office. Agreements dating back as far as 1979 evidence that OA's maintenance and access to WHO personnel information in its provision of personnel and payroll services has been conducted consistent with the role of a agent.

In 1979 an agreement was entered between OA and WHO "designed to protect White House documents and materials in OA's custody from disclosure under the Freedom of Information Act." (See Background, Memorandum of Understanding dated May 13, 1979 between Hugh Carter and Richard Harden.) It memorializes the agent/principal relationship and sets forth procedures for the exchange and disposition of WHO information.

A four-party agreement adopted in 1992 further memorializes the respective rights of ownership, custody, and access to WHO personnel records by the Office of Personnel Management, the National Archives and Records Administration, White House Office and the Office of Administration. Section III of this latter agreement states that WHO personnel records are under the sole control and jurisdiction of WHO. It also expressly states in Section VI that OA maintains the WHO personnel data on behalf of the White House Office. (See Background, 1992 Memorandum of Understanding.)

The position outlined above is consistent with a 1991 review of the scope of FOIA requests over data provided to OA in processing travel vouchers for WHO staff which references similar agreements approved by the Office of Legal Counsel (OLC), Department of Justice, covering the area of access to WHO computer data. OLC concluded in 1982 that WHO data maintained on OA computers was not subject to the FOIA or the Privacy Act. (See Background, Memorandum to Greg Walden, Associate Counsel to the President from this office dated August 1, 1991.)

In sum, the legal analysis and positions adopted by all former administrations since the establishment of OA have recognized the agent/principal relationship between OA and WHO and is consistent with the position being recommended in this instance. The major factor that was different in the 1991 review was that the records sought could be characterized as being physically separate from those of other EOP agencies. While this is still true in terms of the Official Personnel Folders, which are maintained according to employing agency, it becomes less significant over time because so much information is translated from computer databases that contain no inherent separation of data.

Regardless of the strength of the foregoing legal arguments, it is important to advise you that each denied FOIA request is ultimately reviewable by the U.S. District Courts. Consequently, there is some vulnerability to OA that a response stating that OA has "no agency records" may be reviewed de novo, meaning that a contrary conclusion may be drawn by a court. Therefore, we have discussed this matter with the Office of White House Counsel which agrees with the present legal position and recognizes that the issue is of sufficient significance that it is willing to see the matter tested in the courts if need be.

From my own discussions in the past with the Justice Department, I am aware that its Office of Information Policy (OIP) has raised concerns regarding the viability of the agent/principal argument since there is no precedent for it, to anyone's knowledge, in any other agency. That is not surprising since the establishment of the Office of Administration within the EOP --and its working relationship among the different EOP components -- is per se unique and has generated any number of first impression cases in the area of information disclosure law under the FOIA and the Federal Advisory Committee Act. Moreover, the concerns expressed by OIP in no manner mean that the Justice Department would not vigorously defend the position adopted by OA and WHO.

Attachments

cc: Patsy L. Thomasson
Stephen R. Neuwirth

- 5 -

RECOMMENDATION: That you concur in the sending of a response
of "no agency records" in this instance.

_____ Agree _____ Disagree _____ Other _____ Date

Comments: _____



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

Dear Mr. Margasak:

This is in response to your letter dated October 15, 1993, which was received by this office on October 18, requesting copies of records concerning "personnel on both the White House and transition payrolls" between January 20 and February 19, 1993, and other White House Office personnel related information. Your request was made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The Office of Administration (OA) was created by Reorganization Plan No. 1 of 1977 and Executive Order 12028 to provide common administrative and support services for various agencies and offices of the Executive Office of the President (EOP). OA is a distinct entity from the White House Office, which is another agency within the EOP. The White House Office is exempt from the provisions of the FOIA.

We have no agency records responsive to your request.

As the FOIA provides, you may appeal this determination to the Deputy Director of OA. The address is 725 17th Street, NW, Washington, DC 20503. Please clearly label the appeal: "Freedom of Information Act Appeal." OA regulations require that your appeal be filed within 30 calendar days of receipt of this letter.

Sincerely,

William B. Boorman
Freedom of Information
Act Officer

Mr. Larry Margasak
The Associated Press
2021 K Street, NW
Sixth Floor
Washington, DC 20006



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

November 8, 1993

MEMORANDUM FOR THE FILE

FROM: WILLIAM B. BOORMAN *W. Boorman*
FREEDOM OF INFORMATION ACT OFFICER

SUBJECT: Freedom of Information Act Request of
Mr. Larry Margasak

In a Freedom of Information Act (FOIA) request dated October 15, 1993, Mr. Larry Margasak of the Associated Press requested assorted records concerning:

- 1) White House Office (WHO) personnel who were on both the WHO and transition office payrolls between January 20 and February 20, 1993,
- 2) WHO personnel who received retroactive raises, and
3. Information concerning Mr. Robert Rubin, a WHO employee.

In an October 28th telephone conversation, Mary Beck, Director of the OA Personnel Management Division (PMD), notified me that records responsive to Mr. Margasak's request were obtainable from the relevant WHO employees' Official Personnel Folders (OPF), which are maintained by PMD. No other records responsive to this request were identified.

I have determined that the records in the WHO employees' OPFs are not subject to the FOIA because they are not "agency records." This determination follows discussions with Bruce Overton, OA General Counsel, and Marvin Krislov, Special Counsel to the President; a review of WHO-OA memoranda of understanding (MOU) concerning WHO records in the possession of OA; and a review of past FOIA requests for WHO records in the possession of OA.

According to applicable FOIA case law, to be responsive, records must be under "agency control" at the time of the request. A MOU between the WHO, OA, the Office of Personnel Management and the National Archives and Records Administration dated March 24, 1992, specifies that "White House personnel and medical records...are under the sole control and jurisdiction of the WHO."

In addition, a MOU between OA and the WHO dated May 13, 1979, established the relationship between OA and the WHO regarding control of WHO records. This MOU stated that the WHO is the "exclusive owner of all White House materials."

Lastly, OA management has always treated WHO records in the possession of OA as not subject to the FOIA. For previous FOIA requests to OA for WHO records concerning WHO personnel, WHO-related records in the possession of OA have not been considered agency records.

Document Tracking System

OFFICE OF ADMINISTRATION

Control Number: 5700

File Number:

INCOMING PROFILE

Date: 10/18/93

To: William Boorman

From: Larry Margasak - The Associated Press

Subject: FOIA: Information Concerning Various Personnel on
White House and Transition Payrolls Between
January 20 and February 19, 1993

ACTION

Assigned To:	Division:	Date:	Action Required:	Due Date:
BECK	PMD	10/19/93	Prepare Reply	10/22/93
BOORMAN	OES	10/19/93	Prepare Reply	10/29/93

Signature Level: BOORMAN

Copies Sent To: Thomasson, Cressman, Overton, Beck

Comments: Boorman to prepare reply.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

October 28, 1993

Dear Mr. Margasak:

This is in response to your letter dated October 15, 1993, which was received by this office on October 18, requesting copies of records concerning "personnel on both the White House and transition payrolls" between January 20 and February 19, 1993. Your request was made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The Office of Administration was created by Reorganization Plan No. 1 of 1977 and Executive Order 12028 to provide common administrative and support services for various agencies and offices of the Executive Office of the President.

Under FOIA guidelines, we are in the process of searching for and reviewing records that would be responsive to your request. Consequently, we are extending our response date for an additional 10 working days.

Please call me on (202) 395-3191, if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "William B. Boorman".

William B. Boorman
Freedom of Information
Act Officer

Mr. Larry Margasak
The Associated Press
2021 K Street, NW
Sixth Floor
Washington, DC 20006

10-18-1993 11:16PM

P.01

From:
Larry Margasak
The Associated Press
2021 K St. 6th Floor
Washington, D.C. 20006
Phone 202-828-6483 or 828-6400

Oct. 15, 1993

Patsy Thomasson
Director, Office of Administration
Executive Office of the President
The White House

Dear Ms. Thomasson:

This is a request under the federal Freedom of Information Act as amended, 5 USC 552.

I am seeking the following documents:

_A list of personnel on both the White House and transition payrolls between Jan. 20 and Feb. 19.

_The amounts of refunds paid, and balances owed, by those on both the transition and White House payrolls. Also, the dates of the payments.

_The names of White House personnel who received retroactive appointments, the dates the appointments were approved and the effective retroactive dates of employment.

_A list of White House personnel who received retroactive raises, their original salaries and their salaries after the increase.

_Identify those required to file financial disclosure forms from these categories: those who were on the White House and transition payrolls; those who received retroactive appointments; those who received retroactive raises.

_All documentation showing approval for the appointment of Robert Rubin, including standard form WH1 plus any supporting documentation, including SF50.

_An April 22, 1993 memorandum from a White House Office personnel official, recommending that Rubin's appointment be made no earlier than April 11, 1993.

_Copies of certifications from supervisors verifying that those who received retroactive appointments and pay had actually worked. This was done in the cases of 41 employees, and the information was provided to the General Accounting Office on June 11 or thereafter.

I am requesting this information for the purpose of possible public dissemination in a news article and therefore request that you waive charges pursuant to 5 USC 552 (a) (4) (A), Fed. Reg. 7296, Section 1900.25. I am a fulltime journalist employed by The Associated Press.

If you deny this request for a waiver, please advise me in advance of the estimated charges so that I may decide whether to pay the fees or appeal your denial of my request for a waiver of charges.

OFFICE OF THE
ADMINISTRATOR
33 OCT 18 11:35
EXECUTIVE SECRETARY

10 business days, as required by law.

Sincerely,

Larry Margasak

Larry Margasak

The Associated Press

AP-WX-10-15-93 1640EDT<

TOTAL P.01

~~RKM~~ } FYI
~~ED/TM~~ }
JLH-KEEP

THE WHITE HOUSE
WASHINGTON

May 11, 1979

MEMORANDUM FOR: RICHARD HARDEN
FROM: PATRICK APODACA
SUBJECT: F.O.I.A. Memorandum of Understanding

July
Return copies
and make a copy
B.T.P., July, Rhee
& Loma, Underhill
& Newell

Attached is the final version of the Memorandum of Understanding between the Office of Administration and the White House Office which is designed to protect White House documents and materials in OA's custody from disclosure under the Freedom of Information Act. Bob Lipshutz has asked me to send you this document for signature.

Please sign and date the original and the attached two copies. Retain one signed copy for your files and return the original and the other signed copy to me. The original will be maintained in my office.

Also attached is a memorandum to you from Hugh Carter naming Dan Malachuck as his designee under the agreement.

THE WHITE HOUSE
WASHINGTON

May 3, 1979

MEMORANDUM FOR:

RICHARD HARDEN, DIRECTOR OF
THE OFFICE OF ADMINISTRATION

FROM:

HUGH CARTER 

SUBJECT:

Memorandum of Understanding:
White House Documents, Records,
Files and Similar Materials Made
Available to the Office of
Administration

Pursuant to Section V, paragraph 2 of the above referenced agreement, I hereby designate Mr. Dan Malachuk as my designee to request assistance to the White House Office from OA, and to designate White House materials as either "sensitive" or "non-sensitive."

Thank you.

cc: Robert Lipshutz
Dan Malachuk
Pat Apodaca

MEMORANDUM OF UNDERSTANDING:
White House Documents, Records, Files and Similar Materials
Made Available to the Office of Administration

In order to effectuate maximum utilization of existing facilities and services in accordance with Executive Order 12028 (December 4, 1977), the Office of Administration (OA) shall, upon request, assist the White House Office (WHO) in performing its role of providing those administrative services which are primarily in direct support of the President. This memorandum will set forth restrictions governing possession, custody, access, use and control of any documents, records, files and similar materials (including information contained therein) which WHO makes available to OA, or which are generated by OA, in connection with its provision of such services to WHO (hereafter "White House materials").

I. Ownership

It is understood that WHO is and shall remain the exclusive owner of all White House materials and that OA shall not exercise any proprietary interest in White House materials which is inconsistent with this exclusive ownership.

II. Restrictions on the Availability of White House Materials

A. Nonsensitive White House Materials

1. White House materials designated as "nonsensitive" under Section V may be made available to OA to perform requested services. However, OA shall not permit any person to obtain possession, custody, access, use or control of any nonsensitive White House materials unless such person is:
 - a. an employee of WHO;
 - b. an employee of OA (including any person detailed to OA from another agency) who requires the availability of nonsensitive materials in order to perform services requested by WHO; provided, however, that OA shall make materials available only to the extent required by such employee in the normal course of performing these services or,
 - c. a person who has been authorized in writing by a designated WHO official to have the availability of White House materials; provided, however, that

OA shall make available to such person only those materials or types of materials specified in the written authorization for such time or times and to the extent authorized thereby.

B. Sensitive White House Materials

1. White House materials designated "sensitive" under Section V may be made available to OA only in connection with the provision of computerized services requested by WHO. OA shall not obtain possession, custody, access, use or control of sensitive White House materials for any other purpose.
2. The availability of sensitive White House materials shall be strictly limited to OA employees who have specialized ADP skills and who have been designated in writing by the Director of OA, to the Special Assistant to the President for Administration, to assist in the provision of computer services requested by WHO (hereafter "OA technical personnel"). Sensitive White House materials shall be made available to OA technical personnel only to the extent and for the time required for such employees to discharge requested computer services. OA technical personnel shall not transfer sensitive White House materials to any person other than WHO personnel authorized to acquire and maintain them.
3. OA shall not permit any person, other than authorized OA technical personnel and WHO employees, to obtain possession, custody, access, use or control of a sensitive computer system or any of its components. A "sensitive computer system" is any computer system which OA designs, develops, maintains, or operates, at the request of WHO, and whose contemplated or actual use includes the processing of sensitive White House materials or information contained therein.

C. Implementation of Safeguards

OA shall implement necessary safeguards to ensure that no person obtains possession, custody, access, use or control of White House materials, or sensitive computer systems, except as authorized in this section.

III. White House Materials Whose Retention Is No Longer Required

It is understood that White House materials (including those generated by OA) are available to OA personnel only for

such time and for such purposes as are necessary to render a requested service. White House material shall be promptly delivered to appropriate WHO personnel for disposition once the service in question has been performed.

IV. Production, Reproduction, Duplication, Etc., of Documents, Records, Files and Similar Materials.

OA may generate such materials as are required in the normal course of rendering requested services, provided that the generation and disposition of materials shall at all times be subject to the approval and direction of WHO. However, OA shall not generate any materials which would be deemed "sensitive White House materials" without a specific request from a designated WHO official.

V. Miscellaneous

1. The Special Assistant to the President for Administration, with the advice of the WHO official or unit from which the particular White House materials originate, shall designate White House materials as either "sensitive" or "nonsensitive," according to whether they are determined to be of a confidential or non-confidential nature respectively. Prior to making White House materials available to OA, the Special Assistant, or his designee, shall inform the Director of OA, or his designee, of the corresponding designation of White House materials.

Any materials generated by OA which contain information from or about White House materials or computer systems classified as sensitive shall be deemed "sensitive White House materials."

2. The Special Assistant shall designate in writing to the Director of OA those WHO employees who may act on behalf of WHO under this agreement.

Walter A. Carter, Jr.
Special Assistant to the President
for Administration

5/7/79

Richard M. Hand

5/13/79

John

Re Memo of Understanding from WTHO to Richard regarding
FOIA / Disclosure, etc.

Do NOT have definition or listing of materials
declared to be sensitive or non-sensitive.
Specifically, personnel records.

Wonder if records maintained by TPPIS
get covered. Also generated report
covering WTHO personnel cause some problem unless
they allow us to take care of disposal as we
do on other personnel records coming out of TPPIS

B
5/21

per
Wm Pollak:
WTHO personnel folders
TPPIS data and related
records are not sensitive
in the sense intended by the
inter - Richard Hardin
we now have - of which
is ~~more~~ sensitive
any
all be

MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE U.S. OFFICE OF
PERSONNEL MANAGEMENT, THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
AND THE WHITE HOUSE OFFICE

I. GENERAL

This constitutes an agreement between the U.S. Office of Personnel Management (OPM), the National Archives and Records Administration (NARA), the White House Office (WHO), and the Office of Administration (OA) concerning:

- A. The ownership, maintenance, and retention of personnel and medical records of individuals who have been employed both in a position subject to the Civil Service regulations administered by OPM (under title 5, U.S.C. authority) and in a position subject to the personnel and employment regulations administered by the WHO (under title 3, U.S.C. authority). These various authorities are denoted "systems" in this memorandum.
- B. The granting of access to, disclosure from, and amendment of records in Official Personnel Folders (OPFs), Merged Records Personnel Folders (MRPFs), and Employee Medical Folders (EMFs) of individuals who have been employed by both the WHO and in the Civil Service.
- C. The exchange of personnel documents and data between several Privacy Act systems of records; disclosures will be made only if done in accordance with the Privacy Act.
- D. Procedures to be followed by the National Personnel Records Center (NPRC) when responding to requests for access to, providing information from, or disposition of, the records of separated employees when:
 - (1) the OPF or MRPF contains documents created during both Civil Service and WHO employment;
 - (2) a request is received for transfer of an OPF, MRPF, or EMF between systems;
 - (3) processing a request for an OPF, and the OPF contains only records of WHO (title 3, U.S.C.) employment.
 - (4) processing a request from the OA (written or telephone call-in) for retrieval of an OPF, MRPF, and EMF within 3 days from receipt of request (or sooner, if necessary). In all cases, the OA must be insured "priority" handling of request(s).

- E. Consultation and cooperation in the establishment and revision of processing and recordkeeping procedures which affect the OPF, MRPF, EMF.

II. DEFINITIONS

Access means providing an individual's records (or copies thereof) to that individual or to a representative designated in writing by that individual.

Amendment means correction, addition, deletion, or destruction of any part of an individual's record.

Data Subject means the individual to whom the information pertains and by whose name or other individual identifier the information is retrieved.

Disclosure means providing personal review of a record, or a copy thereof, to someone other than the data subject or other than the data subject's authorized representative or legal guardian.

Employee Medical Folder (EMF) (SF 66-D) means a file containing all occupationally-related civilian employee medical records created during the course of an individual's Federal civilian service under a personnel system subject to title 5, U.S.C. as well as another agency's medical records created under a separate personnel system when the agency has so entered into an MOU agreement with OPM and NARA.

Merged Records Personnel Folder (MRPF) (SF 66-C) means a file containing records and documents related to civilian employment under both the Civil Service personnel system (governed by title 5, U.S.C.) and another Federal personnel system, such as the WHO personnel system.

Official Personnel Folder (OPF) (SF 66) means a file containing records and documents related to civilian employment under title 5, U.S.C. or containing records and documents related to civilian employment under title 3, U.S.C. only.

OPM records means personnel records that were created by Federal agencies that are subject to OPM regulations.

Personnel Folder means a file containing records and documents related to civilian Federal government employment.

Third Party Request means a request for information about an individual, by someone other than that individual from outside the agency creating or owning the individual's record, who is not specifically authorized by the individual (data subject) to receive the information.

WHO records means personnel records that were created under title 3, U.S.C. authority.

III. CONTROL OF PERSONNEL AND MEDICAL RECORDS

A Civil Service employee's Official Personnel Folder (OPF) is part of the OPM governmentwide Privacy Act system of records known as OPM/GOVT-1, General Personnel Records, and is under the control and jurisdiction of the Office of Personnel Management (OPM). Documents of title 5, U.S.C. employees retained in the OPF (SF 66) are subject to the requirements of title 5, United States Code, title 5, Code of Federal Regulations, and the Federal Personnel Manual (FPM), as well as appropriate agency or department regulations.

The Merged Records Personnel Folder (SF 66-C) combines records of service under the Civil Service system and another personnel system, and is used whenever an agency creates new records of employment for a person with employment records created under more than one personnel system.

The Employee Medical Folder (SF 66-D) is part of the OPM governmentwide Privacy Act system of records known as OPM/GOVT-10, Employee Medical Files, and is under the control and jurisdiction of the Office of Personnel Management (OPM). Documents retained in the EMF (SF 66-D) are subject to the same authorities described above for the OPF of title 5, U.S.C. employees. The EMF may also contain medical records created under a non-title 5, U.S.C. agency authority; those medical records, although combined with title 5, U.S.C. records, are under the control and jurisdiction of the non-title 5, U.S.C. agency.

The White House Office personnel and medical records are subject to the requirements of title 3, United States Code and are under the sole control and jurisdiction of the WHO. Through implementation of this MOU, WHO personnel and medical records will be retained in the OPF, MRPF, and EMF as appropriate. Although the WHO is not bound by OPM regulations and procedures relating to establishment and maintenance of OPFs, MRPFs, and EMFs, the WHO agrees to follow the OPF and EMF maintenance procedures contained in FPM Supplement 293-31, BASIC PERSONNEL RECORDS AND FILES SYSTEMS, insofar as practicable.

The Office of Administration, Personnel Management Division, of the Executive Office of the President has responsibility for the establishment and maintenance of OPFs, MRPFs and EMFs of WHO employees. Requests for OPFs, MRPFs and EMFs of current WHO employees or any other questions or concerns regarding WHO employee records should be sent to: Director of Personnel Management Division, Office of Administration, Executive Office of the President, 725 17th Street N.W., Room 4013, Washington, D.C. 20503.

IV. REPOSITORY OF RECORDS

NARA, National Personnel Records Center (NPRC), in St. Louis, Missouri, is the authorized repository for the personnel and medical records of most former Federal employees.

The NPRC accepts OPF's, MRPF's and EMF's from agencies that are separating employees from the Federal service. Such records will be accepted by NPRC

only if they are filed in the appropriate folder (SF 66, "Official Personnel Folder," SF 66-C, "Merged Records Personnel Folder," or SF 66-D, "Employee Medical Folder") and contain the proper identification of the former employee--Name (last, first, middle initial), date of birth (month, day, year) and social security number.

The NPRC also agrees to accept loose miscellaneous documents from agencies for filing in OPF, MRPF, or EMF. Such documents will be accepted only if forwarded with a cover letter containing the name, date of birth, social security number and date of separation of the former employee.

If documents are improperly filed in OPF's, MRPF's, or EMF's, or if NPRC determines that an improper folder has been used to retain these records, NPRC will return such document(s) or folder to the separating agency for corrective action.

NPRC agrees to be responsible for the retention, maintenance and safeguarding of these records until they are again requested from NPRC by a designated Federal agency official, or until the authorized retention period of the file expires, whichever comes first.

Records must be forwarded to NPRC in a sealed envelope, a standard records carton, or similar container. All records must be addressed to: National Personnel Records Center (Civilian Personnel Records), 111 Winnebago Street, St. Louis, Missouri 63118.

The OPFs, MRPFs and EMFs (which may contain WHO records) of separated employees, under OPM's control or as agreed to in an MOU with non-title 5 U.S.C. agencies, are retained at the National Personnel Records Center, 111 Winnebago Street, St. Louis, Missouri 63118. NPRC is responsible for the maintenance, retention, and disposition of these records in accordance with OPM procedures (as supplemented by any MOU between the Agency, NARA and OPM).

~~NPRC will forward to the OA an OPF, MRPF and EMF within 3 days from date of receipt of request. Records will be sent by express mail; this service will be funded by WHO. OA will provide an express mail label and envelope with each request.~~

V. ESTABLISHMENT AND MAINTENANCE OF FOLDERS

Title 3, United States Code (title 3, U.S.C.) exempts the WHO from the provisions of Executive Order 12107, "Relating to the Civil Service Commission and Labor-Management in the Federal Service," which designated the OPF in Federal agencies as property of OPM. Title 3, U.S.C. permits the establishment of an independent WHO personnel records management system. Although WHO is not bound by OPM rules and regulations governing the establishment, maintenance and retention of OPFs, MRPFs, and EMFs, the WHO intends to use OPM designated folders (SF 66 OPF, SF 66-C MRPF, and SF 66-D EMF) to retain its records.

VI. TRANSFER OF RECORDS

When a person who is employed by the WHO, and for whom OA, on behalf of the WHO, maintains an OPF or MRPF, transfers to an Executive Branch agency of the Federal government, or to another non-title 5 Federal agency with whom OPM has a MOU, the OA will transfer the OPF or MRPF to the new employing agency upon request. Before the folder is forwarded, however, the OA and the WHO will remove any temporary records filed in the OPF/MRPF by the WHO, and insure that all long-term documents in the OPF/MRPF are complete and correct in accordance with requirements of FPM Supplement 293-31 and WHO regulations.

When an agency receives an OPF containing WHO records, the WHO records will be combined with the agency records and placed in a MRPF (SF 66-C).

When an agency receives a MRPF from the WHO, these records will remain in the MRPF (SF 66-C).

When an individual separates from WHO employment, but is not transferring to another Federal agency, the OA will forward the OPF or MRPF to NPRC.

VII. ACCESS TO PERSONNEL RECORDS

A. Data Subject Access Requests

When an agency receives a request from a current employee, who was formerly employed with the WHO to review or obtain a copy of his/her MRPF, the agency will make arrangements with the employee to establish when the MRPF can be reviewed or when copies of the MRPF can be made available.

When NPRC receives a request from a former WHO employee for a copy of a specific document, information, or transcript from a WHO record retained in an OPF or MRPF, NPRC will provide the requester with the requested copy, information, or transcript.

When NPRC receives a request from a former WHO employee for a copy of his/her OPF, NPRC will determine if the OPF contains only WHO records, or if the OPF contains records created under both the WHO and another personnel system. When the OPF contains only WHO records, NPRC will forward the request and the OPF to: Director of Personnel Management Division, Office of Administration, Executive Office of the President, 725 17th Street N.W., Room 4013, Washington, D.C. 20503. The NPRC will notify the requester of the referral.

When the OPF contains records created only under the WHO and title 5 authorities, NPRC will forward the request and OPF to the U.S. Office of Personnel Management, OPF/ENF Access Unit, for appropriate action, and notify the requester of the referral. OPM will place all records in a MRPF and provide the requester with a copy of his/her title 5, U.S.C. records. OPM will then forward the request and the MRPF to the OA (address above) for appropriate action regarding WHO records, and notify the requester of the referral.

When the OPF or MRPF contains WHO records, title 5 records, and records created by another non-title 5, U.S.C. agency, OPM will provide the requester copies of any title 5 records and then forward the MRPF and request to the OA (address above) for appropriate action regarding WHO records. OPM will notify the requester of the referral. When OA has responded to the request regarding WHO records, OA will forward the request and the MRPF to the next non-title 5 U.S.C. agency for appropriate action and notify the requester of the referral. The last non-title 5 agency responding to the request will return the MRPF to NPRC for retention.

B. Third-Party Access Requests

When NPRC receives a third-party request for access to an employee's WHO personnel records and the WHO records are retained in either an OPF or MRPF, and the requester has not obtained authorization from the data subject for release of his/her records, NPRC will forward the request and the OPF or MRPF to: Director of Personnel Management Division, Office of Administration, Executive Office of the President, 725 17th Street, NW.. Room 4013, Washington, DC 20503. The NPRC will notify the requester of the referral.

When an agency receives a third-party request for access to an employee's WHO personnel records and the WHO records are retained in either an OPF or MRPF, and the requester has not obtained authorization from the data subject for release of his/her records, the agency will determine if the OPF contains only title 5, U.S.C. records, or title 5, U.S.C. records, WHO records, and other non-title 5, U.S.C. records. When the OPF contains only title 5, U.S.C. records, the agency will prepare a transcript with the information that is releasable under 5 CFR 293.311 and forward the transcript to the requester.

When the OPF contains title 5, U.S.C. records and WHO records, or records created under another non-title 5 personnel system, the agency will place all records in an MRPF. The agency will prepare a transcript for the title 5 records with the information releasable under 5 CFR 293.311 and WHO records with the information releasable under title 3, U.S.C. (contact the OA at the address in section VII.A. above to learn what information is releasable under title 3). Information requested on other non-title 5 service will be referred to the specific agency for response.

When an agency or the NPRC receives a third-party request for access to an employee's personnel records and the records are retained in an OPF or MRPF, and the requester has obtained authorization from the data subject for release of his/her records, the agency or the NPRC will proceed under section VII.A. above, treating the request as if it were made by the data subject.

VIII. DATA SUBJECT REQUESTS FOR CORRECTION OR AMENDMENT OF RECORD

Requests for correction or amendment of personnel records by a currently employed title 5, U.S.C. employee will be processed by the current

employing agency to meet the requirements of OPM's regulations. However, when the request involves correction or amendment of a WHO record, the agency will forward the request and the MRPF to the OA at the address in section VII.A. above for appropriate action. The agency will notify the employee of the referral. The OA will return the MRPF to the current employing agency for retention.

When NPRC receives a request from a former WHO employee for amendment of his/her WHO records, and the records are in an OPF or MRPF, NPRC will forward the OPF or MRPF to the OA at the address in section VII.A. above for appropriate action. NPRC will notify the requester of the referral.

IX. AGENCY REQUESTS FOR TRANSFER OF PERSONNEL RECORDS

When an agency is hiring a current WHO employee, the agency will forward a copy of the appointment SF 50, along with the agency's return address, to the OA at the address in section VII.A. above to request the employee's OPF or MRPF. The OA will forward the OPF or MRPF within 5 work days from the date of the request.

When NPRC receives a request from a Federal agency for the loan or transfer of a former WHO employee's OPF or MRPF, NPRC will forward the OPF or MRPF to the agency. NPRC will honor such requests only if the agency has submitted an SF 127, Request for Official Personnel Folder, to request the Folder.

X. REQUESTS FROM INVESTIGATORS

When an agency receives a request from a properly authorized and identified Federal investigator (i.e., FBI, CIA, DIA, NSA, DIS, DEA, OPM, Postal Inspector) for on-site review of a former employee's records that are retained in an OPF or MRPF, and the OPF or MRPF contains WHO records, the agency will furnish the records to the investigator for review. The agency will account for disclosure of the WHO records to any investigator.

When NPRC receives a request from a properly authorized and identified Federal investigator (i.e., FBI, CIA, DIA, NSA, DIS, DEA, OPM, Postal Inspector) for on-site review of a former employee's records that are retained in an OPF or MRPF, and the OPF or MRPF contains title 5 and WHO records, NPRC will furnish the OPF or MRPF to the investigator for review at NPRC.

When an agency receives a request from a properly authorized and identified Federal investigator to review off-site an OPF or MRPF that contains records of a former WHO employee, the agency **will not** release the OPF or MRPF for review of the WHO records unless the investigator presents a letter that specifically authorizes release of the WHO records. The authorization letter must be signed by the Director of Personnel Management Division, Office of Administration, Executive Office of the President (725 17th Street NW., Room 4013, Washington, DC 20503).

When NPRC receives a request from a properly authorized and identified Federal investigator for off-site review of an OPF or MPRF of a former title 5 and title 3 employee's records, NPRC will forward the request and the OPF or MPRF to OPM's OPF/EMF Access Unit for appropriate action.

Before releasing the OPF or MPRF to the investigator, the OPF/EMF Access Unit will:

- (1) obtain authorization from the Assistant Director for Workforce Information for the off-site review of the title 5 records in the OPF or MPRF.
- (2) obtain from the investigator a letter that specifically authorizes the former employee's OPF or MPRF containing title 3 records to be released for review. The authorization letter must be signed by the Director of Personnel Management Division, Office of Administration, Executive Office of the President (725 17th Street NW, Room 4013, Washington, DC 20503).

When the OPF/EMF Access Unit has obtained appropriate and proper authorization to release the OPF or MPRF to the investigator for off-site review, the Unit will:

- (1) make and retain a complete copy of the OPF or MPRF;
- (2) provide the original OPF or MPRF to the investigator with the requirement that the OPF or MPRF be returned to the Unit as soon as the review has been completed;
- (3) notify NPRC that the OPF or MPRF is to be charged out to the investigator. The charge-outs from NPRC for off-site review will be documented in the OPF or MPRF with an SF 127.

When the original OPF or MPRF is returned to the Unit, the Unit will compare each page to the photocopied OPF or MPRF to insure that the original is complete. After verifying the completeness of the OPF/MPRF, the OPF/EMF Access Unit will destroy the copy and return the original to NPRC.

When an agency or NPRC receives a request from a private investigator, who is under contract with a Federal agency, to review on-site an OPF or MPRF which contains records of a former WHO employee, the agency or NPRC will not release the OPF or MPRF for review of the WHO records unless the investigator presents identification that indicates he/she is acting in an official capacity to conduct an investigation and has an authority letter from: Director of Personnel Management Division, Office of Administration, Executive Office of the President, 725 17th Street N.W., Room 4013, Washington, D.C. 20503 authorizing that person's OPF or MPRF be provided for review.

XI. CONGRESSIONAL REQUESTS

When an agency or NPRC receives a request from either a member of Congress or a Congressional Committee for disclosure of a former WHO employee's WHO records, the agency or NPRC will forward both the request and the records to the address in section VII.A. above for appropriate action and notify the requester of the referral.

XII. ACCOUNTING OF DISCLOSURES

The NPRC, the OPM staff, OA and the WHO will account for the disclosure of each record released and place the record of disclosure in the OPF or MRPF, respectively. The accounting will show: the information that was released, the date that it was released, to whom it was released, who released it, and who requested the release.

XIII. ACCESS TO MEDICAL RECORDS

When an agency receives a request concerning medical records of a former WHO employee, the agency will forward the request to: Director of Personnel Management Division, Office of Administration, Executive Office of the President, 725 17th Street N.W., Room 4013, Washington, D.C. 20503, and notify the requester of the referral.

When NPRC receives a request for a copy of or information from the EMF which contains only WHO records, NPRC will forward the EMF and the request to the above address and notify the requester of the referral.

XIV. COORDINATION AND CONSULTATION

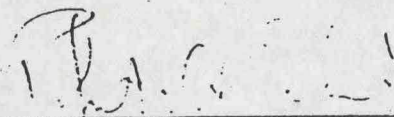
The OPM, WHO, OA, and NARA agree that there is a need for continuing close cooperation and consultation concerning the exchange of personnel documents and data and the applicability of procedures relating to the maintenance and use of OPFs, MRPFs, and EMFs. Matters of mutual concern which may arise, but are not covered by this memorandum, will be mutually resolved.

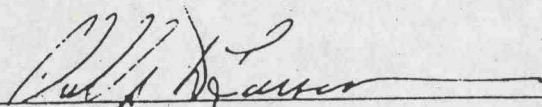
The Assistant Director for Workforce Information (OPM), the Assistant Archivist for Federal Records Centers (NARA), and the White House Office through the Office of Administration, Executive Office of the President, Director of Personnel Management Division, are designated as the coordinators and contact points for the establishment and oversight of relevant procedures, and will assign staff members to implement this agreement. Additional detailed agreements that the coordinators jointly establish will be considered to be a part of this agreement.

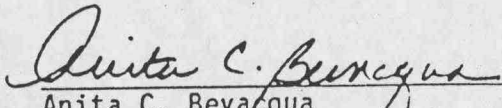
The parties to the Memorandum of Understanding (MOU) understand that the agreement is voluntary, and either party may terminate the MOU after notifying the other of its intention at least 90 days in advance.

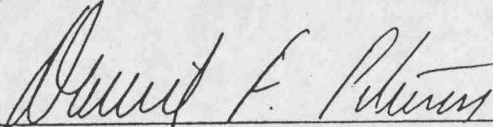
XV. PROCEDURES AND REGULATIONS TO IMPLEMENT THIS MEMORANDUM

It is agreed that the OPM, NARA, OA and WHO may issue regulations and procedures to implement this Memorandum of Understanding (MOU). The coordinators agree that they will consult concerning the development and issuance of such regulations and procedures, and that when such regulations or procedures are issued, a copy will be furnished to the other parties to this agreement.


Philip A. D. Schneider Date
Assistant Director for Workforce Information
U.S. Office of Personnel Management


Phillip D. Larsen 12/9/91 Date
Director of Personnel Management Division
Office of Administration
Executive Office of the President


Anita C. Bevaqua 12/5/91 Date
Director of White House Personnel Office
White House Office
Executive Office of the President


David F. Peterson 3/24/92 Date
Assistant Archivist for Federal Records Centers
National Archives and Records Administration

Tab 2



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

August 1, 1991

MEMORANDUM FOR GREGORY S. WALDEN
ASSOCIATE COUNSEL TO THE PRESIDENT
OFFICE OF WHITE HOUSE COUNSEL

FROM: BRUCE L. OVERTON *BL*
GENERAL COUNSEL

SUBJECT: Freedom of Information Act Requests for
White House Office Records in Possession
of the Office of Administration

The Office of Administration (OA) has recently received two requests pursuant to the Freedom of Information Act (FOIA). The first seeks "all expense accounts" submitted by a senior White House official since he assumed his post. The second requests the "complete log of car travel . . . including destinations, reasons for trips, whether personal or business, the cost of each trip and any reimbursement (including taxes) incurred by" the same senior official. (See attached background for full text of requests.)

In conformance with its internal policy regarding FOIA requests, the OA FOIA Officer, Jonathan Mertz, requested potentially responsive records from appropriate OA divisions. The Acting Director of OA's Financial Management Division (FMD) met with me on July 10, 1991. Three sets of documents were identified by his staff: (1) travel vouchers submitted by the senior official to the White House Administrative Office and forwarded to FMD for further accounting/processing; (2) copies of White House Mess bills; and (3) a copy of the individual's Supplemental W-2 form and the accompanying calculations sheet.

After reviewing the records, the Acting Director of FMD and I determined that items one and three were reasonably within the parameters of the requests. Later on July 10, you concurred that the mess bills were not responsive.

Since identifying the responsive documents, this office has undertaken a review of the applicable FOIA case law and the legal authorities which regulate the relationship between OA and the White House Office (WHO). It is our opinion, set forth in detail below, that the WHO travel vouchers are not subject to FOIA because they are not "agency records." The Supplemental W-2 is generated by OA and comes within the scope of FOIA but is exempt from disclosure for privacy reasons.

Recommendation

It is our recommendation that OA respond to the requests consistent with the determination and analysis contained in this memorandum. Prior to doing so, we seek the formal concurrence of the Office of White House Counsel.

Issue

The narrow legal question of first impression is whether the WHO travel vouchers become subject to FOIA because they are processed for payment by FMD.

Background

The issue stems from two legal anomalies: the WHO records are not subject to FOIA because Congress has expressly excluded the WHO from the scope of FOIA.¹ In addition, OA operates under a charter, Executive Order (E.O.) 12028 (December 12, 1977), which grants OA the authority to provide common administrative support and services to the Executive Office of the President (EOP), but it expressly reserves that assistance primarily in direct support of the President shall be at the request of the WHO and ancillary to that office's administrative role. E.O. 12028, Section 3.²

Since its inception, OA has been subject to FOIA. It has published FOIA regulations and reports annually to the Congress in conformance with FOIA requirements. There is little question that records generated by OA are subject to FOIA.³ However, in its service role a great volume of records and other information

¹ S. Rep. No. 1200, 93rd Cong., 2d Sess. 15 (1974).

² E.O. 12028, Section 4, was amended by E.O. 12122 (February 26, 1979). However, this did not alter the provisions related to assisting the WHO.

³ The FOIA issues regarding the Supplemental W-2 forms and their calculation sheets are very different. In that instance, the OA payroll staff generates the document. These are not subject to release, however, because Exemption b(6) of FOIA allows an agency to withhold records where the disclosure would represent a clearly unwarranted invasion of personal privacy.

is transmitted to OA either electronically or physically to enable OA to perform its mission of providing services. For example, OA's Library and Information Services Division provides records management services for numerous EOP components. These records, in OA custody, have never been considered subject to FOIA requests directed to OA merely because OA transfers them to a records depository for retrieval or other disposition.⁴ Similarly, other records and information in OA's possession are also there only in its custody. One of OA's service areas -- the provision of computer support -- bears particular mention.

In 1982, the Office of Legal Counsel, Department of Justice (OLC), considered the related question of whether the WHO information maintained on OA computers would consequently become subject to FOIA. OLC concluded that because the WHO exercised complete dominion and control over the data -- which was evidenced by an agreement between OA and the WHO -- it was not subject to FOIA.⁵ Factors considered relevant in arriving at that conclusion included the fact that OA was acting expressly as an agent for the WHO. Although OA personnel had access to the data, it was at the express authorization of the WHO and was not for the purpose of understanding the data's contents. Moreover, manipulation of the data was at the direction of the WHO.

In the case of travel vouchers, the records are generated by the White House Administrative Office. The originals come into the custody of FMD for processing after review by, and approval of, the WHO funds manager. This means that an OA accounting officer reviews the travel voucher and authorization to determine that it is proper and then certifies that appropriate payments -- whether

⁴ The case of Ntl. Security Archive v. Archivist of the U.S., 909 F.2d 541 (D.C. Cir. 1990) aff'g 688 F. Supp. 29 (D.D.C. 1988), discussed the OA records management function and provides further recognition to the agency relationship between OA and the WHO. In that case, the plaintiff sought documents reviewed by the "Tower Commission" for which OA had provided administrative support services. Because the OA charter states that it provides records maintenance, the FOIA requester argued the Commission's records were subject to FOIA via OA. The lower court dismissed this argument because the Commission had sole possession and control of the documents. The reviewing Court of Appeals did not reach the present question of records in OA's possession but not under its control. Nevertheless, the fact that the WHO, or here a Presidential Advisory Commission, maintained control of the records, was a key factor.

⁵ Memorandum for Honorable Fred F. Fielding dated February 22, 1982, from Larry L. Simms, Deputy Assistant Attorney General, OLC.

to the traveler or the commercial provider -- be made. Funds availability is confirmed (if it has not been done at an earlier stage by the WHO funds manager) and the WHO appropriation is obligated for the certified amount. The vouchers remain with FMD and are segregated from vouchers of other EOP components. Until several years ago, these records were also kept under separate lock and key. More recently, vouchers from each EOP component have been maintained under the same security safeguards as the WHO vouchers.

Although there is no written agreement on file covering vouchers such as that covering computer data, some documentation has been identified demonstrating that the accounting functions presently performed by FMD were once performed in the WHO. Moreover, substantial consideration was dedicated to whether the vouchers should be sent to FMD or only the account balances. A May 4, 1981, memorandum sent to John F.W. Rogers, former Director of OA and Deputy Assistant to the President for Management, documents that travel vouchers were not to be forwarded to FMD. There is no interim memoranda we have been able to locate which sheds light on how it came that vouchers are presently reviewed and maintained by FMD.

Legal Precedents

The analysis of whether the WHO vouchers are subject to FOIA depends on the application of case law to the unique symbiosis that exists between the WHO and OA. In 1989 the Supreme Court settled the issue whether a record originating in a non-FOIA entity may be subject to release by an agency receiving it. U.S. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989). However, the operative factor determining applicability of FOIA was that the receiving agency must be in control of the requested records. "By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." Id. at 145.

Certainly, OA has come into possession of the travel vouchers in the course of conducting official duties, but the analysis arguably should not stop here. The fact that distinguishes the vouchers from the precedent above is the agency relationship that exists between OA and the WHO, as recognized in the 1982 OLC opinion. This relationship is evident in Section 3(a) of E.O. 12028 where the support services provided the WHO are at its request and under its direction. Moreover, the provisions of E.O. 12122 delegate to the Director of the Office of Administration the authority to "do all other things that the President, as head of the Office of Administration, might do." E.O. 12122, amending Section 4(a) of E.O. 12028. The legal

argument can be made that OA is conducting its official duties at the behest of the WHO in direct support of the President, as consistent with its mandate under the Executive Orders.

Other cases have examined the meaning of "agency control" over records. A review of these cases reveals a pattern of analysis by the courts seeking to determine to what extent agency personnel exercised control over the records. The courts look to a totality of the circumstances surrounding the creation, maintenance and use of the records. Consequently, any evaluation of "control" is fact-intensive and needs to be analyzed on a case-by-case basis.⁶ If the control issue were alone determined by the possession and use of these records by OA personnel, it would be difficult to persuade a court on review that these vouchers are not agency records subject to FOIA. However, the countervailing considerations summarized below are persuasive:

- The Executive Orders establishing the authority of OA within the EOP create an agency relationship between the WHO and OA, as recognized by the OLC in its 1982 opinion.
- The Memoranda Decision executed by John F.W. Rogers May 4, 1981, indicates that the WHO exercised continuing control over their records.
- FMD has consistently maintained the WHO travel vouchers separately from other EOP components.

⁶ In Washington Post v. U.S. Dept. of State, 632 F. Supp. 607 (D.D.C. 1986), the court held:

The Court is directed to conduct an examination into the "totality of the circumstances surrounding the creation, maintenance and use . . . " of the documents to determine whether the material is, in fact, subject to FOIA. [Relying on Bureau of Ntl. Affairs v. U.S. Dept. of Justice, 742 F.2d 1484, 1492 (D.C. Cir. 1984).]

See also Ryan v. Dept. of Justice, 617 F.2d 781 (D.C. Cir. 1981) (questionnaire gathered by Attorney General from Senators deemed to be agency records and not records gathered solely for advising the President); Wolfe v. Dept. of Health and Human Services, 711 F.2d 1077 (D.C. Cir. 1983) (Reagan transition team document held not to be agency record merely because Department of Health and Human Services official kept it in his office).

- OA management has always operated under the belief that the WHO records in the possession of FMD are not subject to FOIA.
- There has been a consistent historical pattern of submission by OA of any requests from the General Accounting Office or Congress for review or release of vouchers to appropriate WHO officials for approval.

Conclusion

The ramifications of the agency relationship extant between the WHO and OA are that records created by the WHO do not become subject to FOIA simply because they pass into the possession of OA. This is demonstrated by the fact that OA does not control the use and disposition of WHO records and information, such as the travel vouchers and computer data.

Recommendation:

That the Office of Administration respond to the request for travel vouchers on the basis that it has no agency records responsive to the request.

Agree: ✓ G&W Disagree: _____ Date: 8-1-91

Comments: _____

Attachment

file - Wls
THE WHITE HOUSE

WASHINGTON

May 4, 1981

MEMORANDUM FOR JOHN F. W. ROGERS

FROM:

ROBERT D. LINDER *Linder*

SUBJECT:

Transfer of Accounting Function

Attached is a copy of the status report I received from Darrell Johnson on progress made to transfer the White House accounting function to OA. As you can see, OA anticipates having a system in place that can produce a mid-month report on May 15. They are also back-loading data from the first of fiscal year 1981. They are not sure how long this operation will take.

For this first mid-month report, OA will receive the balances from WHO for the certifiable accounts, official entertainment, and travel. Accounting for these accounts can be transferred to OA at some future time, depending on those vouchers you want to keep in the WHO and those you don't mind having transferred to OA.

The following is a summary of each account and some factors you may want to consider in making the transfer.

President's Expense Allowance (\$50,000). This account provides for official expenses of the President. You and Mike Deaver have been designated to authorize expenditures. The GAO is permitted to certify vouchers but not perform normal audits on this account. The question is whether WHO keeps all the vouchers and provides only the balances to OA for inclusion in the accounting statements, or we send all paper work to OA.

Send vouchers to OA _____

Send OA only the balances ✓ *pin*

President's Travel Account (\$100,000). Funds are spent on the President's certificate and are not subject to GAO audit. The same issues are involved as the President's Expense Allowance.

Send vouchers to OA _____.

Send OA only the balances .

~~Travel and Transportation of President (\$100,000) in FY 1961~~
This account is composed of two parts:

1) ~~travel and subsistence funds which can be used to~~
~~payments greater than the usual government travel~~
~~regulations permit. These funds are not auditable~~
~~by the GAO, but are subject to an inspection to~~
~~verify the expenditures.~~

2) ~~normal staff travel funds to which government travel~~
~~regulations apply. These are subject to GAO audit.~~

You have indicated that you plan to keep the ~~normal portion~~ in the ~~White House administrative offices~~. This fact, ~~plus the~~
~~certifiable portion of the account, may make it advisable~~
~~to send only balances to GAO.~~

Send vouchers to OA _____

~~Official Entertainment (\$20,000) As you know, this account~~
~~is for use by WFO staff and for allocations to other EOP~~
~~agencies. Accounting for this account could be handled~~
~~either way, depending on what flexibility you want the~~
~~vouchers to have.~~

Send OA only the balances _____.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

May 1, 1981

MEMORANDUM FOR: ROBERT D LINDER,
Director
White House Operations

FROM: DARRELL JOHNSON
ACTING DIRECTOR
OA/FMD

SUBJECT: TRANSFER OF W.H. ACCOUNTING
SYSTEM TO OA/FMD

Since our last meeting we have established the White House office in the OA accounting system with the capability to have reports, not only by appropriation, but by office as well. Also, we have had a chance to talk to Art and several members of his staff to acquaint ourselves with your current systems. Based on these discussions, we have asked for different records and have begun to input detail accounting data for the months of October and November, 1980.

Actions yet to be completed during the month of May are as follows:

1. OA will need the detail information of each accrual that WHO puts on the books as of 4/30/81. We will work, in conjunction with Art, on having this data recorded on a "MOD".
2. We will need aggregate totals of expenditures by object class as of 4/30/81.
3. The information obtained in step 1 above will be reviewed with Art Pettipas to determine which of the accruals are of a continuing nature and what the anticipated expenses to year end will be.
4. The above information will be input to the OA system.
5. We will then run parallel systems from May 1-15, 1981. We will need copies of all invoices received and schedules prepared by Art during the period May 1-15, 1981.
6. On May 15, we will prepare a mid-month report and compare data from both systems. Based upon this review it will be determined whether WHO will continue to make payments during the remainder of the month or OA will process the remaining payments.

Tab 3

THE WHITE HOUSE

WASHINGTON

March 2, 1982

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CIVIL

MEMORANDUM FOR JOHN F.W. ROGERS
DEPUTY ASSISTANT TO THE PRESIDENTFROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: ~~White House Office Use of Office of~~
~~Administration Computers -- Applicability~~
~~of Freedom of Information Act (FOIA)~~

You requested the judgment of Counsel's Office on the applicability of the Freedom of Information Act to White House Office data entered and stored in Office of Administration computers. (The question arises because the Office of Administration is, but the White House Office is not, subject to FOIA.) It is our understanding that since April, 1981, for purposes of efficiency and economy, the Office of Administration has permitted certain routine, administrative data created, owned and controlled by the White House Office to be entered and stored in Office of Administration computers located in the New Executive Office Building. We further understand that there are plans to enter and store more substantive, sensitive data in the Office of Administration computers in the months ahead. This Office has concluded that, given the control and access guidelines agreed upon by the White House Office and the Office of Administration prior to the initial transfer -- although not memorialized in writing -- the transferred data are not subject to FOIA. The Office of Legal Counsel (OLC) at the Department of Justice fully concurs in this determination. Both this Office and OLC recommend, however, that the White House Office and the Office of Administration execute a memorandum of agreement to memorialize the terms and conditions pursuant to which the data have been and, absent objection, will be entered and stored in the Office of Administration computers.

Attached for your review is a proposed memorandum of agreement prepared and approved by this Office and the Office of Legal Counsel, to be executed by the named representatives of the White House Office and Office of Administration. The formal legal opinion prepared by the Office of Legal Counsel, which embodies the judgment of this Office and the Department of Justice that the transferred data are not subject to the Freedom of Information Act, also is attached.

C O P Y
from ORM

Attachments

FFF:JML:aw 3/2/82 cc: FFFielding/JMLuttig/Subj./Chron

Memorandum of Agreement Between the White House
Office and the Office of Administration
Governing White House Data Stored
in Office of Administration Computers

Executive Order 12028 (December 4, 1977) provides, inter alia, that the Office of Administration, upon request, shall assist the White House office in providing those administrative services which are primarily in direct support of the President. John F. W. Rogers, in his capacity as Special Assistant to the President for Administration, has requested that the Office of Administration, in direct support of the President, permit the White House Office to enter and store data from selected White House Office records in computers owned or managed by the Office of Administration and located in its computer center in the New Executive Office Building.

The following understandings, terms, and conditions shall govern any and all instances in which records or data generated in the White House Office or otherwise the property of the White House Office are entered or stored in Office of Administration computers, unless superseded by a subsequent agreement.

1. As used herein, the term "White House data" denotes records of the President, the White House Office, or units within the Executive Office of the President whose sole function is to advise and assist the President. White House data are Presidential records within the meaning of the Presidential Records Act of 1978, 44 U.S.C. § 2201 et seq., and are subject to its provisions.
2. White House data may be entered or stored in Office of Administration computers only with the written authorization of the Special Assistant to the President for Administration. White House data may be entered or stored in Office of Administration computers in the interest of economy and managerial efficiency, in any appropriate format for use by White House Office personnel.

3. Any White House data that are entered or stored in Office of Administration computers remain at all times under the exclusive management and control of the White House Office. Consistent with such control, all such White House data shall be subject to security and access control functions, approved by the Special Assistant to the President for Administration, which limit access to the data to authorized personnel designated in paragraphs 5, 6 and 7.
4. With respect to White House data entered or stored in the Office of Administration computers, the Office of Administration has no authority to enter, access, retrieve, use, dispose of, archive, or otherwise process such data except as expressly stated in this Memorandum of Agreement or pursuant to the written authorization of the Special Assistant to the President for Administration or his designees. In all such cases, the Office of Administration and its personnel act solely as agents of the White House Office and under its exclusive direction.
5. Access to White House data entered or stored in Office of Administration computers by any person, including personnel of the Office of Administration and the White House Office, is prohibited, except pursuant to the written authorization of the Special Assistant to the President for Administration or his designees in individual White House offices.
6. Use, retrieval, archiving or other processing of White House data entered or stored in Office of Administration computers by any person, including personnel of the Office of Administration and the White House Office, is prohibited, except pursuant to the written authorization of the Special Assistant to the President for Administration or his designees in individual White House offices. Whenever the Office of Administration or its personnel are authorized to act under this paragraph, the Office of Administration or its personnel shall not retain any hard-copy record of any White House data used or created.
7. Disposition of White House data by the Office of Administration or any of its personnel is prohibited, except pursuant to the written authorization of the Special Assistant to the President for Administration or his designees in individual White House offices.
8. The White House Office at all times retains the right to terminate this Memorandum of Agreement and to direct that White House data entered or stored in Office of Administration computers be removed or expunged from Office of Administration computers.

9. The foregoing paragraphs memorialize the understandings, terms and agreements pursuant to which all White House data have been entered or stored in Office of Administration computers heretofore.

The understandings, terms and conditions set forth herein were and are intended to underscore the very limited service function of the Office of Administration with respect to White House data entered or stored in Office of Administration computers. It is specifically intended that they serve as evidence that the White House Office at all times asserts exclusive control over all White House data entered in Office of Administration computers.

Chief of Staff and
Assistant to the President

Director,
Office of Administration

Special Assistant to the
President for Administration

Director, Automated Services
Division, Office of Administration



Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

22 FEB 1982

Memorandum for Honorable Fred F. Fielding
Counsel to the President

Re: Applicability of Freedom of Information
Act to White House Records Entered and
Stored in Office of Administration Computers

You have requested the advice of this Office regarding whether data from White House records would become subject to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), when entered and stored in computers owned or operated by the Office of Administration (OA) subject to the terms and conditions contained in the attached draft Memorandum of Agreement (Agreement). For the reasons set forth below, we conclude that the White House data will not become subject to FOIA when entered and stored in OA computers under the terms of the Agreement.

I.

OA was established as a unit in the Executive Office of the President (EOP) by Executive Order 12028. It is charged with responsibility for providing "common administrative support and services to all units within [EOP], except for such services provided primarily in direct support of the President." OA is further directed, on request, to "assist the White House Office in performing its role of providing those administrative services which are primarily in direct support of the President."

Early in this Administration, the White House Office requested the assistance of OA in providing computer services to a variety of its constituent offices. Such services had previously been supplied by the White House Communications Agency (WHCA), a component of the Department of Defense.

These various measures reflect an understanding and agreement between OA and the White House Office that the entry and storage of White House information in OA computers is for these extremely limited purposes and that exclusive control and dominion over the information remains at all times in the White House Office. That understanding will soon be formalized by execution of the draft Agreement attached hereto. The Agreement governs all instances in which White House data -- records of the President, the White House Office, or units within EOP whose sole function is to advise and assist the President -- are entered and stored in OA computers. It states that such data are presidential records within the meaning of the Presidential Records Act of 1978, 44 U.S.C. § 2201 et seq., and provides that such data "remain at all times under the exclusive management and control of the White House Office." OA is specifically prohibited from entering, storing, accessing, retrieving, using, disposing of, archiving, or otherwise processing White House information except pursuant to written authorization of appropriate White House Office officials. When OA does conduct such operations, it is explicitly understood to act only as the agent and under the exclusive direction of the White House Office. OA and its personnel are prohibited from retaining any hard-copy record of White House data used or created during OA operations. The White House Office retains the absolute right to terminate the Agreement without prior notice and to direct that all White House data be expunged from OA computers. The Agreement further provides that its provisions "memorialize the understandings, terms, and agreements pursuant to which any White House data have been entered or stored in [OA] computers heretofore."

II.

The FOIA generally requires that an agency make "agency records" available to the public upon reasonable request. 5 U.S.C. §§ 552(a)(3)(B), (a)(4)(B). Records which are not agency records within the meaning of FOIA, however, are not subject to disclosure under that statute. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 155 (1980); Forsham v. Harris, 445 U.S. 169 (1980). We believe that White House data entered and stored on OA computers under the terms and conditions of the Agreement are not agency records. We are therefore confident that such data are not subject to disclosure under FOIA.

It is clear, as an initial matter, that White House data are not agency records at the time they are generated within the White House. Although the FOIA does not define agency records, it does define "agency." The definition of an agency

includes the "Executive Office of the President," 5 U.S.C. § 552(e). The legislative history explains that the "Executive Office of the President" does not include the White House Office or other units in EOP whose "sole function is to advise and assist the President." H. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974), reprinted in Joint Committee Print, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 232 (1975). See Kissinger v. Reporters Committee for Freedom of the Press, supra, at 156; Putney v. White House Office, No. 78-502 Civ-T-H (M.D. Fla. 1980) (unreported decision). 1/ Because the Agreement applies only to data from the White House Office or units within EOP whose sole function is to advise and assist the President, such data are not within the purview of the FOIA at the time they are generated.

The remaining question is whether such data become subject to the FOIA when they are entered and stored on OA computers, since OA, as a unit within EOP which does not have the sole function of advising and assisting the President, may well be an "agency" within the meaning of FOIA. 2/ The Supreme Court has clearly established that a record does not become the record of an agency merely because of its physical location within an agency. In Kissinger v. Reporters Committee for Freedom of the Press, supra, the Court rejected the argument that White House records became agency records when they were removed from the White House and physically taken to the Department of State:

"We simply decline to hold that the physical location of the notes . . . renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the State Department.

1/ See also Presidential Records Act of 1978, 44 U.S.C. § 2201 (2)(B)(ii)(Supp. III 1979) (Presidential records do not include official records of an agency as defined in FOIA, 5 U.S.C. § 552(e)).

2/ We think it irrelevant that some of this information was stored at one time (and in some cases may continue to be stored for a brief period) on WHCA computers. We understand that White House information in WHCA computers is subject to restrictions similar to those imposed when the information is entered and stored on OA computers. Moreover, the fact that information may once have been stored on WHCA computers has no bearing on the degree of dominion and control presently exercised by the White House Office over information entered and stored on OA computers.

They never entered the State Department's files, and they were not used by the Department for any purpose."

445 U.S. at 157.

Two decisions by the Court of Appeals for the District of Columbia Circuit bear directly on the question whether physical transfer of documents not otherwise "agency records" vests them with that status when the transferee is an "agency" for FOIA purposes. In Goland v. CIA, 607 F.2d 339 (1978), cert. denied, 445 U.S. 927 (1980), the court held that a classified transcript of a congressional hearing in executive session ^{3/} did not become an agency record when it was transferred to the CIA solely for internal reference purposes. In the court's view, the test was not physical location but rather "whether under all the facts of the case the document has passed from the control of Congress and become properly subject to the free disposition of the agency with which the document resides." Id. at 347. The court concluded that the transcript did not become the record of the CIA because (1) circumstances attending the document's generation evidenced a congressional intent to maintain control over its confidentiality; and (2) the conditions attached to its possession by the CIA showed that it was not in any meaningful sense the CIA's property, but rather demonstrated that the CIA acted as "trustee" for Congress. Id.

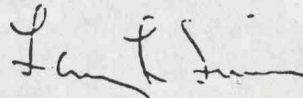
The Goland case was more recently applied in Holy Spirit Association for the Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), petition for cert. filed, 50 U.S.L.W. 3499 (U.S., Dec. 11, 1981)(No. 81-1098). The court declined to hold that Congress must give contemporaneous instructions when forwarding congressional records to an agency. Id. at 842. It concluded, however, that on the facts of that case Congress had not given a sufficiently clear assertion of its intent to retain the documents. The court therefore held that the materials at issue had become agency records for FOIA purposes. ^{4/}

^{3/} Congress is excluded from the definition of "agency" in FOIA. See 5 U.S.C. §§ 552(e); 551(1)(A).

^{4/} Compare RCA Global Communications, Inc. v. FCC, 524 F. Supp. 579 (D. Del. 1981), rejecting the "control" test of Goland in favor of a "function" test. White House data entered and stored in OA computers would not be agency records under the "function" test, since OA does not use the data as part of its functions.

Kissinger, Golan, and Holy Spirit, we believe, clearly establish that White House data do not become agency records when entered and stored on OA computers under the terms and conditions contained in the Agreement. The data at issue were generated in the White House Office, not at OA. The circumstances attending their creation show no intent to depart from the confidentiality that normally applies to White House Office documents. The data were not generated for public use, but solely for internal administrative purposes. The conditions under which the data are entered and stored on OA computers, as evidenced by the Agreement, ensure that the White House Office retains complete dominion, ownership, and control over the data at all times. The data never enter OA's files, nor are they used by or accessible to OA for any purposes other than those of the White House Office. Stringent measures have been adopted to safeguard the security of the information. Every feasible effort is made to ensure that no one can gain access to White House data unless specifically authorized to do so by the appropriate White House Office officials. 5/

In short, the White House exercises complete dominion and control over the data at every stage. The data do not become agency records within the meaning of the FOIA when entered and stored on OA computers. Implementation of the Agreement will therefore not subject White House records to the possibility that they will thereby become subject to public disclosure under the FOIA.



Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

5/ The Agreement clearly establishes that OA's role is limited to providing administrative services. When OA performs any manipulation of White House data, it acts expressly as the agent and under the direction of the White House Office. Its personnel have no access to the data unless specifically authorized by the White House Office. Even when such access is authorized, OA personnel have no authority to read material for the purpose of understanding its contents.

Tab

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TR 172069C

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

1 APR 1982

MEMORANDUM FOR ANNE D. NEAL
General Counsel, Office of Administration
Executive Office of the President

Re: Applicability of Privacy Act to White House
Records Entered and Stored in Office of
Administration Computers

You have requested this Office to supplement an opinion issued February 28, 1982 (Op.), in which we concluded that data from White House records would not become subject to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA) when entered and stored in computers owned or operated by the Office of Administration (OA) subject to the terms and conditions contained in a proposed Memorandum of Agreement (Agreement). Specifically, you have asked us to consider whether certain revisions made by OA to the Agreement affect the conclusions reached in our earlier opinion, and whether the Privacy Act, 5 U.S.C. § 552a, would apply to White House records stored under the Agreement. For the reasons set forth below, we conclude that the revisions to the Agreement do not alter our conclusions as to the applicability of FOIA, and that the Privacy Act would not apply to White House data entered and stored in OA computers under the terms of the Agreement.

I.

The proposed revisions to the Agreement are all relatively minor, involving only changes in Mr. Rogers' title 1/ or clarifications of what we understood were the original terms of

1/ See, e.g., ¶¶ 3, 4, 5, 6, 7.

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the Agreement. 2/ They do not alter the substance of the Agreement or affect the control by the White House of records entered and stored under the Agreement. We believe, therefore, that the amendments do not alter the conclusions reached in our prior opinion regarding the applicability of FOIA to those records.

II.

Although the language of FOIA and of the Privacy Act are not altogether parallel, we believe that the dispositive consideration in determining the applicability of both statutes to White House records stored in OA's computers is the same -- i.e., whether the OA will exercise "control" over the records. Our prior conclusion that FOIA does not apply to those records, because the White House retains complete dominion, ownership, and control over the data at all times and the OA computers serve only a storage and retrieval function, therefore applies to the Privacy Act as well.

It is clear that the Privacy Act does not apply to White House data at the time they are generated within the White House. The Privacy Act applies only to "records" in any "system of records" maintained by an "agency." 5 U.S.C. § 552a (a)(1) - (5). The Act incorporates by reference the definition of "agency" adopted in the 1974 FOIA Amendments, 3/ which, as we

2/ For example, the second introductory paragraph clarifies that "a subsequent agreement" means "a subsequent agreement by the parties"; the changes to ¶ 5 clarify that the prohibition against retention of hard copies of White House data by OA applies to data to which access has been granted under ¶ 5, as well as when use, retrieval, archiving or other processing of the data is authorized under ¶ 6. The additional language in ¶ 5 and ¶ 6 specifying that the OA and its personnel act as agents of the White House reiterates similar requirements imposed in ¶ 4. Finally, the revision to ¶ 8 merely clarifies that the White House Office may terminate the agreement without prior notice.

3/ 5 U.S.C. § 552a(a)(1) provides that: "The term 'agency' means agency as defined in section 552(e) of this title."

noted in our prior opinion, include the Executive Office of the President (EOP), but does not include the White House Office (WH) or other units in the EOP whose "sole function is to advise and assist the President." See Op. at 4. We have concluded on previous occasions that the limiting language in the Conference Report on the definition of "agency" in the 1974 FOIA Amendments has the legal effect of exempting the identified units from the Privacy Act as well. 4/ Thus, we reach the same conclusion with respect to applicability of the Privacy Act to records generated within the WHO as we did with respect to FOIA -- i.e., "because the Agreement applies only to data from the White House Office or units within the EOP whose sole function is to advise and assist the President, such data are not within the purview of the [Privacy Act] at the time they are generated." See Op. at 4. 5/

As under FOIA, we must determine, however, whether the data become subject to the Privacy Act when they are entered and stored in OA's computers. Since the Privacy Act applies only to "systems of records" maintained by an agency, the

4/ See, e.g., Memorandum for Robert Lipshutz and Richard Hardin from John M. Harmon, at 1-2 (February 15, 1978); Letter to the Honorable James T. Lynn from Antonin Scalia, at 2 (April 14, 1975).

5/ We have noted on a prior occasion that the exclusion of White House records from the Privacy Act may not be as "firmly rooted in the Constitution" as the FOIA exclusion. See Memorandum for Robert Lipshutz and Richard Hardin from John M. Harmon, at 4 (February 15, 1978). That comment was intended only to suggest that elimination of the exclusion by Congress might not raise the same constitutional questions as elimination of the exclusion from FOIA. The language of the Privacy Act, however, is explicit; the definition of "agency" contained in FOIA is the definition of "agency" for the purposes of the Privacy Act.

dispositive question is whether the White House data become a "system of records" or part of an existing "system of records" maintained by OA when they are entered on the OA's computers. 6/

The Privacy Act's definition of the term "system of records" specifically requires that the agency exercise "control" over the records. 5 U.S.C. § 552a(a)(5). 7/ "Control" is not defined by the Act or explained in its legislative history, and, insofar as we are aware, has not been interpreted by the courts. Guidelines issued by the Office of Management and Budget implementing the Act emphasize that inherent in the "control" requirement is the concept of "accountability." Thus, one of the primary purposes of the "control" requirement is "to assign responsibility to a particular agency to discharge the obligations established by the Privacy Act. An agency is responsible for those systems which are . . . under the control of the agency" Office of Management and Budget, "Privacy Act Implementation: Guidelines and Responsibilities," 40 Fed. Reg. 28948, 28952 (July 9, 1975) ("OMB Guidelines"). "Accountability" under the Privacy Act incorporates, most importantly,

6/ Not all of the information entered by the WHO on OA's computers will be subject to the Privacy Act. The Act applies only to records about individuals that are retrieved by the name of the individual or by some identifying number, symbol or other particular. 5 U.S.C. § 552a(a)(4) & (5). We understand, however, that much of the information planned to be entered in the OA computers would meet the Privacy Act definitions. Although it may be possible to argue that OA does not "maintain" the information within the meaning of the Privacy Act, because it serves only a custodial function, the definition of "maintain" and its common sense meaning appear to be broad enough to cover the retention of information in a computer system. See 5 U.S.C. § 552a(a)(3) ("The term 'maintain' includes maintain, collect, use or disseminate.").

7/ 5 U.S.C. § 552a(a)(5) provides that: "The term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." (emphasis added).

limitations on the types and sources of information that can be collected by an agency; 8/ obligations to insure the reasonable accuracy, completeness, timeliness and relevance of information maintained about individuals; 9/ obligations to grant access, upon request, to records subject to the Act and to amend the records, when warranted, in response to requests; 10/ and control over disclosure of the records. 11/

As described in our prior opinion, OA's function under the proposed Agreement is a limited one. OA and its personnel have no access to or authority over the data entered in OA's computers except pursuant to the express direction and control and for the exclusive use of the WHO. OA has no independent authority, for example, to add, delete or modify White House information, or to disclose information to anyone outside the White House. We believe that the OA does not exercise "control" over the White House records entered into its computer in terms of its accountability for those records. OA exercises "control" only insofar as the records are physically located in its computer system. While possession may be one test of "control," 12/ it is clearly not the only -- or even the primary -- test. 13/ At least in the context of the Agreement between the White House and OA,

8/ See, e.g., 5 U.S.C. 552a(e)(1), (2), (7).

9/ See, e.g., 5 U.S.C. § 552a(e)(5) & (6).

10/ See, e.g., 5 U.S.C. § 552a(d) & (f).

11/ See, e.g., 5 U.S.C. § 552a(b).

12/ See OMB Guidelines, supra, 40 Fed. Reg. at 28952 ("The concept of possession inherent in ['under the control of'] is also apparent in the language that begins most of the operative subsections of the Act.").

13/ The Privacy Act, in fact, contemplates that in some circumstances "control" can be allocated by an agency under the terms of a contract or agreement. Subsection (m) of the Act provides that if an agency contracts with another entity to provide operation of a system of records on behalf of the agency, the agency shall "cause the requirements of [the Act] to be applied to such system." 5 U.S.C. § 552a(m).

we believe that "control" over records as used in the Privacy Act is analogous to the concept of "control" read into FOIA's definition of "agency records" by the courts. See, e.g., Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Forsham v. Harris, 445 U.S. 169 (1980); Goland v. CIA, 607 F. 2d 339, 347 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

Therefore, we believe that White House data stored in OA's computers would not be "under the control of" OA under the terms of the Agreement, and would not be part of a "system of records" subject to the Privacy Act. We find it legally significant, in reaching this conclusion, that the Agreement does not appear to provide any precedent for evasion or circumvention of the Privacy Act. The OMB Guidelines caution that:

An agency shall not classify records . . . as non-agency records, in order to avoid publishing notices of their existence, prevent access by the individuals to whom they pertain, or otherwise evade the requirements of the Act.

OMB Guidelines, 40 Fed. Reg. at 28952. Because White House data would not be subject to the Privacy Act if maintained in White House computers, the Agreement does not represent an attempt by an agency to "hide" data that would otherwise be subject to the Privacy Act by defining records as "non-agency" records or by transferring records to another agency. In addition, we understand that the White House data will be segregated from OA's other records, accessible only under the terms authorized by the Agreement, and used only by the White House for White House purposes. This contrasts with a situation in which data is supplied to an agency from another entity, incorporated in that agency's systems of records and used to further that agency's purposes. We believe that it would be difficult to argue under the latter circumstances that the information is exempt from the Privacy Act, even if the source of the information is an entity not subject to the Act.

You have also asked us to provide some clarification regarding storage of Presidential and federal records generated by officials who not only advise and assist the President, but who also have statutory responsibilities, such as Mr. Rogers. 14/ It is obviously important for officials who both directly advise the President and exercise other statutory responsibilities within the EOB to remain sensitive to the dividing line between those functions. With respect to the treatment of records, the distinction is particularly important. As we have discussed, the exclusion of documents from FOIA and the Privacy Act extends only to documents or information generated by individuals or units within the EOB whose function is to advise and assist the President directly. In order to preserve the integrity of White House data, it is important that records be identified and segregated as soon as possible, upon generation or receipt, as White House data or as OA data. The identification of records as White House data (or "Presidential records") is required as well by the Presidential Records Act, 44 U.S.C. § 2201 et seq., which directs that records produced or received by, inter alia, units or individuals with the EOP whose function is to advise or assist the President 15/ be identified and categorized, to the extent practicable, either as Presidential records or as personal records 16/ upon their creation or receipt, 44 U.S.C. § 2203.

Thus, both the terms of the Presidential Records Act and implementation of the Agreement governing use of OA's computers by the WHO require that Mr. Rogers and others occupying dual roles identify, at the earliest possible point, documents and information generated or received by them either as White House data or non-White House data. For example, we assume that most information or records generated or received by Mr. Rogers when he is acting in his capacity as Deputy Assistant to the President for Management would be White House data, because we understand his sole function in that job is to advise and assist the President.

14/ Mr. Rogers serves both as Deputy Assistant to the President for Management, a position which is part of WHO, and as the Director of OA.

15/ As the Agreement sets out, "White House data" as used in the Agreement are "Presidential records" within the meaning of the Presidential Records Act.

16/ Under the Presidential Records Act, "personal records" are records of a "purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(3).

On the other hand, most records received or generated by Mr. Rogers in his capacity as Director of OA would not be White House data and should be handled in the same fashion as other agency records maintained by the OA. If you have specific questions about the responsibilities of Mr. Rogers or other officials, we will be glad to answer them.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

cc: ✓ Honorable Fred Fielding
Counsel to the President

Memorandum of Agreement Between the White House
Office and the Office of Administration
Governing White House Data Stored
In Office of Administration Computers

Executive Order 12028 (December 4, 1977), as amended, provides, inter alia, that the Office of Administration, upon request, shall assist the White House Office in providing those administrative services which are primarily in direct support of the President. John F. W. Rogers, in his capacity as Deputy Assistant to the President for Management, has requested that the Office of Administration, in direct support of the President, permit the White House Office to enter and store data from selected White House Office records in computers owned or managed by the Office of Administration and located in its computer center in the New Executive Office Building.

The following understandings, terms, and conditions shall govern any and all instances in which records or data generated in the White House Office or otherwise the property of the White House Office are entered or stored in Office of Administration computers, unless superseded by a subsequent agreement by the parties herein.

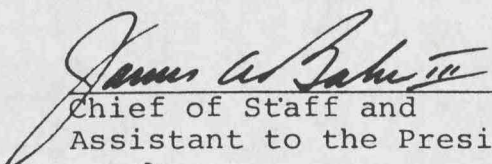
1. As used herein, the term "White House data" denotes records of the President, the White House Office, or units within the Executive Office of the President whose sole function is to advise and assist the President. White House data are Presidential records within the meaning of the Presidential Records Act of 1978, 44 U.S.C. 2201 et seq., and are subject to its provisions.
2. White House data may be entered or stored in Office of Administration computers only with the written authorization of the Deputy Assistant to the President for Management. White House data may be entered or stored in Office of Administration computers in the interest of economy and managerial efficiency, in any appropriate format for use by White House Office personnel.

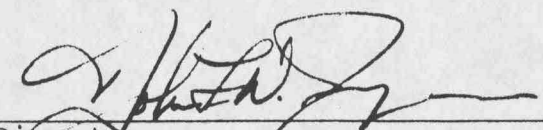
3. Any White House data that are entered or stored in Office of Administration computers remain at all times under the exclusive management and control of the White House Office. Consistent with such control, all such White House data shall be subject to security and access control functions, approved by the Deputy Assistant to the President for Management, which limit access to the data to authorized personnel designated in paragraphs 5, 6 and 7.
4. With respect to White House data entered or stored in the Office of Administration computers, the Office of Administration has no authority to enter, access, retrieve, use, dispose of, archive, or otherwise process such data except as expressly stated in this Memorandum of Agreement or pursuant to the written authorization of the Deputy Assistant to the President for Management or his designees in individual White House offices. In all such cases, the Office of Administration and its personnel act solely as agents of the White House Office and under its exclusive direction.
5. Access to White House data entered or stored in the Office of Administration computers by any person, including personnel of the Office of Administration and the White House Office, is prohibited, except as expressly stated in this Memorandum of Agreement, or pursuant to the written authorization of the Deputy Assistant to the President for Management or his designees in individual White House offices. Whenever the Office of Administration or its personnel are authorized to act under this paragraph, the Office of Administration or its personnel shall not retain any hard-copy record or any other record of any White House data used or created. In all such cases, the Office of Administration and its personnel act solely as agents of the White House Office and under its exclusive direction.
6. Use, retrieval, archiving or other processing of White House data entered or stored in Office of Administration computers by any person, including personnel of the Office of Administration and the White House Office, is prohibited, except as expressly stated in this Memorandum of Agreement, or pursuant to the written authorization of the Deputy Assistant to the President for Management or his designees in individual White House offices. When-

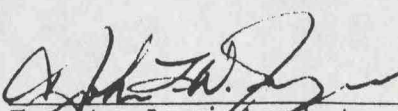
ever the Office of Administration or its personnel are authorized to act under this paragraph, the Office of Administration or its personnel shall not retain any hard-copy record or any other record of any White House data used or created. In all such cases, the Office of Administration and its personnel act solely as agents of the White House Office and under its exclusive direction.

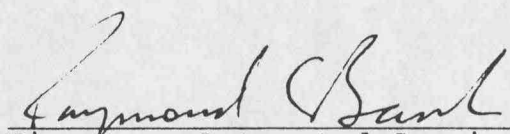
7. Disposition of White House data by the Office of Administration or any of its personnel is prohibited, except pursuant to the written authorization of the Deputy Assistant to the President for Management or his designees in individual White House offices.
8. The White House Office at all times retains the right to terminate this Memorandum of Agreement without prior notice and to direct that White House data entered or stored in Office of Administration computers be removed or expunged from Office of Administration computers.
9. The foregoing paragraphs memorialize the understandings, terms and agreements pursuant to which all White House data have been entered or stored in Office of Administration computers heretofore.

The understandings, terms and conditions set forth herein were and are intended to underscore the very limited service function of the Office of Administration with respect to White House data entered or stored in Office of Administration computers. It is specifically intended that they serve as evidence that the White House Office at all times asserts exclusive control over all White House data entered in Office of Administration computers.


Chief of Staff and
Assistant to the President


Director,
Office of Administration


Deputy Assistant to the
President for Management


Director, Automated Services
Division, Office of Administration

Tab

5

MEMORANDUM OF UNDERSTANDING:
White House Documents, Records, Files and Similar Materials
Made Available to the Office of Administration

In order to effectuate maximum utilization of existing facilities and services in accordance with Executive Order 12028 (December 4, 1977), the Office of Administration (OA) shall, upon request, assist the White House Office (WHO) in performing its role of providing those administrative services which are primarily in direct support of the President. This memorandum will set forth restrictions governing possession, custody, access, use and control of any documents, records, files and similar materials (including information contained therein) which WHO makes available to OA, or which are generated by OA, in connection with its provision of such services to WHO (hereafter "White House materials").

I. Ownership

It is understood that WHO is and shall remain the exclusive owner of all White House materials and that OA shall not exercise any proprietary interest in White House materials which is inconsistent with this exclusive ownership.

II. Restrictions on the Availability of White House Materials

A. Nonsensitive White House Materials

1. White House materials designated as "nonsensitive" under Section V may be made available to OA to perform requested services. However, OA shall not permit any person to obtain possession, custody, access, use or control of any nonsensitive White House materials unless such person is:
 - a. an employee of WHO;
 - b. an employee of OA (including any person detailed to OA from another agency) who requires the availability of nonsensitive materials in order to perform services requested by WHO; provided, however, that OA shall make materials available only to the extent required by such employee in the normal course of performing these services; or,
 - c. a person who has been authorized in writing by a designated WHO official to have the availability of White House materials; provided, however, that

OA shall make available to such person only those materials or types of materials specified in the written authorization for such time or times and to the extent authorized thereby.

B. Sensitive White House Materials

1. White House materials designated "sensitive" under Section V may be made available to OA only in connection with the provision of computerized services requested by WHO. OA shall not obtain possession, custody, access, use or control of sensitive White House materials for any other purpose.
2. The availability of sensitive White House materials shall be strictly limited to OA employees who have specialized ADP skills and who have been designated in writing by the Director of OA, to the Special Assistant to the President for Administration, to assist in the provision of computer services requested by WHO (hereafter "OA technical personnel"). Sensitive White House materials shall be made available to OA technical personnel only to the extent and for the time required for such employees to discharge requested computer services. OA technical personnel shall not transfer sensitive White House materials to any person other than WHO personnel authorized to acquire and maintain them.
3. OA shall not permit any person, other than authorized OA technical personnel and WHO employees, to obtain possession, custody, access, use or control of a sensitive computer system or any of its components. A "sensitive computer system" is any computer system which OA designs, develops, maintains, or operates, at the request of WHO, and whose contemplated or actual use includes the processing of sensitive White House materials or information contained therein.

C. Implementation of Safeguards

OA shall implement necessary safeguards to ensure that no person obtains possession, custody, access, use or control of White House materials, or sensitive computer systems, except as authorized in this section.

III. White House Materials Whose Retention Is No Longer Required

It is understood that White House materials (including those generated by OA) are available to OA personnel only for

such time and for such purposes as are necessary to render a requested service. White House material shall be promptly delivered to appropriate WHO personnel for disposition once the service in question has been performed.

IV. Production, Reproduction, Duplication, Etc., of Documents, Records, Files and Similar Materials.

OA may generate such materials as are required in the normal course of rendering requested services, provided that the generation and disposition of materials shall at all times be subject to the approval and direction of WHO. However, OA shall not generate any materials which would be deemed "sensitive White House materials" without a specific request from a designated WHO official.

V. Miscellaneous

1. The Special Assistant to the President for Administration, with the advice of the WHO official or unit from which the particular White House materials originate, shall designate White House materials as either "sensitive" or "nonsensitive," according to whether they are determined to be of a confidential or non-confidential nature respectively. Prior to making White House materials available to OA, the Special Assistant, or his designee, shall inform the Director of OA, or his designee, of the corresponding designation of White House materials.

Any materials generated by OA which contain information from or about White House materials or computer systems classified as sensitive shall be deemed "sensitive White House materials."

2. The Special Assistant shall designate in writing to the Director of OA those WHO employees who may act on behalf of WHO under this agreement.

Hugh A. Carter, Jr.
Special Assistant to the President
for Administration

5/7/79

Richard M. Hurd

5/13/79

~~RKM~~ } FYI
~~ED/TM~~ }
JLH-KEEP

THE WHITE HOUSE
WASHINGTON

May 11, 1979

MEMORANDUM FOR: RICHARD HARDEN
FROM: PATRICK APODACA
SUBJECT: F.O.I.A. Memorandum of Understanding

July
Return copy is
will make a copy for
B. H. P. July. Rhonda
& Son. Kenneth, Jr.
& Newell
RH

Attached is the final version of the Memorandum of Understanding between the Office of Administration and the White House Office which is designed to protect White House documents and materials in OA's custody from disclosure under the Freedom of Information Act. Bob Lipshutz has asked me to send you this document for signature.

Please sign and date the original and the attached two copies. Retain one signed copy for your files and return the original and the other signed copy to me. The original will be maintained in my office.

Also attached is a memorandum to you from Hugh Carter naming Dan Malachuck as his designee under the agreement.

John

Re Memo of Understanding from WHO to Richard regarding
FOIA / Disclosure, etc.

Do NOT have definition or list of materials
declared to be sensitive or non-sensitive.
Specifically, personnel records.

Wonder if records maintained by TPPIS
get covered. Also generated report
covering WHO personnel cause some problem unless
they allow us to take care of disposal as we
do on other personnel records coming out of TPPIS.

B
5/21

per
Wm Pollak:
WHO personnel folders
WHO data and related
TPPIS records are not sensitive
in the sense intended by the
Center - Richard Herd
understanding of understanding
we now have - of which
is non-sensitive -
not forms - any
submitted to us
all be on
no

THE WHITE HOUSE

WASHINGTON

May 3, 1979

MEMORANDUM FOR:

RICHARD HARDEN, DIRECTOR OF
THE OFFICE OF ADMINISTRATION

FROM:

HUGH CARTER 

SUBJECT:

Memorandum of Understanding:
White House Documents, Records,
Files and Similar Materials Made
Available to the Office of
Administration

Pursuant to Section V, paragraph 2 of the above referenced agreement, I hereby designate Mr. Dan Malachuk as my designee to request assistance to the White House Office from OA, and to designate White House materials as either "sensitive" or "non-sensitive."

Thank you.

cc: Robert Lipshutz
Dan Malachuk
Pat Apodaca

Tab 6

Office of Administration in the Executive Office of the President

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended, Reorganization Plan No. 2 of 1970 (5 U.S.C. App. II), Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c), and Reorganization Plan No. 1 of 1977 (42 FR 56101 (October 21, 1977)), and as President of the United States of America, in order to effectuate the establishment of the Office of Administration in the Executive Office of the President, it is hereby ordered as follows:

SECTION 1. The establishment, provided by Section 2 of Reorganization Plan No. 1 of 1977 (42 FR 56101), of the Office of Administration in the Executive Office of the President shall be effective, as authorized by Section 7 of that Plan, on December 4, 1977.

SEC. 2. The Director of the Office of Administration, hereinafter referred to as the Director, shall report to the President. As the chief administrative officer of the Office of Administration, the Director shall be responsible for ensuring that the Office of Administration provides units within the Executive Office of the President common administrative support and services.

SEC. 3. (a) The Office of Administration shall provide common administrative support and services to all units within the Executive Office of the President, except for such services provided primarily in direct support of the President. The Office of Administration shall, upon request, assist the White House Office in performing its role of providing those administrative services which are primarily in direct support of the President.

(b) The common administrative support and services provided by the Office of Administration shall encompass all types of administrative support and services that may be used by, or useful to, units within the Executive Office of the President. Such services and support shall include, but not be limited to, providing support services in the following administrative areas:

- (1)** personnel management services, including equal employment opportunity programs;
- (2)** financial management services;
- (3)** data processing, including support and services;
- (4)** library, records, and information services;
- (5)** office services and operations, including: mail, messenger, printing and duplication, graphics, word processing, procurement, and supply services; and
- (6)** any other administrative support or service which will achieve financial savings and increase efficiency through centralization of the supporting service.

(c) Administrative support and services shall be provided to all units within the Executive Office of the President in a manner consistent with available funds and other resources, or in accord with Section 7 of the Act of May 21, 1920 (41 Stat. 613), as amended (31 U.S.C. 686, referred to as the Economy Act).

SEC. 4. (a) Subject to such direction or approval that the President may provide or require, the Director shall:

- (1)** organize the Office of Administration;
- (2)** employ personnel;
- (3)** contract for supplies or services; and
- (4)** do all other things that the President, as head of the Office of Administration, might do.

(b) The Director shall not be accountable for the program and management responsibilities of units within the Executive Office of the President; the head of each unit shall remain responsible for those functions.

SEC. 5. The primary responsibility for performing all administrative support and service functions of units within the Executive Office of the President shall be transferred and reassigned to the Office of Administration: except to the extent those functions are vested by law in the head of such a unit, other than the President: and except to the extent those functions are performed by the White House Office primarily in direct support of the President.

SEC. 6. The records, property, personnel, and unexpended balances of appropriations, available or to be made available, which relate to the functions transferred or reassigned by this Order from units within the Executive Office of the President to the Office of Administration, shall be transferred to the Office of Administration.

SEC. 7. (a) The Director of the Office of Management and Budget shall make such determinations, issue such orders, and take all actions necessary or appropriate to effectuate the transfers or reassignments provided by this Order, including the transfer of funds, records, property, and personnel.

(b) Such transfers shall become effective on April 1, 1978, or at such earlier time or times as the Director of the Office of Management and Budget determines, after consultation with the Director of the Office of Administration and other appropriate units within the Executive Office of the President.

JIMMY CARTER

THE WHITE HOUSE,
December 12, 1977.

sies, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

JIMMY CARTER

THE WHITE HOUSE,
February 14, 1979.

Executive Order 12121 of February 26, 1979

Energy Coordinating Committee

By the authority vested in me as President by the Constitution of the United States of America, and in order to enlarge the membership of the Energy Coordinating Committee, Section 1-102 of Executive Order No. 12083 of September 27, 1978, is hereby amended by adding in alphabetical order the following:

“(x) The Director of the Community Services Administration.

“(y) The Chairman of the Council on Wage and Price Stability.”.

JIMMY CARTER

THE WHITE HOUSE,
February 26, 1979.

Executive Order 12122 of February 26, 1979

Office of Administration

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 107(b) of Title 3 of the United States Code, in order to provide limited employment authority for the Office of Administration, it is hereby ordered that Section 4 of Executive Order No. 12028 of December 12, 1977, is amended to read as follows:

“Sec. 4. (a) Subject to such direction or approval as the President may provide or require, the Director shall organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do.

“(b) The Director is designated to perform the functions of the President under Section 107(b) of Title 3 of the United States Code.

“(c) The Director may appoint and fix the pay of employees pursuant to the provisions of Section 107(b)(1)(A) of Title 3 of the United States Code without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Under that section the Director may also fix the pay of an employee serving in a competitive position or in the career service in order to avoid the pay limitation imposed by Section 114 of Title 3 of the United States Code. The provisions of other

laws regulating the employment or compensation of persons in the Government service shall continue to apply to such employee.

"(d) The Director shall not be accountable for the program and management responsibilities of units within the Executive Office of the President; the head of each unit shall remain responsible for those functions."

JIMMY CARTER

THE WHITE HOUSE,

February 26, 1979.

Executive Order 12123 of February 26, 1979

Offshore Oil Spill Pollution

By the authority vested in me as President of the United States of America by Section 303(b)(3), 305, and 312(a) of Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 674, 677, and 684, 43 U.S.C. 1813(b)(3), 1815, and 1822), relating to the Offshore Oil Spill Pollution Fund, and by Section 301 of Title 3 of the United States Code, and in order to assign certain management responsibilities related to protecting the environment from offshore oil spill damage, it is hereby ordered as follows:

1-1. Assertion of Oil Pollution Claims.

1-101. The authority vested in the President by Section 303(b)(3) of Title III of the Outer Continental Shelf Lands Act Amendments of 1978, hereinafter referred to as the Act (92 Stat. 674, 43 U.S.C. 1813(b)(3)), is delegated to the Secretary of Commerce with respect to those natural resources which are subject to his management or control.

1-102. The authority vested in the President by Section 303(b)(3) of the Act (92 Stat. 674, 43 U.S.C. 1813(b)(3)) is delegated to the Secretary of the Interior with respect to those natural resources which are subject to his management or control.

1-2. Determination of Financial Responsibility and the Assessment and Compromise of Penalties.

1-201. The authority vested in the President by Section 305(a)(1) of the Act (92 Stat. 677, 43 U.S.C. 1815(a)(1)), relating to vessels, is delegated to the Federal Maritime Commission.

1-202. The authority vested in the President by Section 305(b) of the Act (92 Stat. 678, 43 U.S.C. 1815(b)), relating to offshore facilities, is delegated to the Secretary of Transportation.

1-203. The authority vested in the President by Section 312(a)(2) of the Act (92 Stat. 684, 43 U.S.C. 1822(a)(2)), relating to the assessment and compro-