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MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Applicability of the Freedom of Information
Act to the White House Office

This is in reply to your recent request for our views regarding the applicability of the Freedom of Information Act (FIA), as amended, to the White House Office.

Summary

The legislative history of the Freedom of Information Act Amendments of 1974 makes clear that some entities within the Executive Office of the President are not "agencies" for purposes of the FIA; but it does not provide clear guidelines for determining which they are. In our opinion, it is proper to conclude that generally speaking the components of the White House Office, in the traditional or budgetary sense, are not "agencies." The more difficult questions relate to the status of other entities within the Executive Office, such as the Domestic Council or the National Security Council.

Statutory Provisions

Prior to adoption of the 1974 Amendments, coverage under the FIA, 5 U.S.C. 552(b), depended entirely upon the definition of "agency" contained in the Administrative Procedure Act (of which the FIA is a part). The APA definition is not particularly helpful with respect to the present issue. That definition (5 U.S.C. 551(1)) reads as follows:

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

- (A) the Congress;
- (B) the courts of the United States;
- (C) . . . (H) [six other specific exceptions, none of which refers to the President or the White House Office].

The 1974 Amendments, which took effect on February 19, 1975, add a special definition of "agency" applicable only to the FIA portion of the APA. Section 3 of the Amendments adds the following provision to 5 U.S.C. 552:

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

While the statutory language itself does not differentiate among the various parts of the Executive Office of the President, the legislative history makes clear that some parts are not intended to be covered. Before turning to the legislative history, it is necessary to discuss the most prominent feature in its background, which was a District of Columbia Circuit Court decision under the original definition of "agency."

Soucie v. David

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), involved an FIA request for a document of the Office of Science and Technology (OST), a unit within the Executive Office of the President, but not part of the White House Office. The principal issue in the case was whether OST was an "agency" within the meaning of 5 U.S.C. 551(1).

In resolving this issue in the affirmative, the court adopted a functional approach to the Act. ^{1/} It stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F.2d at 1073 (footnote omitted). The court's reasoning with respect to OST was explained, in part, as follows:

If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President--a relation that might result in the use of such information as a basis for advice to the President. By virtue

^{1/} In a recent case involving the applicability of the FIA to certain advisory committees of the National Institute of Mental Health, the court, in holding that the advisory groups are not "agencies," used a similar functional approach. Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 246 (D.C. Cir., 1974).

of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act. 448 F.2d at 1975 (footnotes omitted).

Thus, the principal basis of the court's decision was the fact that OST was not limited to advising and assisting the President, but also had an independent power delegated by Congress

The legislative history of the 1974 Amendments

The bill to amend the FIA reported by the House Committee on Government Operations in March 1974 contained a provision regarding the meaning of "agency" which was essentially the same as the provision ultimately enacted. 2/ H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), p. 29. Like the enacted provision, the House version expressly referred to the "Executive Office of the President."

The expanded definition of "agency" was explained as follows in the House report (p. 8):

For the purposes of this section, the definition of 'agency' has been expanded to include those entities which may not be considered

2/ The only difference between the House version and the final version related to the introductory phrase. The House version stated: "Notwithstanding section 551(1), for purposes of this section, the term 'agency' means any executive department . . . [etc.]." The provision which was enacted states: "For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department . . . [etc.]."

agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of 'agency' for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

The term 'establishments in the Executive Office of the President,' as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Thus, the report's explanation did not refer to the President or to the White House Office. It should be noted that the Department of Justice had sent the House committee a bill report which asserted that it would be unconstitutional for Congress to extend the FIA to the President's staff. House report, p. 20.

During House debate on the bill, Congressman Erlenborn paraphrased the committee report's discussion of the Executive Office of the President. Then he asked the floor manager, Congressman Moorhead, if it was correct that "it [the bill's definition of agency] does not mean the public has a right to run through the private papers of the President himself." 120 Cong. Rec. H 1789 (daily ed., Mar. 14, 1974). Congressman Moorhead replied that Congressman Erlenborn's view was correct, i.e., that no right of access to the private papers of the President was intended. The precise meaning of this exchange is not entirely clear. However, taken in con-

nection with the silence of the House report regarding the President, the exchange should establish that the House bill was not intended to make the FIA applicable to the President himself.

The bill reported by the Senate Judiciary Committee expanded the existing definition of "agency" in some respects (e.g., by adding an express reference to the Postal Service), but did not deal expressly with the status of the Executive Office of the President. The Senate report did refer, with approval, to the decision in Soucie v. David. S. Rep. 93-854, 93d Cong., 2d Sess. (1974), p. 33.

The only other pertinent item in the legislative record is the conference report, S. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), pp. 14-15. That report described the differences between the House and Senate provisions regarding "agency" and stated (p. 14) that: "The conference substitute follows the House bill." It then continued (p. 15):

With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

Apparently, the conference committee read Soucie to mean that, if the functions of OST had been limited to advising and assisting the President, OST records would not have been subject to the FIA. The correctness of this interpretation of Soucie is questionable, for the court specifically stated that it found it unnecessary to decide that issue. 448 F.2d at 1073. Still, the main consideration here is not what the Soucie court stated, but what Congress intended.

Interpreting the legislative history

It can be argued that on the point at issue here the language of the 1974 Amendments ("any . . . establishment in the executive branch of the Government (including the Executive Office of the President)") is absolutely clear and thus permits no resort to legislative history. See, e.g., Caminetti v. United States, 242 U.S. 470, 490 (1917). If the parenthetical phrase "(including the Executive Office of the President)" clearly modified the word "establishment," that might be the case. However, its position in the sentence indicates that it modifies the word "Government"--which would leave for determination what units, within the Executive Office of the President, constitute "establishments" within the meaning of the Act, compelling examination of evidence of legislative intent. Moreover, any reading which would place the entire Executive Office within the Act would include the President himself, who is the head of that office; and since this would raise the most serious constitutional questions, an interpretation would be sought to avoid it--again compelling resort to legislative history. In short, we have no doubt that courts will not adopt the blanket view that all parts of the Executive Office are covered but will examine the legislative history to clarify the point.

The exact meaning of the legislative history, as described above, is unclear. As noted, the House report listed a number of entities within the Executive Office that were to be covered by the bill ("the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments"). The conference report took an entirely different approach to the issue, seeking to clarify the meaning of "Executive Office" by principle rather than by example. The term "Executive Office" was not meant to include "the President's immediate personal staff or units . . . whose sole

function is to advise and assist the President." Because of this basic difference in approach, it is impossible to tell whether the conference committee agreed or disagreed with the House report. Tending to show agreement is the statement in the conference report that "the conference substitute follows the House bill"--but this is a reference to the language of the bill, and goes no further than the statute itself toward showing that the House committee's intent was adopted. This issue of the relationship between the House and conference committee reports is relevant but not crucial to the present determination; it will be absolutely central when we come to consider the status under the Act of units named in the House report.

Constitutional Considerations

It is a settled rule of statutory construction that an interpretation that raises substantial constitutional questions will not be adopted where another reading of the statute is possible. See, e.g., Crowell v. Benson, 285 U.S. 22, 66 (1932). This principle is pertinent here. For the Congress to subject the President, or that portion of the Executive Office that functions as a mere extension of the President, to the requirements of the FIA (including its provisions for judicial review) seems inconsistent with the doctrine of separation of powers. Cf. Myers v. United States, 272 U.S. 52 (1926). Moreover, the exemptions of the FIA do not necessarily correspond to the scope of Executive privilege, a privilege grounded on the Constitution. United States v. Nixon, 42 Law Week 5237 (1974). Finally, the practical burdens resulting from application of the FIA to the President and his staff, including the provisions for judicial review and sanctions, might unduly interfere with the President's duty under Article II, § 3 to execute the laws.

These considerations weigh heavily against any interpretation of "agency"--if another is feasible under the statute and its history--which would apply it to what might be termed the nucleus of the Presidency.

General Conclusions

On the basis of the language of the statute, its legislative history (which includes reliance upon the Soucie case) and the constitutional issues involved, we are of the view that the following factors should be determinative of whether a unit within the Executive Office is covered by the Act:

1. Functional proximity to the President. A unit such as the Office of Telecommunications Policy, which ordinarily reports through one or another Presidential Assistant, is more likely to be covered than a unit such as the Domestic Council, which has regular direct access.

2. Authority to make dispositive determinations. A unit such as OMB, which regularly makes Executive branch decisions is more likely to be covered than a unit such as the Council of Economic Advisers, which only makes recommendations to the President.

3. Constitutional basis for the functions performed. A unit such as the Office of Economic Opportunity, which is meant to achieve goals established under the Constitution by the Congress, is more likely to be covered than a unit such as the National Security Council, which performs a function directly assigned to the President by the Constitution.

4. Manner of creation. A unit such as the Council on Environmental Quality, originally established by statute, is more likely to be covered than a unit such as the Federal Property Council, established by Executive Order on the basis of inherent Presidential authority.

Needless to say, no single one of these factors is determinative.

The status of the White House Office

Your immediate inquiry is whether the "White House Office" is covered by the Act. We are not entirely clear what that phrase is meant to include. The United States Government Manual (1974-75) lists officials who are in the White House Office (p. 81) and contains a chart (copy attached) showing the relation of that Office to other parts of the Executive Office of the President (p. 80). The Executive Office Appropriation Act for 1975 (and for prior years) contains a separate line item for that unit. 3/ Public Law 93-381 (1974), Title III. However, more recently, a revised chart showing the organization of the "White House Staff" was issued (copy attached). 4/ That chart does not use the term "White House Office," and appears to give parallel treatment to units that are in our view not at all comparable for present purposes. We assume that your inquiry relates to the White House Office as shown in the Government Organization Manual and as separately funded in the Budget.

It is clear from the legislative history that the FIA does not embrace the "President's immediate personal staff." This phrase is used in the conference report, but is not explained. Presumably, it means that records maintained in the President's own offices or maintained

3/ Other line items within the Executive Office include the CEA, Domestic Council, NSC, OMB and OTP.

4/ 10 Weekly Compilation of Presidential Documents 1588-89 (Dec. 23, 1974).

5/

by his closest aides are beyond the scope of the FIA. This would seem to include the records of the four cabinet-rank advisers listed on the recent chart (Messrs. Buchen, Hartmann, Marsh and Rumsfeld); and those of the units listed as White House Operations, Counsellor to the President (Mr. Marsh), Office of the Press Secretary, Counsellor to the President (Mr. Hartmann), and Office of the Counsel. It would appear that the White House Office includes all of the aforementioned entities. They all perform staff functions for the President, and they do not appear to have OST-type independent functions. In our view they all must be considered as "advising and assisting" the President, even if that phrase is narrowly construed.

5/ That the President himself is not an "agency" for purposes of the FIA should follow, a fortiori, from the expressed intent to exclude the President's immediate staff. See also the Erlenborn-Moorhead exchange (discussed above).

It may also be noted that the recent opinion of the U.S. District Court for the District of Columbia (Judge Richey), dealing with access to White House tapes and other material compiled during the Nixon Administration, stated that the "Office of the President" is not an "agency" and that records of the "President and his immediate aides" are not subject to the FIA. Nixon v. Samoson, Civ. Action No. 74-1518, D.D.C. (Jan 3, 1975), p. 69. The court supported its conclusion by reference to the legislative history of the 1974 Amendments, i.e., the conference report. (The effect of this opinion has been stayed by the Court of Appeals.)

We are expressing no opinion at the present time as to the application of the FIA to other units of the Executive Office, such as OMB, 6/ NSC, 7/ CEA, and the Domestic Council. Each of those units must be considered separately, and the question can be reserved for consideration when requests addressed to each of them are received.

As a matter of sound planning, we urge that two steps be taken for the future:

(1) Any functions performed by those units described above as being within the White House Office which do not consist of "advising and assisting" the President should, if possible, be located within another Executive Office unit. If this is not possible, then a segregable subunit of the White House Office unit should be created.

6/ On February 19, 1975, OMB published an FIA regulation implementing the view that some, but not all, of OMB's functions are subject to the FIA. See 40 Fed. Reg. 7346, 7347.

7/ The recent FIA regulation published by the NSC staff contains language which seeks to leave open the question of coverage. See 40 Fed. Reg. 7316 (Feb. 19, 1975).

(2) The concept of a separate "White House Office" should be fostered and strengthened in as many ways as possible. Any future organizational charts should clearly indicate the existence of such a unit separate and apart from the rest of the Executive Office. Judicial acceptance of such a functional division can greatly simplify our FIA problems with respect to the Executive Office.

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