

Department of Justice
Washington, D.C. 20530

November 18, 1977

MEMORANDUM FOR ROBERT J. LIPSHUTZ
Counsel to the PresidentRe: Intelligence Oversight Board

This responds to your request for our views regarding the effect of the Freedom of Information Act, as amended, 5 U.S.C. §552 (Supp. V. 1975), (the "FOIA") on the Intelligence Oversight Board ("IOB").

It should be clearly understood at the outset that whether or not the IOB is an agency subject to the FOIA, there are a number of exemptions in that Act which would protect virtually all IOB records from mandatory disclosure. The most important of these exemptions are as follows:

A. The exemption for properly classified records (5 U.S.C. §552(b)(1)).

B. The exemption for records specifically exempted from disclosure by other statutes (5 U.S.C. §552(b)(3)). The statutes relating to the protection of sources and methods (50 U.S.C. §§403(d)(3), 403g) fall within this exemption.

C. The exemption for inter- and intra-agency memoranda of a deliberative nature (5 U.S.C. §552(b)(5)). This exemption protects memoranda reflecting the opinions and advice of their authors; deliberative memoranda from the Board to the President would fall within this exemption. Although this exemption does not apply to purely factual matters, except where the choice of facts reveals the thought processes of the author of the memorandum, if such factual recitations consist of classified matter or matters that will reveal sources and methods, they would be exempt under the other exemptions discussed above.



Given the role of the IOB and the nature of the matters it considers, the exemptions described above would, in our view, allow the Board to withhold from the public virtually all of its records and very little information about the IOB will become available under the FOIA. While some administrative burden might result from having to process (and deny) FOIA requests, that burden ought not to be substantial.

In any event, it is far from clear that the IOB is in fact an agency within the meaning of the FOIA; in our opinion a respectable argument can be made for excluding the Board from the FOIA entirely.

The FOIA defines the agencies subject to the Act as follows:

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. 5 U.S.C. §552(e) (Supp. V. 1975).

This subsection was added to the Act in the 1974 Amendments, primarily for the purpose of including various Government corporations within the Act. With respect to the express inclusion of the Executive Office of the President, the Conference Report on the subsection provided:

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. Conference Report, H.R. Rep. 93-1380, 93d Cong. 2d Sess. 15 (1974).

We understand that the purpose of the IOB is to advise and assist the President with respect to carrying out his responsibility to oversee the activities of the Intelligence Community. 1/ The intimate nature of the IOB's advisory role, the IOB's small size, its placement in the White House Office, which is the locus of all personal Presidential assistants, its lack of any authority to take any action of the type typically considered to be executive (with the possible exception of its investigatory function, which should properly be seen as purely an adjunct to its advisory function) all support the view that the IOB is a unit whose sole function is advising and assisting the President and thus is not an agency within the FOIA. All of the functions and authorities vested in the IOB relate to its duties to assist and advise the President and, insofar as it is authorized to gather information to enable it to perform its advisory function, it stands on the same basis as other personal Presidential assistants who must, of course, gather information in order to provide advice. 2/

We have paid particular attention to whether the requirement that the IOB refer matters raising questions of legality to the Attorney General would affect the determination as to whether or not the IOB is an agency for purposes of the FOIA. While it is possible to argue that this requirement provides the IOB with a function in addition to that of advising and assisting the President, it seems to us that such a mechanical interpretation of the FOIA, equating advice with information rather than with counsel, is inappropriate and proves too much. The IOB would not be providing advice (in the sense of counsel) to the Attorney General, but merely referring to the Attorney General those matters which are within his special

1/ To make this clear, you might wish to add language expressly stating this purpose to the proposed Executive Order.

2/ The Domestic Council's situation provides some support for the view that the IOB is not an agency. The Domestic Council, a unit with responsibilities much broader than those of the IOB, has never considered itself an agency. To date, no litigant has attempted to challenge this conclusion.

expertise. Here again, the IOB would stand on no different footing from that of any other Presidential assistant in following the Administration's policy of referring legal matters to the Attorney General. Thus, it seems to us that this function, which is incidental to that of providing advice and assistance to the President, ought not to affect the determination of whether or not the IOB is an agency subject to the FOIA.

You should also be aware that the Advisory Committee Act, 5 U.S.C. App. I (Supp. V, 1975) (the "ACA"), might apply to the IOB. Were this to be the case, there are a number of exceptions from the otherwise rigorous requirements of the ACA which apply when national security matters are involved and we believe that they would keep the ACA from heavily burdening the workings of the IOB. The most important of these exemptions are found in §10(a)(1) and §10(d) of the ACA. Of course, were the IOB to be found to be an advisory committee, its records would become subject to the FOIA, subject to all the exemptions from that Act described at the beginning of this letter.

In any event, the application of the ACA to the IOB is not clear and two different arguments are available to exclude the IOB from the Act.

First, it could be argued that the IOB's function is to advise and assist the President, not merely to render advice. Unless the assisting function requires the IOB to assume substantial operational responsibility, we have grave doubts as to whether it would remove the IOB from the scope of the ACA. The legislative history of the ACA makes it clear that where advisory and operational responsibilities are commingled, the predominant portion of the "committee's" activities must be operational in order to remove it from the ACA. We doubt that this situation will obtain with respect to the IOB. Furthermore, to the extent that the IOB is described in operational terms to avoid the ACA, it becomes more like an agency subject to the FOIA.

The second, more defensible, argument rests on the CIA

exemption found in §4(b)(1) of the ACA. The pertinent provision of subsection 4(b) provides as follows:

Nothing in this Act should be considered to apply to any advisory committee established or utilized by ---

(1) the Central Intelligence Agency

It is unclear whether "utilize" means "utilize for advice" or "utilized for any purpose." In this situation, it may be argued that an advisory committee which the CIA uses for any purpose falls within this exemption. Because the CIA will use the IOB as a conduit for reporting certain matters with respect to CIA activities to the President, it may be said that the IOB utilizes the CIA and that the IOB is thus entirely exempt from the ACA.

Some support for this argument can be found in a close reading of the text of the ACA. The ACA defines advisory committees as any group "established or utilized . . . in the interest of obtaining advice or recommendations" (§3(2)). Thus, in the definitional section of the ACA, the term utilize is limited by the phrase "for obtaining advice" whereas the CIA exemption omits the limiting phrase, thus, perhaps, indicating that the term "utilize" properly should be given a broader reading.

In conclusion, we believe that respectable arguments can be advanced for excluding the IOB from the coverage of the FOIA and the ACA. The requirement that the IOB refer legal questions to the Attorney General should not affect whether or not the IOB is covered by those Acts. In any event, even were the IOB to be subject to those Acts, the exemptions in them would be sufficient to enable the IOB to conduct virtually all of its business in confidence.

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cc: Thomas L. Farmer