

Department of Justice
Washington, D.C. 20530

12 SEP 1979

MEMORANDUM FOR DOUGLAS S. WOOD
Deputy Director
Office of Information Law and Policy

Re: Legal Effect of Executive Order 12146 on
Access to Agency Legal Opinions

This responds to your August 28, 1979 oral inquiry concerning the legal effect of Section 1-501 of Executive Order 12146, 44 Fed. Reg. 42657 (1979), which provides:

1-501. In addition to the disclosure now required by law, all agencies are encouraged to make available for public inspection and copying other opinions of their legal officers that are statements of policy or interpretation that have been adopted by the agency, unless the agency determines that disclosure would result in demonstrable harm.

1-502. All agencies are encouraged to make available on request other legal opinions, when the agency determines that disclosure would not be harmful.

You question whether this section imposes a legal restriction on the discretion of federal agencies to determine that legal opinions may be withheld under Exemption 5 of the Freedom of Information Act. 5 U.S.C. § 552(b)(5). We conclude that no such restriction is imposed because, as explained below, this paragraph was drafted with the specific intention of expressing a presidential policy goal without in any way changing the relevant statutory standard.

Executive Order 12146 was proposed by the President's Reorganization Project of the Office of Management and Budget. As originally written, section 1-5 of the proposed order on the management of federal legal resources provided:

All Federal agencies are now required by section 552(a)(2) of title 5, United States Code, to make available for public inspection and copying these opinions of their legal officers that constitute: (1) statements of policy and interpretations which have been adopted by the agency, or (2) instructions of staff that affect a member of the public. Section 552(a)(2) further provides that to the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when such opinions are released. All Federal agencies are hereby directed to also make available for public inspection and copying as many other opinions of their legal officers as the agency determines to be consistent with effective agency management and applicable legal restrictions.

In commenting on this draft, this Department, through then-Associate Attorney General Michael J. Egan, expressed its concern that the OMB language might suggest to agencies and courts an intention by the President to impose additional legal requirements before opinions withholdable under the FOIA might, in fact, be withheld. (See page 5 of the attachment to the May 8, 1979 letter from Egan to William Nichols, OMB General Counsel, which is attached to this memorandum.) The Associate Attorney General noted our understanding that this was not OMB's intention. Acting on the recommendation of this Office, he proposed language essentially the same as that of Executive Order 12146 with the express purpose of precluding any such construction.

OLC's formulation was intended to avoid even the appearance of imposing additional legal requirements. Our formulation eliminated the mandatory language of OMB's draft and incorporated into § 1-501, which pertains to legal opinions that agencies adopt as statements of policy or interpretation, the policy standard specified by the Attorney General in his May 5th, 1977 letter to the heads of all federal departments and agencies regarding the defense of FOIA suits. In that letter, the Attorney General said:

. . . the Justice Department will defend Freedom of Information Act cases only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the act.

To assure further that the Executive Order introduced no new legal requirement, but merely stated a policy concern, our draft went so far as to omit the word "demonstrable" from the policy exhortation in § 1-502 concerning legal opinions that are not agency-adopted statements of policy or interpretation.

As indicated in the memorandum to all federal departments and agencies from Robert L. Saloschin, Director of the Office of Information Law and Policy, the judgment whether to release or withhold legal opinions under the statutory mandate of the Freedom of Information Act often involves a balance of complex factors. The Executive Order was not intended to alter agencies' discretion in striking this balance, but to exhort policy-makers to weigh appropriately the public interest in the release of agency legal opinions. As we stated in our June 22, 1979 memorandum to the White House approving the Executive Order for form and legality, paragraph 5-1:

. . . expresses the President's policy concern that, like other agency records, legal opinions should be disclosed in cases in which no harm will result from disclosure. This policy does not, as we understand it, seek to impose any additional legal requirements before legal opinions withholdable under the Freedom of Information Act may, in fact, be withheld.

For the foregoing reasons, we perceive no inconsistency between the Executive Order and Director Saloschin's June 6, 1979 memorandum, and do not interpret § 1-5 as altering the legal obligations of the executive departments and agencies.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Attachment