

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.

The decision to use the services of OA was based on the need to free WHCA for its primary mission of providing confidential communications support for the President and on the benefits of efficiency and convenience that could be achieved by using the OA IBM 4341 computer located in the New Executive Office Building. Accordingly, a number of White House offices have for some time been entering and storing information in OA computers, and, where appropriate, erasing information from WHCA computers. It is anticipated that additional White House information will be entered and stored in OA computers in the coming months.

The information entered and stored in OA computers is primarily of a routine, administrative nature. It is initially prepared and processed in the various White House offices, and is used solely for internal White House purposes. Offices that have used OA services to date include the White House Offices of Communications, Media Liaison, Administration, Mail Analysis and others.

In addition to providing data storage and retrieval, OA develops computer programs for the White House to assist the various offices in processing the information. OA is capable of performing archiving or other manipulations of the stored information upon request. OA also provides some word processing support upon request.

We are assured that every effort has been made to provide full guarantees of security for White House information stored in OA computers. Logical access to OA computers is controlled by an ACF-II Security Control System, which OA considers to be the best available tool to ensure that only authorized users are able to gain access to programs and data files. Additional security is provided by the Model 204 Database Management System, which was originally designed for the National Security Agency in order to meet its security requirements. Programs and files are protected by multiple passwords, which are changed at regular intervals, in order to ensure that only authorized users can gain access.

In addition, no paper or microform copies of White House documents are retained by OA. Printed reports created for White House users are specially handled to ensure the safe and expeditious delivery to the user. We are assured by OA that none of the operations which its staff perform for the White House requires substantive understanding of the content of particular documents. By far the largest number of operations can be performed mechanically with no necessity to read the document. In some cases, OA staff will review White House documents upon White House request, but such review is solely for the purpose of ensuring stylistic consistency, an operation that does not require understanding of content.

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.

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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.