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4 Effect of P.L. 89-487, the new "Public Records Statute,"
upon the public availability of items given to the United
States and placed in the Archives under section 6(d) of
the Federal Records Act of 1950, as amended, 44 U.S.C. 397.

This responds to your informal request for an analysis of these provisions of P.L. 89-487 which may have some application to materials in the custody of the Archivist as a result of gifts governed by 44 U.S.C. 397.

That section governs the acceptance of "records" for historical preservation. The term "records," as it is used throughout the section, is defined in 44 U.S.C. 401 and 366 to include "any documentary materials, regardless of physical form or characteristics."

The Administrator of General Services is authorized by 44 U.S.C. 397(e), whenever he deems it in the public interest, to accept for deposit "papers and other historical materials" of any Government official or former official, "subject to restrictions agreeable to the Administrator as to their use." The term "historical materials" is defined in subsection (j) of the same section to include any "objects or materials having historical or commemorative value." Subsection (a)(4) of that section authorizes the Administrator to direct and effect the transfer of such materials from private sources as well as from Government agencies.

It is evident that the terms "record" and "historical materials" embrace not only papers and photographs, but also any other articles, whatever their physical form, for example, a desk upon which a treaty was signed.

There is no statutory requirement governing disclosure of "records" and "historical materials," as those terms are used in the Federal Records Act. There are, however, provisions for nondisclosure. The subsection which assigns to the Administrator responsibility for the custody, use, and withdrawal of "records" transferred to him, specifically authorizes restrictions upon their use. Subsection (f) provides that "papers, documents, or other historical materials accepted and deposited under subsection (e) * * * shall be held subject to such restrictions respecting their availability and use as may be specified in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository * * *."

The term "record," as it is used in P.L. 89-487, although not defined therein, obviously is intended to have a much narrower meaning. Although the precise limits of the term were not discussed in the legislative history, the word was used throughout the hearings and in the reports as though it were intended to apply to papers, diagrams, maps, pictures, microfilm, etc. Nothing in the legislative history of the enactment appears to contemplate, for example, a desk.

It would appear arguable that P.L. 89-487 therefore, if it has any application to items given to the United States under 44 U.S.C. 397, applies only to papers, reports, photographs, etc., and not to objects such as a desk.

Subsection (e) in P.L. 89-487, which is entitled "Agency Records" and which requires the disclosure of "records," in the more limited sense of the term, is subject to nine exemptions set forth in subsection (e). Under the third exemption, the disclosure requirements of P.L. 89-487 "shall not be applicable" to matters that are "specifically exempted from disclosure by statute". Explaining this provision, the House report (H. Rept. No. 1497, 89th Cong., 2d Sess., 10) notes that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records." During the Senate hearings on the bill, it had been pointed out that many statutes intended to protect the confidentiality of information in the possession of Federal agencies do not "specifically exempt from disclosure," but rather prohibit disclosure

"except as authorized by law" or provide for disclosure only as "authorized by law." The fear was expressed in the hearings that this statute (P.L. 89-487) might be construed as being the necessary statutory authority to authorize disclosure.

The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted in 1962 which concluded that the total number of statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure is less than 100. The reference therefore indicates an intention, notwithstanding the use of the word "specifically" in the exemption, to perpetuate whatever protection is afforded under the terms of other statutes, whatever their terms. Since 44 U.S.C. 397(e) specifically authorizes acceptance of papers and other historical materials subject to restrictions as to their use, the items in question may be "specifically exempted from disclosure by statute," within the meaning of exemption (3) in P.L. 89-487.

Exemption (6) in P.L. 89-487 renders the disclosure requirements of that act inapplicable to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The reports in both the Senate and House explain, with respect to this exemption, that a general exemption for all files the disclosure of which would invade personal privacy is much more practical than separate statutes protecting each type of personal record. Therefore, the exemption would seem to relieve from the disclosure requirements of P.L. 89-487 not only x-rays and medical reports, but also any other document in Government files which invades the privacy of the individual involved or the members of his family.

Exemption (7) in P.L. 89-487 protects from disclosure "investigatory files compiled for law enforcement purposes

except to the extent available by law to a private party." The House report, at page 11, explains that this exemption is intended to include files prepared in connection with related litigation. Because of the obvious need for non-disclosure of FBI files generally, very little was said in the hearings or elsewhere in the legislative history which describes specifically the limits of this exemption. No provision is made relative to the time when such materials are no longer afforded protection. Because investigatory files reveal the names of informers, investigation techniques, and perhaps many other kinds of information which should not be disclosed even after the case is closed, it is unlikely that the intention was that this exemption apply only until the purpose specified had been served. Therefore, materials conveyed to the Government under 44 U.S.C. 397 which were "compiled for law enforcement purposes" may be within the exemption for an indefinite period after the purpose has been served.

Otherwise, P.L. 89-487 would seem to have no application to the materials in question.