

APR 14 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

out 4/14/75
@ 2 pm

Dear Mr. Lynn:

The Attorney General has referred to this Office your letter of March 12, 1975 requesting views on several issues arising under the Privacy Act of 1974.

We have had occasion to consider the definition of the term "agency" contained in the 1974 Amendments to the Freedom of Information Act - - which, as you note, the Privacy Act incorporates by reference. 5 U.S.C. 552a(a)(1). There is a discussion of its meaning at pages 24 to 26 of the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act.

The new definition of "agency" was designed principally to clarify and expand the coverage of the term (1) by explicitly referring to government corporations and government-controlled corporations, and (2) by explicitly referring to the Executive Office of the President. See S. Rept. 93-1200, pp. 14-15. As to the former, the legislative history indicates that mere receipt of appropriated funds does not make a corporation subject to the Act, but that Federal chartering or control is necessary. The Corporation for Public Broadcasting is mentioned as a specific example of a corporation not covered.

As to application of the amendment to the Executive Office of the President, the legislative history makes it

clear that not all portions of that organizational entity are intended to be covered.

"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. 1970). 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." S. Rept. 93-1200, p. 15.

Concerning the issue of which particular units within the Executive Office of the President are covered by the definition, I enclose for your use a copy of that portion of an earlier memorandum to the White House dealing with the general question. More specific advice will have to be rendered on a unit-by-unit basis, with full information concerning the precise function and makeup of the particular component of the Executive Office involved. It is essential, of course, that we apply the same conclusion to both the Freedom of Information Act and the Privacy Act.

With respect to the second portion of your first inquiry, pertaining to the issue of whether subsidiary units within a larger governmental entity such as a department must be considered separate "agencies" for purposes of the Freedom of Information Act and Privacy Act: We do not regard the 1974 Amendments as making any change with respect to this issue. As noted above, the congressional focus in adopting those amendments was upon the overall scope of the coverage and not on the issue of how far government entities are to be subdivided for purposes of applying the Act. Thus, the statement in the new subsection 552(e) that the term agency "includes any executive department" is not intended to imply that subagencies within the Department of Health, Education, and Welfare, for example, cannot be treated as separate units for purposes of administering the Freedom of Information Act. The statement in the Senate Report that "it is not intended that the term 'agency' be applied to subdivisions, offices or units

within an agency" is of course entirely circular; in our opinion, it is not meant to forbid reasonable administrative decentralization of the sort just mentioned but rather to prevent the conferral of agency status upon a unit that does not have "substantial independent authority in the exercise of specific functions." The latter phrase is taken from Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971), which was endorsed in the sentence immediately following the excerpt from legislative history quoted above. Had it been the intention of the new amendments to forbid the widespread and well-known practice of several Departments to consider certain of their subdivisions separate "agencies" for purposes of the Freedom of Information Act, it is in our view certain that some specific expression of this concern would appear in the legislative history, which it does not.

In short, it is our firm view that the 1974 Amendments require no change in the principle which has been applied under the original Act, that it is for the over-unit -- the Department or other higher-level "agency" -- to determine which of its substantially independent components will function independently for Freedom of Information Act purposes. Moreover, as the Attorney General noted in that portion of his Memorandum dealing with the subject, "it is sometimes permissible to make the determination differently for purposes of various provisions of the Act -- for example, to publish and maintain an index at the over-unit level while letting the appropriate subunits handle requests for their own records." Attorney General's Memorandum at 26. In our view, this practice of giving variable content to the meaning of the word "agency" for various purposes can be applied to the Privacy Act as well as the Freedom of Information Act. For example, it may be desirable and in furtherance of the purposes of the Act to treat the various components of a Department as separate "agencies" for purposes of entertaining applications for access and ruling upon appeals from denials, while treating the Department as the "agency" for purposes of those provisions limiting intragovernmental exchange of records. (Of course, dissemination among components of the Department must still be only on a "need-to-know" basis. 5 U.S.C. 552a(b)(1).)

Needless to say, this practice must not be employed invidiously, so as to frustrate rather than to further the purposes of the Act; and there should be a consistency between the practice under the Privacy Act and the practice for comparable purposes under the Freedom of Information Act. For this reason it seems to us doubtful (though not entirely impossible) that a Department or other over-unit which has treated its components as separate agencies for all purposes under the Freedom of Information Act could successfully maintain that all of its components can be considered a single "agency" under the Privacy Act, simply to facilitate the exchange of records.

On the basis of the foregoing comments, we would suggest revision of the first paragraph on page 4 of your proposed guidelines. It does not seem to us desirable to indicate the existence of any ambiguity on the point whether there can be an "agency within an agency" for the purposes of the Freedom of Information Act and the Privacy Act. In our view this point is clear. The extensive quotation from Congressman Moorhead, consisting mainly of a hypothetical using the Department of Justice as an example, is not helpful, since this Department has for almost all purposes chosen to consider itself a single "agency" under the Freedom of Information Act. We would replace this paragraph with advice concerning the permissible and impermissible use of the "agency within an agency" concept, similar to that which we set forth above.

We agree with the interpretation of the Civil Service Commission that civilian personnel records can be treated as a single system of records under the control of the Civil Service Commission. These are records required to be maintained by Civil Service regulations and they are kept on standard forms approved by the Civil Service Commission. The fact that duplicate copies are kept by agencies and by components of agencies does not require that each set of duplicates be treated as a separate system of records.

If Civil Service personnel records are treated as a single set of records, however, care must be taken to assure that they are indeed uniform. It may be that some agencies

include within personnel files material developed within the agency in addition to standard personnel forms. If so, it may be necessary for those agencies to publish an addendum or supplement to the Civil Service notice describing the system, which details the additional information their files contain. Using an addendum, rather than a separate notice, would accomplish the purposes of the Act without unnecessarily expanding the required compilation of information systems.

We would also note that if Civil Service publishes a single notice of personnel systems it should take care that individual access to records remains convenient to the employee. Thus, the notice might specify that examination of records can take place in the particular agency or agency component, rather than at the Commission offices; and agencies might indicate in an addendum the location where records in their possession may be examined. In the alternative, Civil Service could publish, as part of the notice, a directory of personnel offices where records can be examined.

There may be other records which could be similarly consolidated in a single notice. For example, the financial statements required of certain employees are kept on identical forms. While they are not held in a central location, it may nevertheless be possible to describe them as a single system of records, explaining in the notice that they are kept on an agency by agency, or office by office basis rather than in a central repository.

Your inquiry concerning procedures to be followed with respect to litigation was referred to the Civil Division of this Department. Attached is a memorandum from that Division setting forth its views on the guidelines with respect to civil litigation.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attachments