13 JAN 1981

MEMORANDUM FOR ALLIE B. LATIMER
General Counsel
General Services Administration

You have requested the opinion of this Office with respect to the legality of proposed procedures for the disposition of transcripts of telephone conversations of former Secretary of State Henry A. Kissinger. For the reasons that follow, we believe that, properly interpreted, the proposed procedures comply with the requirements of federal law.

I. Background

A. In General

From September 22, 1973, to January 20, 1977, Dr. Henry Kissinger served as Secretary of State. During his period of service, Dr. Kissinger's secretaries generally monitored his telephone conversations and took notes of what was said. The notes took the form of summaries which were sometimes verbatim transcripts. The conversations ranged from official business to purely private matters. Although Dr. Kissinger did not regularly edit the notes for accuracy, they were used by his executive secretary to prepare his appointments schedule and were also read by his staff to keep abreast of his activities and to follow up on matters discussed. The notes, which were not circulated beyond his immediate staff, were filed in Dr. Kissinger's office in personal rather than official files.

On at least two occasions in 1976, the Legal Adviser of the Department of State advised Dr. Kissinger that the telephone summaries were personal materials that Dr. Kissinger would be able to remove when he left office. In reaching this result, the Legal Adviser relied on the facts that Dr. Kissinger had filed the materials in his personal files, had not circulated them beyond his personal staff, and had not been required to create the notes by statute or regulation. The Legal Adviser concluded that the State Department's record-keeping needs could be satisfied by the preparation of extracts of the information contained in the notes that pertained to official

business. Mr. Lawrence Eagleburger, Dr. Kissinger's assistant, prepared certain extracts before the transcripts were removed. By a deed dated December 24, 1976, Dr. Kissinger transferred to the United States ownership of the notes, subject to certain restrictions on access. Four days later the notes were transferred to the Library of Congress.1/ The extracts of the notes were retained by the Department of State.

After a process of negotiation, the Department of State and Dr. Kissinger reached agreement on a procedure for review and disposition of the notes. The proposed procedures were forwarded by letter of September 19, 1980, to the Administrator of General Services. The Administrator objected to the proposed plan. After an effort at negotiation proved unsuccessful, the matter was referred to this Office.

B. Proposed review procedures

Under the review procedures agreed upon by the State Department and Dr. Kissinger, the conversations and portions thereof would be placed in one of three categories: (1) information pertaining to official business that has "record value"; (2) information pertaining to official business that lacks record value; and (3) personal and private information.

1/ Dr. Kissinger's notes were the subject of an action brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in 1977 by the Reporters Committee for Freedom of the Press and William Safire of the New York Times. The district court concluded that the notes were "agency records" under the FOIA and the Federal Records Act because they were prepared on government time and with the aid of State Department employees and resources. The court also held that it would be proper for it to exercise its equitable powers to order return of the wrongfully removed notes. Reporters Committee for Freedom of the Press v. Vance, 442 F. Supp. 383 (D.D.C. 1977). The court of appeals affirmed in relevant part. In Kissinger v. Reporters Committee for Freeedom of Press, 445 U.S. 136 (1980), the Supreme Court reversed on the ground that neither the FOIA nor the Federal Records Act confers a right of action on private parties, and that the district court had not been authorized to order production of Dr. Kissinger's notes, which were not "withheld" within the meaning of the FOIA. The Court's conclusion that the notes had not been withheld was based on the fact that they had been removed from the custody of the State Department.

A conversation is without record value if it is "not appropriate for preservation for [its] evidential or informational value or [if its] substance is adequately reflected in other documents that are records of the Department of State." It is "personal and private" if it concerns "the personal or nonpublic activities" of Dr. Kissinger or other persons and not his "constitutional and statutory duties as Secretary of State or official activities of the Department of State."

The review procedures would be undertaken by a team consisting of two retired Senior Foreign Service officers and a Team Director, under the guidance of the Director of the Foreign Affairs Information Management Center. The National Archives and Records Service and Dr. Kissinger's staff would be invited to participate in a briefing session for all participants regarding criteria for determining record status.

Prior to the review, Dr. Kissinger's staff would be required to prepare a consecutively numbered list of all notes made during his tenure as Secretary. The list would then be made available to the review team. The review process itself would consist of two stages. During the first stage, conversations or portions thereof containing personal or private information would be separated from those containing information relating to official business. The separation process would be undertaken by the Team Director, who would consider the suggestions of members of Dr. Kissinger's staff. When the Team Director and staff members agreed that conversations were personal, those conversations would be excluded from further review, subject to the approval of the Secretary of State. During the second review, the review team as a group would separate information having record value from information not having such value. The conclusions reached at this second stage would be subject to the approval of the Team Director and the Director of the Foreign Affairs Management Information Center. In the event of disagreements at either stage, the Secretary of State would make the final determination; the conclusions reached at each stage would also be subject to the Secretary's examination and final decision.

At the conclusion of the reviewing process, the Team Director would certify the results and make copies or summaries

of notes 2/ or portions thereof designated as containing record information. All final copies or summaries would be transferred to the State Department for inclusion in the Central Foreign Policy File. All other materials would be either disposed of in the manner provided for disposition of classified material or retained at the Library of Congress.

II. Discussion

The Federal Records Act defines the term "records" to include:

> [A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. The principal issues for decisions relate to (1) the State Department's conclusions as to when the notes in question are "appropriate for preservation" within the meaning of the Act and (2) the respective roles of the Department of State and the GSA in making that determination. The Department of Justice resolved these issues in a general way in the briefs filed in the Kissinger case in the Supreme Court. We believe that the position adopted in these briefs represents a correct interpretation of the governing law.

A. General Principles: The Kissinger briefs

In the Kissinger briefs, the United States concluded that written materials found in an agency fall in three general categories: (1) personal materials; (2) "nonrecord" materials; and (3) records. Personal materials do not relate

2/ We are informed that summaries rather than actual copies will be returned only in extremely limited circumstances, as for example where personal and private information is intertwined with matters of official business. More difficult legal questions would be presented if the notes were to be summarized on a more general basis. Cf. n. 6, infra.

to official business and would include, for example, private correspondence or a diary. Nonrecord materials have been gathered or generated by a government official acting within the scope of his employment for the purpose of recording official business. Such materials are owned by the government. See, e.g., Scherr v. Universal Match Corp. 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 347 U.S. 936 (1970); United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958). Nonrecords materials are not, however, either "preserved" or "appropriate for preservation" within the meaning of the Federal Records Act. The Administrator of GSA has published guidelines expressly providing that "[n]onrecord materials, such as . . . preliminary worksheets, and similar papers that need not have been made a matter of record, shall not be incorporated in the official files of the agency." 41 C.F.R. 101-11.401-311. The statutory language to the effect that only documents "preserved or appropriate for preservation" need be categorized as records authorizes agencies to relinquish nonrecord materials to departing officials. Once the relinquishment has taken place, the materials become the property of the official. Finally, "records" are materials that have been preserved or are appropriate for preservation within the meaning of the Records Act.

Agencies retain a measure of discretion in deciding whether materials are "appropriate for preservation." When Congress adopted the definition of "records" in the Records Disposal Act, it stated its intention to "place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved," and to "make it clear that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943). This legislative history suggests that it is the agency's discretion -- not that of the GSA or the Archivist -- that is to be applied in determining whether certain materials are appropriate for preservation.3/ Admittedly,

3/ When the statute was passed in 1943, there was no GSA, and the Archivist's role was limited to reviewing agency proposals for the destruction of old records. The 1943 legislation

(Cont. on p. 6)

agencies are required to comply with GSA regulations as to record disposal and to cooperate with the GSA in designing "standards, procedures, and techniques designed to improve the management of records . . . ." 44 U.S.C. § 3102(2),(3). However, the GSA is not authorized to promulgate standards or guidelines that have binding effect on the agency's determinations as to whether a document constitutes a "record."

With respect to Dr. Kissinger's papers, the result should depend on application of two principles: (1) within the limits of the Federal Records Act, agencies have discretion to distinguish between record and nonrecord materials; and (2) an agency is authorized to dispose of unclassified nonrecord materials by allowing the employee to retain them as his personal papers, but the materials do not become his property until so relinquished. Once relinquished under a proper application of an agency rule, the documents are not subject to the Records Act.

These principles were impossible to apply on the record in the Kissinger case when that case reached the Supreme Court. First, the State Department's records management program did not explicitly address the subject of telephone notes. The program did require that "discussions of any significance . . . by telephone" be "made a matter of record . . . in the form of aide-memoire, memorandums of conversation, or memorandums to the file," Foreign Affairs Manual (FAM) 423.2-1.4/ That provision does not, however, require creation of the notes at issue, at least in the form of transcripts. Only information

---

3/ (Cont.)
assigned no responsibilities to the Archivist of any sort in assisting agencies in drawing the line between record and nonrecord materials. 57 Stat. 380. Accordingly, we believe that the reference to materials "appropriate for preservation" can be interpreted only to contemplate that it is the agency, not GSA, that is to make the "appropriateness" determination.

4/ The regulation states: "Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aide-memoire, memorandums of conversation, or memorandums to the file."

"of significance" must be recorded.5/ Moreover, notes created before the information has been incorporated in some final memorandum need not be retained. It is sufficient if "discussions of any significance" have been summarized and entered in agency files. The Department's Handbook expressly states that "working files," which include "rough drafts and working papers," may be "disposed of as soon as they have served their purpose." Records Management Handbook of the Department of State ¶ 271-272.

The Administrator's own guidelines, promulgated under 44 U.S.C. § 2904, are substantially identical. Those guidelines provide that "[s]ignificant decisions and commitments recorded orally . . . by telephone . . . should be reduced to writing and included in the record." 41 C.F.R. § 101-11.202-2(b). Controls should ensure "that important policies and decisions are adequately recorded; that routine operational paper work is kept to a minimum; and that the accumulation of unnecessary files is prevented." 41 C.F.R. 101-11.102-3.

The record in the Kissinger case also failed to show whether the extracts or any memoranda of Dr. Kissinger's conversations satisfied the requirement that "discussions of any significance" be "made a matter of record." The Legal Adviser of the State Department had concluded that the telephone notes need not be characterized as agency records so long as extracts of official matters reflected in the notes were made part of the agency files. But neither the notes nor the extracts could be found in the Kissinger record for comparison. There was no indication that the State Department believed that the extracts were sufficient for purposes of its record management program. The Legal Adviser himself had no opportunity to compare the extracts with the notes. If the notes constituted the only record of important agency transactions, they must be "appropriate for preservation" in light of the State Department's own requirement that a record be made of conversations having "any significance." And in order for the extracts to be sufficient, they must be "complete to the extent necessary [inter alia] to (a) facilitate the

5/ We do not, of course, suggest that documents that need not be created are by virtue of that fact not "appropriate for preservation." Such documents may be records if the agency concludes that they should be preserved under 44 U.S.C. § 3301.

making of decisions and policies and the taking of actions by the incumbents and their successors in office; . . . (c) make possible a proper scrutiny, by the Congress and by other duly authorized agencies of the Government, of the manner in which the functions of the Department of State have been discharged; . . . and (e) provide materials for research and historical purposes." 5 FAM 423:1. The sufficiency of the extracts could not, therefore, be evaluated unless both the extracts and the notes were made available for comparison. As to this issue, then, the United States recommended that the Kissinger case should be remanded for comparison of the extracts and the notes to ascertain whether the information contained in the notes was adequately reflected. The Supreme Court found it unnecessary to reach the issue because it accepted the Department's primary submission. See note 1, supra.

B. Applications

Application of these principles suggests that the disposal scheme proposed by the Department of State complies with legal requirements. First, the scheme recognizes that ownership of those notes that were made during the scope of Dr. Kissinger's employment and that relate to official business was vested in the Federal government, at least when the notes were originally made. Only the notes of purely personal conversations are even arguably Dr. Kissinger's property. Second, the scheme accords to the Department of State a measure of discretion in determining whether materials are "appropriate for preservation." In our view, the Department of State is authorized to decide that certain notes need not be retained if the information they contain may be found in extracts of the notes, memoranda of the same conversation, or some other document in the Department's files.6/ Finally,

6/ It is important to note that our views are based on an interpretation of the State Department's proposal that comports with the Foreign Affairs Manual, the Legal Adviser's views in 1976, and the position of the United States in Kissinger. The provision of that proposal that materials have nonrecord value "whose substance is adequately reflected in other documents that are records of the Department of State" should not be read to conflict with any of those sources. The mere fact that a decision is in some sense reflected in some other document would not in most contexts be sufficient to justify failing to retain Dr. Kissinger's own account

(Cont. on p. 9)

the scheme recogizes that an agency is permitted to relinquish ownership of materials pertaining to official business but nonetheless deemed not "appropriate for preservation," and that once relinquished, those materials become the property of the employee.

The GSA 7/ raises three basic objections 8/ to this scheme, which we will discuss in sequence.

1. GSA contends that the notes are public property and that they must therefore be returned to the Government in their entirety. We believe, however, that regardless of whether the notes are public property, the State Department is entitled to conclude that if they do not relate to official business, they need not be deemed "appropriate for preservation" and thus need not be retained as records. Such notes may

---

6/ (Cont.)
of the conversation. Under the regulation and the Legal Adviser's interpretation, Dr. Kissinger was required to make "a matter of record" all "discussions of any significance," in the form of "aide-memorie, memorandums of conversation, or memorandums to the file." If Dr. Kissinger failed to adhere to this obligation -- though extracts, his own memoranda, or some other document filed by another official but containing the information in a substantially complete form -- either the notes themselves or extracts thereof must be returned to the Department of State. Employees are not permitted to prepare extracts of existing records and then to discard the records. We believe that the definition in the proposal of the term "nonrecord value" must be interpreted to conform to these principles. Accordingly, we need not consider whether an agency's determination that notes of important conversations are not "records" would be an abuse of discretion. See n.10 infra.

7/ We received memoranda from GSA and the Department of State supporting their respective legal positions. Further, a meeting was conducted with GSA representatives to clarify the underlying questions.

The authority of the Administrator of GSA has been redelegated in the records management area to the National Archives and Records Service (NARS), see 44 U.S.C. § 29, 31, 33. We use the abbreviation "GSA" for convenience.

8/ GSA raises two minor objections. First, it complains that the proposal contemplates the return of only copies rather than the originals of the transcripts. GSA states

well have been government property when made, see p. 5 supra, but the Department of State has discretion to relinquish them to Dr. Kissinger. The same conclusion is appropriate with respect to nonrecord materials. Even if those materials were government property when generated, the State Department is authorized to conclude that they are not appropriate for preservation.9/

2. GSA maintains that the State Department's distinction between documents containing "significant" information and those containing "insignificant" information is unlawful. According to GSA, the notes represent a separate and independent record series and must be characterized as "records" notwithstanding the possibility that the same information appears elsewhere in State Department files.

This objection has two components. First, GSA appears to contend that the State Department may not rely on a distinction between significant and insignificant information in deciding whether documents are "records" within the meaning of 44 U.S.C. § 3301. We disagree. The Federal Records Act expressly provides that the term "records" does

---

8/ (Cont. from page 9)
that "this is a technical objection and of no real concern"; we do not believe that the State Department's proposal for return of copies is barred by any provision of federal law.

GSA also contends that the Records Officer of the State Department should be required to certify that personal and private conversations are in fact personal and private. The proposed scheme provides that the Review Team Director will separate personal and private conversations from those involving official business. We do not believe that either GSA's or the State Department's proposal is barred or required by federal law.

9/ We do not express approval of the procedure initially followed by the Department of State, under which the notes were furnished to Dr. Kissinger prior to a determination whether there were sufficient extracts to comply with the Federal records statutes and the State Department's implementing regulations. We do believe, however, that the proposed scheme is an adequate functional substitute for a procedure under which the required determination was made in advance of surrender of the notes.

not include materials found not appropriate for preservation. It is plain, in light of the legislative history, that materials not containing information of any significance may be considered to be not appropriate for preservation. The Senate Report accompanying the Federal Records Act states, "records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them." S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950). It is surely permissible for an agency to conclude that whether a written document contains significant information is the most important factor in determining whether the organization's administrative and executive needs require classification of that document as a "record." GSA's own regulations support this conclusion. See p. 7, supra. Accordingly, the State Department may lawfully conclude that a document not containing significant information need not be characterized as a record.10/

Second, GSA appears to object to the State Department's conclusion that notes not having "record value" are not "appropriate for preservation." According to GSA, the notes as a whole form a unique record series that must be preserved in its entirety, notwithstanding the fact that some of the information the notes contain may be found elsewhere. While this position is a plausible one, we believe that the decision is one for the Department of State, not GSA, to make in the first instance. The State Department's regulations required Dr. Kissinger to make a record only of conversations "of any

10/ An agency's conclusion that a document is not "appropriate for preservation" is, of course, subject to review for abuse of discretion. If such decisions were final, agencies could subvert the carefully designed disposal provisions of the federal records statutes, 44 U.S.C. § 3301 et seq., by concluding that important documents need not be retained. There are thus substantial constraints on an agency's authority to permit removal of documents on the ground that their continued retention is unnecessary. In this case, however, the State Department has not abused its discretion: it has concluded that Dr. Kissinger's notes need not be retained only to the extent that the information they contain has been recorded elsewhere. See note 6, supra.

significance." We understand that under the proposed scheme, the notes of such conversations will be returned to the Department if Dr. Kissinger has not otherwise complied with the regulation through the preparation of extracts, summaries, or memoranda to files. See note 6, supra. The State Department is authorized to conclude that it is only the information itself that must be preserved, notwithstanding the value Dr. Kissinger's notes may have as a matter of historical interest. The proposal thus comports with the statutory definition of "records."

3. Finally, GSA contends that the proposed scheme is unlawful because it accords to the Administrator an insufficient role in making the determination whether the notes are records within the meaning of the Federal Records Act. GSA concedes that it is for the State Department to determine in the first instance whether the notes are appropriate for preservation. It contends, however, that GSA maintains a supervisory role in making that determination. For purposes of this argument, GSA does not challenge the basic disposal scheme formulated by the State Department and Dr. Kissinger; instead it claims that even if the scheme as a whole is lawful, GSA should play a role in identifying personal and nonrecord materials.

We believe that this position was correctly rejected by the United States in its briefs in the Kissinger case. To be sure, agencies are required to comply with any GSA regulations issued under the provisions of 42 U.S.C., see 44 U.S.C. 3102(2),(3), and must "cooperate" with GSA in applying "standards, procedures and techniques designed to improve the management of records . . . ." These provisions do not, however, authorize GSA to promulgate regulations governing the scope of nonrecord materials.11/ With respect to such matters, the Administrator may issue only "standards, procedures, and guidelines." 44 U.S.C. § 2904. Such guidelines are without binding effect. In our view, nothing in the governing statutes requires an agency to follow GSA's decisions as to whether documents are "records," or even to allow GSA to participate in the identification process.

11/ The GSA "regulations" authorized by 44 U.S.C. § 3102(3) include those governing inter-agency transfers of records (44 U.S.C. § 2908) and those governing safeguards against the removal or loss of records (44 U.S.C. § 3105).

The only provision arguably supportive of GSA's position is the requirement that agencies "cooperate" with GSA in applying standards and procedures designed to improve records management. We do not believe, however, that this provision should be read to require GSA to play a role in determining the record status of particular documents. The Department of State's proposal permits GSA to discuss the requirements of the relevant statutes with the individuals who will review Dr. Kissinger's notes. In our view, the requirement of "cooperation" does not mean that the Department of State must do more.

III. Conclusion

For the reasons stated, we believe that the State Department's proposal for the disposition of the notes of Dr. Kissinger's telephone conversations complies with the requirements of Federal law.12/

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

12/ As a result of our conclusion, we need not discuss the Department of State's suggestion that even if the proposed scheme were unlawful, the Attorney General should exercise his prosecutorial discretion not to initiate proceedings against Dr. Kissinger.