The original documents are located in Box 17, folder "Freedom of Information - General (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

P.B.

I agree with Nino on "core" White House office — based primarily on statutory interpretation. (The Constitutional argument is weak.)

(Dudley has a copy of Nino's memo)

P.A.

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

FEB 26 1975

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Applicability of the Freedom of Information Act to the White House Office

This is in reply to your recent request for our views regarding the applicability of the Freedom of Information Act (FIA), as amended, to the White House Office.

Summary

The legislative history of the Freedom of Information Act Amendments of 1974 makes clear that some entities within the Executive Office of the President are not "agencies" for purposes of the FIA; but it does not provide clear guidelines for determining which they are. In our opinion, it is proper to conclude that generally speaking the components of the White House Office, in the traditional or budgetary sense, are not "agencies." The more difficult questions relate to the status of other entities within the Executive Office, such as the Domestic Council or the National Security Council.

Statutory Provisions

Prior to adoption of the 1974 Amendments, coverage under the FIA, 5 U.S.C. 552(b), depended entirely upon the definition of "agency" contained in the Administrative Procedure Act (of which the FIA is a part). The APA definition is not particularly helpful with respect to the present issue. That definition (5 U.S.C. 551(1)) reads as follows:

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;
(B) the courts of the United States;
(C) . . . (H) [six other specific exceptions, none of which refers to the President or the White House Office].

The 1974 Amendments, which took effect on February 19, 1975, add a special definition of "agency" applicable only to the FIA portion of the APA. Section 3 of the Amendments adds the following provision to 5 U.S.C. 552:

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

While the statutory language itself does not differentiate among the various parts of the Executive Office of the President, the legislative history makes clear that some parts are not intended to be covered. Before turning to the legislative history, it is necessary to discuss the most prominent feature in its background, which was a District of Columbia Circuit Court decision under the original definition of "agency."

Soucie v. David

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), involved an FIA request for a document of the Office of Science and Technology (OST), a unit within the Executive Office of the President, but not part of the White House Office. The principal issue in the case was whether OST was an "agency" within the meaning of 5 U.S.C. 551(1).

In resolving this issue in the affirmative, the court adopted a functional approach to the Act. 1/ It stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F.2d at 1073 (footnote omitted). The court's reasoning with respect to OST was explained, in part, as follows:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President--a relation that might result in the use of such information as a basis for advice to the President. By virtue

---

1/ In a recent case involving the applicability of the FIA to certain advisory committees of the National Institute of Mental Health, the court, in holding that the advisory groups are not "agencies," used a similar functional approach. Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 246 (D.C. Cir., 1974).

> of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act. 448 F.2d at 1975 (footnotes omitted).

Thus, the principal basis of the court's decision was the fact that OST was not limited to advising and assisting the President, but also had an independent power delegated by Congress

The legislative history of the 1974 Amendments

The bill to amend the FIA reported by the House Committee on Government Operations in March 1974 contained a provision regarding the meaning of "agency" which was essentially the same as the provision ultimately enacted. 2/ H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), p. 29. Like the enacted provision, the House version expressly referred to the "Executive Office of the President."

The expanded definition of "agency" was explained as follows in the House report (p. 8):

> For the purposes of this section, the definition of 'agency' has been expanded to include those entities which may not be considered

---

2/ The only difference between the House version and the final version related to the introductory phrase. The House version stated: "Notwithstanding section 551(1), for purposes of this section, the term 'agency' means any executive department . . . [etc.]." The provision which was enacted states: "For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department . . . [etc.]."

agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of 'agency' for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

The term 'establishments in the Executive Office of the President,' as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Thus, the report's explanation did not refer to the President or to the White House Office. It should be noted that the Department of Justice had sent the House committee a bill report which asserted that it would be unconstitutional for Congress to extend the FIA to the President's staff. House report, p. 20.

During House debate on the bill, Congressman Erlenborn paraphrased the committee report's discussion of the Executive Office of the President. Then he asked the floor manager, Congressman Moorhead, if it was correct that "it [the bill's definition of agency] does not mean the public has a right to run through the private papers of the President himself." 120 Cong. Rec. H 1789 (daily ed., Mar. 14, 1974). Congressman Moorhead replied that Congressman Erlenborn's view was correct, i.e., that no right of access to the private papers of the President was intended. The precise meaning of this exchange is not entirely clear. However, taken in con-

nection with the silence of the House report regarding the President, the exchange should establish that the House bill was not intended to make the FIA applicable to the President himself.

The bill reported by the Senate Judiciary Committee expanded the existing definition of "agency" in some respects (e.g., by adding an express reference to the Postal Service), but did not deal expressly with the status of the Executive Office of the President. The Senate report did refer, with approval, to the decision in Soucie v. David. S. Rep. 93-854, 93d Cong., 2d Sess. (1974), p. 33.

The only other pertinent item in the legislative record is the conference report, S. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), pp. 14-15. That report described the differences between the House and Senate provisions regarding "agency" and stated (p. 14) that: "The conference substitute follows the House bill." It then continued (p. 15):

> 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. 1971). 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.

Apparently, the conference committee read Soucie to mean that, if the functions of OST had been limited to advising and assisting the President, OST records would not have been subject to the FIA. The correctness of this interpretation of Soucie is questionable, for the court specifically stated that it found it unnecessary to decide that issue. 448 F.2d at 1073. Still, the main consideration here is not what the Soucie court stated, but what Congress intended.

Interpreting the legislative history

It can be argued that on the point at issue here the language of the 1974 Amendments ("any . . . establishment in the executive branch of the Government (including the Executive Office of the President)") is absolutely clear and thus permits no resort to legislative history. See, e.g., Caminetti v. United States, 242 U.S. 470, 490 (1917). If the parenthetical phrase "(including the Executive Office of the President)" clearly modified the word "establishment," that might be the case. However, its position in the sentence indicates that it modifies the word "Government"--which would leave for determination what units, within the Executive Office of the President, constitute "establishments" within the meaning of the Act, compelling examination of evidence of legislative intent. Moreover, any reading which would place the entire Executive Office within the Act would include the President himself, who is the head of that office; and since this would raise the most serious constitutional questions, an interpretation would be sought to avoid it--again compelling resort to legislative history. In short, we have no doubt that courts will not adopt the blanket view that all parts of the Executive Office are covered but will examine the legislative history to clarify the point.

The exact meaning of the legislative history, as described above, is unclear. As noted, the House report listed a number of entities within the Executive Office that were to be covered by the bill ("the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments"). The conference report took an entirely different approach to the issue, seeking to clarify the meaning of "Executive Office" by principle rather than by example. The term "Executive Office" was not meant to include "the President's immediate personal staff or units . . . whose sole

function is to advise and assist the President." Because of this basic difference in approach, it is impossible to tell whether the conference committee agreed or disagreed with the House report. Tending to show agreement is the statement in the conference report that "the conference substitute follows the House bill"--but this is a reference to the language of the bill, and goes no further than the statute itself toward showing that the House committee's intent was adopted. This issue of the relationship between the House and conference committee reports is relevant but not crucial to the present determination; it will be absolutely central when we come to consider the status under the Act of units named in the House report.

Constitutional Considerations

It is a settled rule of statutory construction that an interpretation that raises substantial constitutional questions will not be adopted where another reading of the statute is possible. See, e.g., Crowell v. Benson, 285 U.S. 22, 66 (1932). This principle is pertinent here. For the Congress to subject the President, or that portion of the Executive Office that functions as a mere extension of the President, to the requirements of the FIA (including its provisions for judicial review) seems inconsistent with the doctrine of separation of powers. Cf. Myers v. United States, 272 U.S. 52 (1926). Moreover, the exemptions of the FIA do not necessarily correspond to the scope of Executive privilege, a privilege grounded on the Constitution. United States v. Nixon, 42 Law Week 5237 (1974). Finally, the practical burdens resulting from application of the FIA to the President and his staff, including the provisions for judicial review and sanctions, might unduly interfere with the President's duty under Article II, § 3 to execute the laws.

These considerations weigh heavily against any interpretation of "agency"--if another is feasible under the statute and its history--which would apply it to what might be termed the nucleus of the Presidency.

General Conclusions

On the basis of the language of the statute, its legislative history (which includes reliance upon the Soucie case) and the constitutional issues involved, we are of the view that the following factors should be determinative of whether a unit within the Executive Office is covered by the Act:

1. Functional proximity to the President. A unit such as the Office of Telecommunications Policy, which ordinarily reports through one or another Presidential Assistant, is more likely to be covered than a unit such as the Domestic Council, which has regular direct access.

2. Authority to make dispositive determinations. A unit such as OMB, which regularly makes Executive branch decisions is more likely to be covered than a unit such as the Council of Economic Advisers, which only makes recommendations to the President.

3. Constitutional basis for the functions performed. A unit such as the Office of Economic Opportunity, which is meant to achieve goals established under the Constitution by the Congress, is more likely to be covered than a unit such as the National Security Council, which performs a function directly assigned to the President by the Constitution.

4. Manner of creation. A unit such as the Council on Environmental Quality, originally established by statute, is more likely to be covered than a unit such as the Federal Property Council, established by Executive Order on the basis of inherent Presidential authority.

Needless to say, no single one of these factors is determinative.

The status of the White House Office

Your immediate inquiry is whether the "White House Office" is covered by the Act. We are not entirely clear what that phrase is meant to include. The United States Government Manual (1974-75) lists officials who are in the White House Office (p. 81) and contains a chart (copy attached) showing the relation of that Office to other parts of the Executive Office of the President (p. 80). The Executive Office Appropriation Act for 1975 (and for prior years) contains a separate line item for that unit. 3/ Public Law 93-381 (1974), Title III. However, more recently, a revised chart showing the organization of the "White House Staff" was issued (copy attached). 4/ That chart does not use the term "White House Office," and appears to give parallel treatment to units that are in our view not at all comparable for present purposes. We assume that your inquiry relates to the White House Office as shown in the Government Organization Manual and as separately funded in the Budget.

It is clear from the legislative history that the FIA does not embrace the "President's immediate personal staff." This phrase is used in the conference report, but is not explained. Presumably, it means that records maintained in the President's own offices or maintained

---

3/ Other line items within the Executive Office include the CEA, Domestic Council, NSC, OMB and OTP.

4/ 10 Weekly Compilation of Presidential Documents 1588-89 (Dec. 23, 1974).

by his closest aides are beyond the scope of the FIA.[5/] This would seem to include the records of the four cabinet-rank advisers listed on the recent chart (Messrs. Buchen, Hartmann, Marsh and Rumsfeld); and those of the units listed as White House Operations, Counsellor to the President (Mr. Marsh), Office of the Press Secretary, Counsellor to the President (Mr. Hartmann), and Office of the Counsel. It would appear that the White House Office includes all of the aforementioned entities. They all perform staff functions for the President, and they do not appear to have OST-type independent functions. In our view they all must be considered as "advising and assisting" the President, even if that phrase is narrowly construed.

5/ That the President himself is not an "agency" for purposes of the FIA should follow, a fortiori, from the expressed intent to exclude the President's immediate staff. See also the Erlenborn-Moorhead exchange (discussed above).

It may also be noted that the recent opinion of the U.S. District Court for the District of Columbia (Judge Richey), dealing with access to White House tapes and other material compiled during the Nixon Administration, stated that the "Office of the President" is not an "agency" and that records of the "President and his immediate aides" are not subject to the FIA. Nixon v. Sampson, Civ. Action No. 74-1518, D.D.C. (Jan 3, 1975), p. 69. The court supported its conclusion by reference to the legislative history of the 1974 Amendments, i.e., the conference report. (The effect of this opinion has been stayed by the Court of Appeals.)

We are expressing no opinion at the present time as to the application of the FIA to other units of the Executive Office, such as OMB, 6/ NSC, 7/ CEA, and the Domestic Council. Each of those units must be considered separately, and the question can be reserved for consideration when requests addressed to each of them are received.

As a matter of sound planning, we urge that two steps be taken for the future:

(1) Any functions performed by those units described above as being within the White House Office which do not consist of "advising and assisting" the President should, if possible, be located within another Executive Office unit. If this is not possible, then a segregable subunit of the White House Office unit should be created.

6/ On February 19, 1975, OMB published an FIA regulation implementing the view that some, but not all, of OMB's functions are subject to the FIA. See 40 Fed. Reg. 7346, 7347.

7/ The recent FIA regulation published by the NSC staff contains language which seeks to leave open the question of coverage. See 40 Fed. Reg. 7316 (Feb. 19, 1975).

(2) The concept of a separate "White House Office" should be fostered and strengthened in as many ways as possible. Any future organizational charts should clearly indicate the existence of such a unit separate and apart from the rest of the Executive Office. Judicial acceptance of such a functional division can greatly simplify our FIA problems with respect to the Executive Office.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE
WASHINGTON

2/28/75

Phil,

Per your request.

Bill Casselman

Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

February 7, 1975

On February 19, 1975 the recently passed amendments to the Freedom of Information Act go into effect. Among the important changes in the Act are the setting of short mandatory time limits for response to requests and a change in the wording of the exemption for national security information. These new provisions, particularly in light of changing attitudes about secrecy, should make it possible to secure the release of current newsworthy information about defense and foreign policy.

In order to assist journalists, scholars, and other citizens in using the amended FOIA, the ACLU Foundation and the Center for National Security Studies have established a Project on Freedom of Information and National Security. The Project has just published a pamphlet explaining what the Act means and how you can use it. A copy is enclosed. Please let me know if you would like additional copies or know of others who might find the pamphlet useful.

Meetings to provide additional information about the Act and to answer questions will be held at 122 Maryland Avenue, N.E. on Thursday, February 13th and on Friday, February 14th at 10:00 am. You and any of your colleagues are invited to attend.

If you are contemplating using the Act and would like assistance or advice, please do not hesitate to call or write to me at this address.

Sincerely yours,

Morton H. Halperin

mhh/cmm

The New Freedom Of Information Act & National Security Information

What the Act says.....
How you can use it.....
Where to get help.....

Project on Freedom of Information and the National Security

Center for National Security Studies

ACLU Foundation

This pamphlet is published by the Project on Freedom of Information and National Security sponsored jointly by the American Civil Liberties Union Foundation and the Center for National Security Studies. The aim of the project is to secure the release of information needed for an informed public debate on matters of national defense and foreign policy. The activities of the project, in addition to the preparation of this pamphlet, include requesting information on national security matters, particularly information which reveals how the secrecy system works, making that information available to the public, and assisting journalists, professors, and members of the public to use the amended Freedom of Information Act.

Additional copies of this pamphlet and assistance in using the FOIA may be obtained from the project office or from the ACLU Foundation. Inquiries should be addressed to:

Project on Freedom of
Information and National Security
122 Maryland Avenue NE
Washington DC 20002
202-544-5380

Mr. John H. F. Shattuck
Staff Counsel
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
212-725-1222

February 1975

The Freedom of Information Act and National Security Information

In November 1974 Congress amended the Freedom of Information Act over President Ford's veto. New provisions of the Act create the possibility of requiring the Executive Branch to disclose information of importance to public debate on *current* national security issues. The amendments, which become effective on February 19, 1975, will be important only if members of Congress, the press and the public make use of them. This pamphlet seeks to facilitate the release of information by: (1) explaining the provisions of the amended Act as they relate to national security information; (2) describing in detail how to request information under the Act; and (3) offering the assistance of the ACLU Foundation and the Center for National Security Studies to persons seeking to use the Act.

Provisions of the Amended FOIA

1. *Criteria for Withholding Information*

The Freedom of Information Act provides that all records in the possession of the government must be provided to anyone on request unless they are specifically exempted from disclosure by the Act (title 5 U.S. Code, section 552(b)). The national security information exemption is contained in subsection (b)(1). In the original Act as passed, this subsection exempted information:

> specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.

In interpreting this exemption the Supreme Court in 1973 held that Congress had provided only for very limited judicial review of classified documents (*E.P.A. v Mink*, 410 U.S. 73 (1973)). Following *Mink*, all that the courts could do was to determine if a document was in fact classified; it could not deter-

mine whether the classification was sound or even whether the decision to classify was, in the words of Justice Stewart, "cynical, myopic or even corrupt."

However, the Supreme Court also noted in *Mink* that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures...."

Congress in 1974 responded to this invitation. The (b)(1) subsection as amended exempts national security records *only* if they are:

> (a) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (b) are in fact properly classified pursuant to such Executive order.

The House-Senate Conference Report notes that this revised provision requires that "both procedural and substantive criteria" contained in the Executive order be followed. The relevant order is Executive Order 11652 on "Classification and Declassification of National Security Information and Material" issued by President Nixon on March 10, 1972. The preamble of the Order notes that

> There is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints.

The Order provides that such information shall be classified "Top Secret," "Secret," or "Confidential." To be properly classified under the Order, information must at least fit the criterion of "Confidential," which reads as follows:

> The test for assigning "confidential" classification shall be whether its unauthorized disclosure could be reasonably expected to cause damage to the national security.

An implementing directive issued by the National Security Council on May 19, 1972, provides that

> If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment.

Thus the relevant *minimum substantive criterion* for proper classification appears to be:

No substantial doubt that release of the informa-

tion could be reasonably expected to cause damage to the national security.

The Executive Order also provides that information shall be declassified as soon as it no longer fits the criteria for classification. Thus to withhold information under the (b)(1) exemption, the agency possessing the records must make a new determination, at the time of the request, that the information is still properly classified; it cannot rely on a determination made in the past.

Furthermore, for the amended FOIA (b)(1) exemption to apply, the procedures of the Executive Order and implementing directive must have been followed. These include:

1. Limiting classification authority to designated agencies.
2. Indicating on a document whether it is subject to the Declassification Schedule.
3. Indicating on each document the office of origin and the date of classification.
4. "To the extent practicable marking the document to indicate which portions are not classified."

The Order and implementing directive also provide for automatic declassification of information according to a fixed schedule unless it is exempt from the declassification procedures.

If either substantive or procedural requirements of the Order are not met, files may not be withheld under section (b)(1). However, national security information which is not exempt under amended subsection (b)(1) of the FOIA may nevertheless be exempt under other subsections of the Act. Those most likely to be relevant are subsection (b)(3) relating to information exempted from disclosure by statute, which would apply to Atomic Energy information, cryptographic information, and, perhaps, to intelligence sources and means; subsection (b)(5) which excludes intra- and inter-agency memoranda containing only advice on policy matters (the advice would be exempt, but not factual material included

in the same memorandum if it were separable); and subsection (b)(7) which exempts "investigatory files compiled for law enforcement purposes," including those relating to "lawful national security intelligence investigations." Under these exemptions, it should be noted, documents may still be released through agency discretion, although they are protected from required disclosure. Matters not specifically excepted from disclosure by the FOIA exemptions may not be withheld for any reason.

2. *Requesting a File from an Agency*

Description of Record:

The Act provides that upon request by any person an agency shall make a record available if it is not exempt from release. The request must be honored under the 1974 amendments if it "reasonably describes such records." The original FOIA provided for release of "identifiable" records. In changing the language, Congress indicated that it expects the agency to locate the records requested if it can do so with a reasonable amount of effort. The agency is not, however, required to compile information not already contained in a document; the FOIA is in reality a public records law rather than literally an information law.

Partial Exemption:

If parts of a record are exempt from release "any reasonably segregable portion of a record" must be released after the exempt material is deleted.

Fees:

The Act provides that requests must conform to rules established regarding procedures and fees. Fees are limited to "reasonable standard charges for document search and duplication." Thus no fees may be charged for assessing whether previously classified documents should now be de-classified, in whole or in part. The amended Act also provides that fees may be reduced or waived when the agency determines that release of the information can be

considered as primarily benefiting the general public.

Time Limits:

Under the original Act, agencies often took many months to respond to a request. Recognizing the frequent need for timely release of information, Congress laid out in the 1974 amendments very detailed time limits for responding to requests.

A request for information must be answered within 10 working days. If some or all of the requested information is denied, the individual must be informed of his right to appeal and given the name of the person to whom the appeal is to be addressed. If a denial of information is appealed, a final determination must be made within 20 days. Either time limit may, upon written notice to the requester, be extended for a combined total of up to 10 additional days, but only under three specific instances of "unusual" circumstances specified in the Act. These are (1) records are located in separate offices, (2) a voluminous amount of material from separate files must be examined, or (3) a need to consult with other agencies or other components of the same agency. No other circumstances justify a delay.

If a request is denied or if there is no response within either specified time periods, the person making the request may take his case to a federal District Court. A complaint in court must be answered by the government in 30 days unless the Court grants a delay upon a showing by the government that there are exceptional circumstances and that the agency is exercising due diligence.

3. *The New Role of Judicial Review*

The Act provides that a District Court in the District of Columbia (or the district in which the complainant resides or the records are kept) may, on complaint, order the disclosure of records improperly withheld. The Act reads:

> In such cases the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld,

and,

> the burden is on the agency to sustain its action.

This means that the government must persuade the Court that the information is properly classified under the Executive order. In order to reach a determination the Court may, if it feels it necessary, examine the disputed documents in secret.

The conference report comments as follows on these provisions:

> In *Environmental Protection Agency* v. *Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examinations need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.
>
> * * *
>
> However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

In a major FOIA case, decided before the Act was amended, the Court of Appeals for the District of Columbia Circuit spelled out in detail the burden on the government to demonstrate that a particular document or parts of it were in fact exempt (*Vaughn* v. *Rosen*, 489 F.2d 820 (1973)). The Court held that there must be (1) a detailed justification for any withholding, not simply a conclusory opinion, (2) speci-

ficity, separation and indexing so that the court could release one or more parts of a document, even if some information in the document is exempt, and (3) adequate testing, perhaps by the appointment of a special master.

The courts are instructed by the amended Act to expedite hearings in such cases so that the usual lengthy delays encountered by civil litigants may be avoided. If the documents are ordered released the court may order the government to pay court costs and attorneys' fees. Decisions of the District Court may be appealed by either party.

Using the Act

If you want information related to national security that the government has not released, you should ask for it. Here is how to do that.

Written Request:

The first step is to write a letter to the official designated by the agency having the records to receive such requests or, if his identity is not known, to the General Counsel of the agency. (A list of designated officials for FOIA requests of the major national security agencies is on the back cover.) If you are not sure which agency has the information write to the most likely one; your letter will be forwarded if necessary.

The letter should begin by invoking the provisions of the Freedom of Information Act as amended (section 552 of title 5, United States Code) and indicating that this is a request for information under the Act. The letter should then describe the information requested in as much detail as possible. If known, the location and specific identification of the file or record should be given. However, you should not hesitate to write because you lack information on the whereabouts of the material you seek. You need only "reasonably describe" the records you are requesting. You need not give any reason for requesting the information, but if you have a specific interest you may wish to state it.

The writer should indicate a willingness to pay reasonable fees for locating and copying the requested files. If the documents you are requesting may be particularly voluminous, you can request a cost estimate before the actual location and copying is performed. You may be able to cut costs by volunteering to view originals rather than paying for copies of all requested documents. You may wish to request a reduction or waiver of these fees on the grounds that release of the information would benefit the general public. If so, you should state the nature of this benefit and summarize any other factors, such as indigency, which might influence a reduction in fees.

The letter should request release of the information within 10 working days, as provided by the amended Act. You may wish to give your telephone number and suggest that matters relating to identification of records, clarification of the scope of the request, and negotiation on the reduction of fees be handled by telephone to save processing time. The letter should indicate that, if any or all of the information is not released, the writer wishes to know what exemption is being relied on. It might also state that if any parts of a document are not exempt they should be forwarded immediately, without prejudice to a right to appeal for the entire document. (A sample letter is on page 14.)

Appeal:

If a written refusal is received, an appeal letter should be sent. If you do receive a written rejection, you must appeal before going to court, even if you are confident of a rejection on appeal. If you receive no response to the original request in 20 days (or up to thirty days if you are advised of unusual circumstances) you may wish to immediately file a complaint in a federal district court, or file an appeal letter, or do both simultaneously. If a refusal is received, the letter should advise you of the person to whom an appeal should be addressed. If it does not or if you have not received a letter, the appeal should be addressed to the head of the agency.

The appeal letter should repeat the description of the requested information and indicate that release was denied. It should request a final decision within 20 working days as provided in the Act. A copy of the previous exchange of letters should be included for the agency's convenience. You may wish in the appeal letter to comment on or refute the reasons for the denial if they have been given to you. In many instances, it may be possible to persuade a senior official to release information which a more junior official has denied you. If you wish to make such a case, you may increase your chances of success by seeking help at this stage. If you intend to go to

court if your request is denied, you should so state in your appeal letter. Also, if you believe that a denial of the record is "arbitrary or capricious," you should state this in your appeal letter, since these terms are used in the law and provide for possible administrative sanctions against officials so acting. (Sample letters are on pages 15 & 16.)

You may also wish to send copies of your correspondence to the Senate Subcommittee on Administrative Practice and Procedure (Sen. Kennedy, Chairman) and the House Subcommittee on Government Information (Cong. Bella S. Abzug, Chairperson), which oversee and monitor agency implementation of the FOIA. These subcommittees may be able to assist you in pressing your request with the agency.

Going to Court:

If this appeal is denied, or if no answer to the appeal is received within 20 days—or, at most, 30 days if the agency has informed you of a delay because of unusual circumstances—a suit may be brought in a Federal District Court.

At this point, if not earlier, advice should be sought as to how to proceed without counsel or how to obtain counsel.

Getting Help

The American Civil Liberties Union Foundation and the Center for National Security Studies have jointly established a Project on Freedom of Information and National Security. The aim of the Project is to promote the use of the FOIA to obtain the release of information related to national security matters. The Project staff is available to provide assistance at every stage and to arrange for legal assistance through the ACLU Foundation when necessary. The staff will also refer you to other organizations prepared to help.

To enable us to monitor the functioning of the Act in this area, we would appreciate receiving copies of correspondence with agencies requesting national security information under the FOIA.

If you would like more specific information about using the FOIA or help in getting national security information from the Executive Branch, contact:

In Washington:

Morton H. Halperin
Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

In New York:

John H. F. Shattuck
National Staff Counsel
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
(212) 725-1222

FOIA Exemptions

1. Records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and which are "in fact properly classified pursuant to such Executive order."

2. Matters concerning "internal personnel rules and practices" that do not affect a member of the public.

3. Matters exempted from disclosure by statute.

4. Trade secrets and commercial or financial information that a person has given to the agency and that are privileged or confidential.

5. Inter-agency or intra-agency communications, such as memoranda showing how individual decision-makers within an agency feel about various policy alternatives.

6. Personnel and medical files, which could not be disclosed without a "clearly unwarranted invasion" of someone's privacy.

7. Investigatory records compiled for law enforcement purposes (such as files compiled by the F.B.I. in a criminal investigation)—*but only* if the production of such records would (a) interfere with law enforcement, (b) deprive a person of a fair trial, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in criminal and lawful national security intelligence investigations, confidential information furnished only by such a source, (e) disclose investigative techniques, or (f) endanger the life or safety of law enforcement personnel.

8. Reports prepared by or for an agency responsible for the regulation or supervision of financial institutions, such as reports prepared by the Securities and Exchange Commission concerning the New York Stock Exchange.

9. "Geological and geophysical information and data, including maps, concerning wells." This refers to reports based on explorations by private gas and oil companies.

For further discussion of these exemptions and other provisions of the Act see the ACLU pamphlet, "Your Right to Government Information" (revised ed. January 1975).

SAMPLE Request Letter

Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

February 19, 1975

The Assistant to the Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Sir:

This is a request under the Freedom of Information Act as amended (5 U.S.C. 8552).

I write to request a copy of the report on CIA domestic activities sent by Mr. William Colby to President Ford on or about January 1, 1975.

To avoid any possible misunderstanding of what is being requested, I enclose a copy of a newspaper story in which Presidential Press Secretary Ronald Nesson states that President Ford has received this report. My request includes any and all appendices, annexes, or other materials attached to the copy of the Report as transmitted to President Ford by Mr. Colby.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested Report are exempt, you provide me immediately with a copy of the remainder of the Report. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the Report is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the material which you are not releasing.

I am prepared to pay reasonable costs for locating the requested file and reproducing it.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

As provided for in the amended Act, I will expect to receive a reply within 10 working days.

Sincerely yours,

SAMPLE Appeal Letter
(Simple Form)

Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544 5380

Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Mr. Secretary:

This is an appeal pursuant to subsection (a)(6) of the Freedom of Information Act (5 U.S.C. 552).

On _____, I received a letter from _____ of your agency denying my request for information and indicating that an appeal should be directed to you. This letter constitutes that appeal. I am enclosing a copy of my exchange of correspondence with your agency so that you can see exactly what files I have requested and the insubstantial grounds on which my request has been rejected.

I trust that upon examination of my request you will conclude that the information I have requested is not properly covered by exemption (b)(1) of the amended Act and will make the information promptly available.

As provided for in the Act, I will expect to receive a reply within 20 working days.

If you are unable to order release of the requested information, I intend to initiate a lawsuit to compel its disclosure.

Yours sincerely,

A project of the fund for peace.

SAMPLE Appeal Letter
(With Argumentation)

Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Mr. Secretary:

We, the undersigned, pursuant to the Freedom of Information Act (5 U.S.C. 552), hereby appeal the refusal of the Department of Defense to release to the public a complete list of all armaments, munitions and war materiel supplied by our government to the Republic of South Vietnam since the signing of the Peace Agreement on January 27, 1973. We demand this information in the name of the public's right to know.

On February 19, 1975, one of the signers of this letter sent you a letter requesting a list of all armaments supplied to the South Vietnamese government since the cease fire agreement. The response denied this information, stating that it was classified because its disclosure might be injurious to the government of South Vietnam. We cannot accept this reason for withholding vital information regarding government operations from the American people. Surely the familiar justification of national security does not apply to the affairs of a country in which, as we have repeatedly said, we have no military involvement. Any policy of withholding this information from the American public is made further unacceptable by Article 7 of the Protocol to the Agreement Ending the War, which provides for the supervision and control of arms replacements by the Two-Party Joint Military Commission and the International Commission of Control and Supervision. Obviously, this permits the inspection of armaments, munitions and war materiel by persons other than American citizens.

Why, once again, should the American public be the last to know what its own government is doing?

As you no doubt know, the Freedom of Information Act places the burden of proof for withholding such documents as these upon the administrative authority.

We hereby demand that you release this information within twenty working days from the receipt of this letter, as provided in the amended Freedom of Information Act. Otherwise, we intend to begin litigation.

Sincerely yours,

Where to Write

Department of Defense:

Martin R. Hoffmann
General Counsel
Department of Defense
Washington, D.C. 20301

Department of State:

Mr. Daniel Brown
Director, Freedom of Information Staff
TA/FOI
Room 5835
Department of State
Washington, D.C. 20520

Central Intelligence Agency:

Mr. Angus MacLean Thuermer
The Assistant to the Director
Central Intelligence Agency
Washington, D.C. 20505

National Security Council:

Mrs. Jeanne W. Davis
Staff Secretary
Room 374
National Security Council
Old Executive Office Building
Washington, D.C. 20506

THE WHITE HOUSE
WASHINGTON

P.B.

I agree with Nino on "core" White House office — based primarily on Dudley interpretation. (The Constitutional argument is weak.)

(Dudley has a copy of Nino's memo)

P.A.

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

FEB 26 1975

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Applicability of the Freedom of Information Act to the White House Office

This is in reply to your recent request for our views regarding the applicability of the Freedom of Information Act (FIA), as amended, to the White House Office.

Summary

The legislative history of the Freedom of Information Act Amendments of 1974 makes clear that some entities within the Executive Office of the President are not "agencies" for purposes of the FIA; but it does not provide clear guidelines for determining which they are. In our opinion, it is proper to conclude that generally speaking the components of the White House Office, in the traditional or budgetary sense, are not "agencies." The more difficult questions relate to the status of other entities within the Executive Office, such as the Domestic Council or the National Security Council.

Statutory Provisions

Prior to adoption of the 1974 Amendments, coverage under the FIA, 5 U.S.C. 552(b), depended entirely upon the definition of "agency" contained in the Administrative Procedure Act (of which the FIA is a part). The APA definition is not particularly helpful with respect to the present issue. That definition (5 U.S.C. 551(1)) reads as follows:

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;
(B) the courts of the United States;
(C) . . . (H) [six other specific exceptions, none of which refers to the President or the White House Office].

The 1974 Amendments, which took effect on February 19, 1975, add a special definition of "agency" applicable only to the FIA portion of the APA. Section 3 of the Amendments adds the following provision to 5 U.S.C. 552:

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

While the statutory language itself does not differentiate among the various parts of the Executive Office of the President, the legislative history makes clear that some parts are not intended to be covered. Before turning to the legislative history, it is necessary to discuss the most prominent feature in its background, which was a District of Columbia Circuit Court decision under the original definition of "agency."

Soucie v. David

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), involved an FIA request for a document of the Office of Science and Technology (OST), a unit within the Executive Office of the President, but not part of the White House Office. The principal issue in the case was whether OST was an "agency" within the meaning of 5 U.S.C. 551(1).

In resolving this issue in the affirmative, the court adopted a functional approach to the Act. 1/ It stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F.2d at 1073 (footnote omitted). The court's reasoning with respect to OST was explained, in part, as follows:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President--a relation that might result in the use of such information as a basis for advice to the President. By virtue

---

1/ In a recent case involving the applicability of the FIA to certain advisory committees of the National Institute of Mental Health, the court, in holding that the advisory groups are not "agencies," used a similar functional approach. Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 246 (D.C. Cir., 1974).

> of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act. 448 F.2d at 1975 (footnotes omitted).

Thus, the principal basis of the court's decision was the fact that OST was not limited to advising and assisting the President, but also had an independent power delegated by Congress

The legislative history of the 1974 Amendments

The bill to amend the FIA reported by the House Committee on Government Operations in March 1974 contained a provision regarding the meaning of "agency" which was essentially the same as the provision ultimately enacted. 2/ H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), p. 29. Like the enacted provision, the House version expressly referred to the "Executive Office of the President."

The expanded definition of "agency" was explained as follows in the House report (p. 8):

> For the purposes of this section, the definition of 'agency' has been expanded to include those entities which may not be considered

---

2/ The only difference between the House version and the final version related to the introductory phrase. The House version stated: "Notwithstanding section 551(1), for purposes of this section, the term 'agency' means any executive department . . . [etc.]." The provision which was enacted states: "For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department . . . [etc.]."

> agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of 'agency' for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.
>
> The term 'establishments in the Executive Office of the President,' as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Thus, the report's explanation did not refer to the President or to the White House Office. It should be noted that the Department of Justice had sent the House committee a bill report which asserted that it would be unconstitutional for Congress to extend the FIA to the President's staff. House report, p. 20.

During House debate on the bill, Congressman Erlenborn paraphrased the committee report's discussion of the Executive Office of the President. Then he asked the floor manager, Congressman Moorhead, if it was correct that "it [the bill's definition of agency] does not mean the public has a right to run through the private papers of the President himself." 120 Cong. Rec. H 1789 (daily ed., Mar. 14, 1974). Congressman Moorhead replied that Congressman Erlenborn's view was correct, i.e., that no right of access to the private papers of the President was intended. The precise meaning of this exchange is not entirely clear. However, taken in con-

nection with the silence of the House report regarding the President, the exchange should establish that the House bill was not intended to make the FIA applicable to the President himself.

The bill reported by the Senate Judiciary Committee expanded the existing definition of "agency" in some respects (e.g., by adding an express reference to the Postal Service), but did not deal expressly with the status of the Executive Office of the President. The Senate report did refer, with approval, to the decision in Soucie v. David. S. Rep. 93-854, 93d Cong., 2d Sess. (1974), p. 33.

The only other pertinent item in the legislative record is the conference report, S. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), pp. 14-15. That report described the differences between the House and Senate provisions regarding "agency" and stated (p. 14) that: "The conference substitute follows the House bill." It then continued (p. 15):

> 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. 1971). 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.

Apparently, the conference committee read Soucie to mean that, if the functions of OST had been limited to advising and assisting the President, OST records would not have been subject to the FIA. The correctness of this interpretation of Soucie is questionable, for the court specifically stated that it found it unnecessary to decide that issue. 448 F.2d at 1073. Still, the main consideration here is not what the Soucie court stated, but what Congress intended.

Interpreting the legislative history

It can be argued that on the point at issue here the language of the 1974 Amendments ("any . . . establishment in the executive branch of the Government (including the Executive Office of the President)") is absolutely clear and thus permits no resort to legislative history. See, e.g., Caminetti v. United States, 242 U.S. 470, 490 (1917). If the parenthetical phrase "(including the Executive Office of the President)" clearly modified the word "establishment," that might be the case. However, its position in the sentence indicates that it modifies the word "Government"--which would leave for determination what units, within the Executive Office of the President, constitute "establishments" within the meaning of the Act, compelling examination of evidence of legislative intent. Moreover, any reading which would place the entire Executive Office within the Act would include the President himself, who is the head of that office; and since this would raise the most serious constitutional questions, an interpretation would be sought to avoid it--again compelling resort to legislative history. In short, we have no doubt that courts will not adopt the blanket view that all parts of the Executive Office are covered but will examine the legislative history to clarify the point.

The exact meaning of the legislative history, as described above, is unclear. As noted, the House report listed a number of entities within the Executive Office that were to be covered by the bill ("the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments"). The conference report took an entirely different approach to the issue, seeking to clarify the meaning of "Executive Office" by principle rather than by example. The term "Executive Office" was not meant to include "the President's immediate personal staff or units . . . whose sole

function is to advise and assist the President." Because of this basic difference in approach, it is impossible to tell whether the conference committee agreed or disagreed with the House report. Tending to show agreement is the statement in the conference report that "the conference substitute follows the House bill"--but this is a reference to the language of the bill, and goes no further than the statute itself toward showing that the House committee's intent was adopted. This issue of the relationship between the House and conference committee reports is relevant but not crucial to the present determination; it will be absolutely central when we come to consider the status under the Act of units named in the House report.

Constitutional Considerations

It is a settled rule of statutory construction that an interpretation that raises substantial constitutional questions will not be adopted where another reading of the statute is possible. See, e.g., Crowell v. Benson, 285 U.S. 22, 66 (1932). This principle is pertinent here. For the Congress to subject the President, or that portion of the Executive Office that functions as a mere extension of the President, to the requirements of the FIA (including its provisions for judicial review) seems inconsistent with the doctrine of separation of powers. Cf. Myers v. United States, 272 U.S. 52 (1926). Moreover, the exemptions of the FIA do not necessarily correspond to the scope of Executive privilege, a privilege grounded on the Constitution. United States v. Nixon, 42 Law Week 5237 (1974). Finally, the practical burdens resulting from application of the FIA to the President and his staff, including the provisions for judicial review and sanctions, might unduly interfere with the President's duty under Article II, § 3 to execute the laws.

These considerations weigh heavily against any interpretation of "agency"--if another is feasible under the statute and its history--which would apply it to what might be termed the nucleus of the Presidency.

General Conclusions

On the basis of the language of the statute, its legislative history (which includes reliance upon the Soucie case) and the constitutional issues involved, we are of the view that the following factors should be determinative of whether a unit within the Executive Office is covered by the Act:

1. Functional proximity to the President. A unit such as the Office of Telecommunications Policy, which ordinarily reports through one or another Presidential Assistant, is more likely to be covered than a unit such as the Domestic Council, which has regular direct access.

2. Authority to make dispositive determinations. A unit such as OMB, which regularly makes Executive branch decisions is more likely to be covered than a unit such as the Council of Economic Advisers, which only makes recommendations to the President.

3. Constitutional basis for the functions performed. A unit such as the Office of Economic Opportunity, which is meant to achieve goals established under the Constitution by the Congress, is more likely to be covered than a unit such as the National Security Council, which performs a function directly assigned to the President by the Constitution.

4. Manner of creation. A unit such as the Council on Environmental Quality, originally established by statute, is more likely to be covered than a unit such as the Federal Property Council, established by Executive Order on the basis of inherent Presidential authority.

Needless to say, no single one of these factors is determinative.

The status of the White House Office

Your immediate inquiry is whether the "White House Office" is covered by the Act. We are not entirely clear what that phrase is meant to include. The United States Government Manual (1974-75) lists officials who are in the White House Office (p. 81) and contains a chart (copy attached) showing the relation of that Office to other parts of the Executive Office of the President (p. 80). The Executive Office Appropriation Act for 1975 (and for prior years) contains a separate line item for that unit. 3/ Public Law 93-381 (1974), Title III. However, more recently, a revised chart showing the organization of the "White House Staff" was issued (copy attached). 4/ That chart does not use the term "White House Office," and appears to give parallel treatment to units that are in our view not at all comparable for present purposes. We assume that your inquiry relates to the White House Office as shown in the Government Organization Manual and as separately funded in the Budget.

It is clear from the legislative history that the FIA does not embrace the "President's immediate personal staff." This phrase is used in the conference report, but is not explained. Presumably, it means that records maintained in the President's own offices or maintained

---

3/ Other line items within the Executive Office include the CEA, Domestic Council, NSC, OMB and OTP.

4/ 10 Weekly Compilation of Presidential Documents 1588-89 (Dec. 23, 1974).

by his closest aides are beyond the scope of the FIA.[5/] This would seem to include the records of the four cabinet-rank advisers listed on the recent chart (Messrs. Buchen, Hartmann, Marsh and Rumsfeld); and those of the units listed as White House Operations, Counsellor to the President (Mr. Marsh), Office of the Press Secretary, Counsellor to the President (Mr. Hartmann), and Office of the Counsel. It would appear that the White House Office includes all of the aforementioned entities. They all perform staff functions for the President, and they do not appear to have OST-type independent functions. In our view they all must be considered as "advising and assisting" the President, even if that phrase is narrowly construed.

5/ That the President himself is not an "agency" for purposes of the FIA should follow, a fortiori, from the expressed intent to exclude the President's immediate staff. See also the Erlenborn-Moorhead exchange (discussed above).

It may also be noted that the recent opinion of the U.S. District Court for the District of Columbia (Judge Richey), dealing with access to White House tapes and other material compiled during the Nixon Administration, stated that the "Office of the President" is not an "agency" and that records of the "President and his immediate aides" are not subject to the FIA. Nixon v. Sampson, Civ. Action No. 74-1518, D.D.C. (Jan 3, 1975), p. 69. The court supported its conclusion by reference to the legislative history of the 1974 Amendments, i.e., the conference report. (The effect of this opinion has been stayed by the Court of Appeals.)

We are expressing no opinion at the present time as to the application of the FIA to other units of the Executive Office, such as OMB, 6/ NSC, 7/ CEA, and the Domestic Council. Each of those units must be considered separately, and the question can be reserved for consideration when requests addressed to each of them are received.

As a matter of sound planning, we urge that two steps be taken for the future:

(1) Any functions performed by those units described above as being within the White House Office which do not consist of "advising and assisting" the President should, if possible, be located within another Executive Office unit. If this is not possible, then a segregable subunit of the White House Office unit should be created.

6/ On February 19, 1975, OMB published an FIA regulation implementing the view that some, but not all, of OMB's functions are subject to the FIA. See 40 Fed. Reg. 7346, 7347.

7/ The recent FIA regulation published by the NSC staff contains language which seeks to leave open the question of coverage. See 40 Fed. Reg. 7316 (Feb. 19, 1975).

(2) The concept of a separate "White House Office" should be fostered and strengthened in as many ways as possible. Any future organizational charts should clearly indicate the existence of such a unit separate and apart from the rest of the Executive Office. Judicial acceptance of such a functional division can greatly simplify our FIA problems with respect to the Executive Office.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel