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WITHDRAWAL SHEET

Ronald Reagan Library

Collection Name SHEPHERD, J MICHAEL: FILES

Withdrawer

AEM 4/30/2019

File Folder FOIA KISSINGER COMMISSION: FOIA/SHEPHERD
CHRON (1 OF 9)

FOIA

F15-0053/01

Box Number 13977

KEYS

2

DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	MEMO	FOR: JAY B. STEPHENS FROM: J. MICHAEL SHEPHERD WITH ATTACHMENTS	4	1/2/1987	B6
2	MEMO	FOR: JAY B. STEPHENS FROM: J. MICHAEL SHEPHERD SUBJECT: ATTACHED FOIA REQUEST, WITH ATTACHMENTS	14	1/2/1987	B7(C) B7(D)
3	MEMO	FOR: JAY B. STEPHENS FROM: J. MICHAEL SHEPHERD SUBJECT: ATTACHED FREEDOM OF INFORMATION/PRIVACY ACTS REQUEST, WITH ATTACHMENTS	21	12/9/1986	B6

Freedom of Information Act - [5 U.S.C. 552(b)]

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THE WHITE HOUSE

WASHINGTON

January 2, 1987

MEMORANDUM FOR PETER J. WALLISON

FROM:

J. MICHAEL SHEPHERD *JMS*

SUBJECT:

Eisenach Request and Policy on Removal of
Records by Departing White House Staff

As you directed, I have reviewed the attached materials prepared by Jack Carley in connection with former Executive Assistant to the Director of OMB Jeff Eisenach's request for permission to have copies of certain OMB documents for use in connection with his work on the Presidential campaign of Governor du Pont. This memorandum also reviews current procedures applicable to departing members of the White House staff.

In each case, I recommend that the current policy be maintained that departing employees are not allowed to take with them any official documents. I believe that this policy best protects sensitive information and appropriately reflects the fact that officials in the Executive Office of the President serve in positions of public trust and do not obtain property rights in the documents generated in the course their duties. In addition, I believe it important to maintain a consistent policy in this area throughout the Administration in fairness to officials who have already left the staff.

1. Eisenach Request

OMB Director Miller has requested your advice regarding Mr. Eisenach's request for copies of official OMB documents. Jack Carley's analysis is described in his attached memoranda for Miller. Carley essentially concludes that, to the extent that the information is sensitive and would not be released to the public under the Freedom of Information Act, it should not be released to Eisenach.

I agree with Carley's reasoning, because it is the confidential nature of the information that determines whether it should be withheld, not the fact that additional copies have been retained by the agency. As you will recall from our consideration of the FOIA waiver issue in connection with the preparation of the Morris agreement, courts are likely to find selective disclosures to constitute a waiver of FOIA exemptions. Mead Data Central, Inc. v. U.S. Department of Air Force, 566 F.2d 242, 257-58 (D.C. Cir. 1977); State of North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 180-81 (8th Cir. 1978). Accordingly, the conscious

provision of this information to Eisenach would limit substantially OMB's future ability to withhold the information. As Carely has suggested, the best way to ensure that sensitive information is not released to Eisenach inadvertently and that he is not given preferential treatment is to deal with his request as a FOIA request.

2. Policy Regarding Departing White House Staff

In connection with the review of the Eisenach matter, you asked me to review White House policy regarding the removal of records by departing White House staff. I believe that the current policy -- as stated in the White House Staff Manual -- that no records may be taken by departing employees is correct.

Presidential records are the property of the United States, and remain in the custody and control of the President during his term of office. Unlike Federal records, Presidential records are not available to the public under the Freedom of Information Act until after the President leaves office. Under the Presidential Records Act the President can restrict public access to certain categories through the FOIA, of records for up to 12 years. 44 U.S.C. § 2204.

The access restrictions, however, do not apply to records which have been made public by the President or his agents. To the extent that former staff members have copies of Presidential records, particularly if they choose to make those records public, the President's ability to restrict public access to them is limited. I understand that the President has asserted the 12 year restriction for all of his records. Accordingly, to change our current policy would undermine that decision.

Attached for your review and signature is a memorandum for Miller concurring in Carley's advice.

Attachment

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR JAMES E. MILLER, III
DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Removal of Official Records by Departing
Staff Members

As you requested, this office has reviewed the memorandum to you from Darrell Johnson and Bob Bedell, and the memoranda and other material assembled by Jack Carley relating to Jeff Eisenach's request for copies of certain official documents maintained in his official files. We concur in Carley's analysis and recommend that Eisenach be given copies only of those documents available to the public under the Freedom of Information Act. Finding "selective disclosures" to be inconsistent with the purposes of the FOIA, courts have found that the provision of documents to one member of the public waives an agency's ability later to withhold the same documents.

As the memoranda provided by OMB indicate, it is the longstanding policy of federal agencies and the White House Office to restrict the ability of departing employees to take copies of sensitive agency records when they leave. I believe that this policy is sound because it recognizes that it is the sensitivity of the information rather than the existence of other copies that determines its availability, and appropriately reflects the fact that officials in the Executive Office of the President are privileged to serve in positions of public trust and do not obtain a property interest in the documents generated in the course of their duties.

Thank you for bringing this matter to our attention.

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THE WHITE HOUSE

WASHINGTON, D.C.

December 18, 1986

MEMORANDUM FOR JAY B. STEPHENS

FROM:

J. MICHAEL SHEPHERD *JMS*

SUBJECT:

Attached FOIA Request of Beth Chalcraft Boyle

Attached for your review and signature is a letter to Beth Chalcraft Boyle, News Editor of WJLA-TV, who wrote the attached letter to Pat Buchanan requesting information under the Freedom of Information Act. She requests records of any telephone calls he may have placed to two 900 area code numbers. I called the first number, it apparently registers votes in some sort of preference poll. There was no indication of the issue, so I can only surmise that it has to do with civil rights because Brad Reynolds is copied.

I note that Pat does not keep phone logs. I decided not to include that information in the letter.

Attachments

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FOR: JAY B. STEPHENS FROM: J. MICHAEL
SHEPHERD SUBJECT: ATTACHED FREEDOM OF
INFORMATION/PRIVACY ACTS REQUEST, WITH
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JBS/JMS:JCK
JBStephens
JMShepherd ✓
Chron.

THE WHITE HOUSE

WASHINGTON, D.C.

Dear Ms. Boyle:

Your letter of December 8, 1986, to Patrick Buchanan, requesting copies of his telephone logs under the Freedom of Information Act, recently was referred to this office for response. The United States Supreme Court has held that, as an "entity whose sole function is to advise and assist the President," the White House Office is not an "agency" subject to the Freedom of Information Act. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980).

Accordingly, we must respectfully decline to comply with your request.

Sincerely,
ORIGINAL SIGNED BY J.B.S.

Jay B. Stephens
Deputy Counsel to the President

Ms. Beth Chalcraft Boyle
News Editor
WJLA-TV
4461 Connecticut Ave., N.W.
Washington, D.C. 20015