

Ronald Reagan Presidential Library Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Roberts, John G.: Files
Folder Title: JGR/Presidential Records
(2 of 5)
Box: 39

To see more digitized collections visit:

<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:

<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

August 28, 1980

MEMORANDUM TO: VERONICA PICKMAN
FROM: MARIE ALLEN *Marie*
SUBJECT: ISSUES REMAINING TO BE RESOLVED CONCERNING
PRESIDENTIAL RECORDS ACT IMPLEMENTATION

As you requested several days ago, I've put together a list of those issues still requiring resolution. I do not include in the decision items below those issues about which there is general agreement. The two major lists of decision items from which this summary is drawn come from the Final Report of the Working Group, Presidential Papers Task Force (1/21/80), and the Terman legal analysis report (7/21/80).

- (1) Assignment of Policy Responsibility for Presidential records.

Counsel _____

Chief of Staff _____

Assistant for Administration _____

Note: Michael Berman has suggested that the President's Counsel and/or Chief of Staff might have the official responsibility for Presidential records, signing the major memoranda to the staff on the subject, while Hugh Carter assumed the administrative responsibility for recommending and implementing records decisions.

It is generally agreed that the Vice President's Counsel and Administrative Officer will assume similar functions for Vice Presidential records.

- (2) Assignment of records management responsibility for Presidential records.

W.H.O. Office of Records Management _____

Office of Administration _____

Note: The Working Group report recommended that the White House Office of Records Management assume responsibility for Presidential records wherever located in the EOP and that OA assume responsibility for federal records wherever located in the EOP.

(7) Disposal schedule for Presidential/Vice Presidential records

_____ Working Group draft approved

_____ Working Group draft disapproved

(8) Handbook for Presidential/Vice Presidential records

_____ Official responsible for review

_____ Official responsible for signature

(9) Training courses for Presidential staffers in Act and use of Handbook.

Training courses _____ approved

_____ disapproved

Responsibility for organization of training courses assigned to _____.

(10) Restriction statement to be signed by President and Vice President claiming right to restrict documents in six categories for 12 years after the end of the Administration.

Terman draft approved _____

Working Group draft approved: short version _____

long version _____

Other _____

(11) Guidelines for documents removed by departing staffers from White House complex.

Addressed in immediate memo from Counsel to staff _____

Addressed in handbook for period after 1/20/80 _____


Not addressed at this time _____.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

July 22, 1980

MEMORANDUM FOR HUGH CARTER
✓ MIKE CARDOZO
MARY LAWTON
MARIE ALLEN
VERONICA PICKMAN

FROM: MIKE BERMAN 
SUBJECT: PRESIDENTIAL PAPERS ACT OF 1978

The following are attached for your consideration:

- a memorandum from Jim Terman (an attorney working in our office for a short period of time) to me on issues raised by the Act and the Task Force Report.

- Marie Allen's comments on a draft of the memorandum preceding the draft that you are receiving.

- Jim Terman's responses to Marie Allen's comments.

- a chart which I requested from Marie Allen relating to the basis for restricting access to certain kinds of papers under the Presidential Papers Act and FOIA.

After an opportunity to digest this material, I believe we should have a meeting to discuss this memorandum and the Task Force Report.

attachments

MSB/meg

cc: Frank Matthews

THE WHITE HOUSE
WASHINGTON

August 27, 1980

MEMORANDUM FOR HUGH CARTER
MIKE CARDOZA
MIKE BERMAN
VERONICA PICKMAN
MARIE ALLEN

FROM: *ML* MARY LAWTON

SUBJECT: Presidential Records Act

Labor Day approaches and there are some significant decisions regarding the Presidential Records Act which must be made if we are to have sufficient lead time to implement the Act by January 20, 1981.

The issues requiring most immediate resolution are the definition of Presidential and Vice Presidential Records and the question of whether to establish a file break. If there is to be a file break, the designation of an official in charge of implementation will also be essential.

Definitions There are a number of sub-issues involved in arriving at an agreed-upon definition of records covered by the Act. True implementation cannot begin until we have resolved these and reached a definition.

1. Elements of the EOP which produce Presidential Records

Jim Terman's memo to Mike Berman contains recommendations on which elements and officials produce Presidential records and which do not. Marie Allen's comments question the distinction he makes between the Drug Abuse Policy Office and the rest of the Domestic Policy Staff (i.e. Records of the former are subject to FOIA and of the latter are Presidential.) I think this is a close question. I also question whether CEA can be considered outside FOIA. Otherwise I agree with Jim Terman's analysis. This matter should be brought to conclusion soon.

MEMORANDUM
August 27, 1980
page two

2. Coverage of Vice Presidential Records in the Senate Office

Jim Terman concludes that records in the Vice President's Senate Office are not covered by the Act. I agree that all communications to the Vice President as President of the Senate are outside the scope of the Act. What remains to be determined is whether there are records of the Vice President as a part of the Administration which are also maintained at that office which might arguably be subject to the Act. We should ascertain the facts and resolve this issue.

3. Coverage of Gifts

Jim Terman concludes that domestic gifts are not subject to the Act except possibly those of special historic significance. I do not believe any of the gifts are subject to the Act although the log recording the gifts is a documentary record and it should be preserved under the Act. Whichever view prevails a decision should be reached soon.

4. Official versus Personal Records

The sharpest differences between Jim Terman and Marie Allen arise in the area of differentiating between official records and personal records. This included decisions whether drafts, "extra copies," diaries, datebooks, communications from DNC, briefing materials for political trips and similar items are records. This is undoubtedly the most difficult aspect of defining records but it must be resolved before implementation of the Act can proceed any further.

File Break There is no dispute, as a matter of law, that Presidential records of the first term are personal property and those of the second are government property. The issue is whether, if there is already a decision to donate first term records to the government, it is nevertheless desirable to impose a file break.

The argument in favor of a file break is essentially the desirability of clearly asserting legal ownership and preserving flexibility and control over first term records by segregating them from records covered by the Act.

MEMORANDUM
August 27, 1980
page three

The argument against a file break is essentially practical -- the enormous complexity of trying to separate records of two continuous terms of office. To illustrate --

- o If first term records are carted up and shipped to storage, they will be unavailable for reference on matters of continuing interest.
- o If records are retained but distinguishable by different file folders or some other visible mark, they will inevitably be comingled -- copy of first term memo attached to second term memo.
- o The value of memory typewriters is lost if all memory must be erased at the beginning of the second term.
- o The value of the Presidential handwriting computer file is diminished if a new and separate computer file must be initiated at noon, January 20.
- o Is a photo shot on the morning of January 20 but developed in the afternoon a first or second term record?

If there is to be file break one central official or office will have to be designated to resolve these issues and many others as yet unanticipated.

Recommendation I do not believe that a further exchange of paper will bring us any closer to resolving these issues. I suggest a meeting at which we can sit down and hammer them out. We can then get on with the business of recommending a decision to the President and Vice President and, based on that decision, implementing the Act.



OFFICE OF THE VICE PRESIDENT

WASHINGTON

July 21, 1980

MEMORANDUM FOR MICHAEL BERMAN

FROM: JIM TERMAN

RE: LEGAL ANALYSIS OF REPORT OF THE WORKING
GROUP - PRESIDENTIAL, VICE PRESIDENTIAL
PAPERS TASK FORCE - PRESIDENTIAL PAPERS
ACT OF 1978

This memorandum is divided into four sections. The first section proposes the major legal decision items that will have to be considered in implementing this Act. The second examines what government units are covered by the Presidential Records Act of 1978 (hereinafter referred to as the Act). The third section examines the legal definition of a "Presidential record" and "personal record". The final section proposes revisions in the draft and implementation documents prepared by the working group task force.

DECISION ITEMS

(1) Does the documentary materials received or created by the following government units generally constitute an official Presidential record?

White House Office	Yes ___	No ___	Recommendation - Yes
Intelligence Oversight Board	Yes ___	No ___	Recommendation - Yes
Office of Management and Budget	Yes ___	No ___	Recommendation - No
Domestic Policy Staff General Documents	Yes ___	No ___	Recommendation - Yes
Documents relating to Coordination of Drug Abuse Policy	Yes ___	No ___	Recommendation - No

National Security Council			
General Documents	Yes <u> </u>	No <u> </u>	Recommendation - No
Files of Brzezinski	Yes <u> </u>	No <u> </u>	Recommendaiton - Yes
Files of Deputy Asst. Aaron	Yes <u> </u>	No <u> </u>	Recommendation - Yes
Situation Room	Yes <u> </u>	No <u> </u>	Recommendation - Yes
Council of Economic Advisors	Yes <u> </u>	No <u> </u>	Recommendation - Yes
Office of Science and Technological Policy			
General Documents	Yes <u> </u>	No <u> </u>	Recommendation - No
Selected Files of Director as Advisor to the President	Yes <u> </u>	No <u> </u>	Recommendation - Yes
Council on Environmental Quality	Yes <u> </u>	No <u> </u>	Recommendation - No
Office of the Special Rep. for Trade Neg.	Yes <u> </u>	No <u> </u>	Recommendation - No
Office of Administration Director of OA	Yes <u> </u>	No <u> </u>	Recommendation - No
	Yes <u> </u>	No <u> </u>	Recommendaiton - Yes
Office of the V.P.			
General Documents	Yes <u> </u>	No <u> </u>	Recommendation - Yes
Documents retained as Pres. of Senate	Yes <u> </u>	No <u> </u>	Recommendation - No
Council on Wage and Price Stability	Yes <u> </u>	No <u> </u>	Recommendation - No
Director's Files	Yes <u> </u>	No <u> </u>	Recommendation - Yes

(2) Are documentary materials created or received by Presidential advisory boards and Presidential commissions to be generally considered official Presidential documents?

Yes No Recommendation - No

(3) Do the following documentary materials constitute official Presidential records?

Domestic gifts Yes No Recommendation - No

All documentary materials relating to "political" trips of President and Vice President Yes No Recommendation - Yes

All speech drafts or, in the alternative, only speech drafts of historically significant occasions (i.e., inaugural address, acceptance speech before Dem. Convention) All speech drafts
 Historical drafts only
 Recommendation - Historical drafts only

Draft Schedules	Yes _____	No _____	Recommendation - No
"Political" memos traditionally prepared for the President during his travels	Yes _____	No _____	Recommendation - Yes
All documents received from DNC	Yes _____	No _____	Recommendation - No
Datebooks utilized by staff	Yes _____	No _____	Recommendation - Yes
Chronological files and subject matter files	Yes _____	No _____	Recommendation - Yes
Copies of Presidential records received by an agency outside of EOP	Yes _____	No _____	Recommendation - No

(4) Approval of letter to archivist providing notification of election to restrict access to Presidential documents. (Appendix B)

Approved _____ Revise _____

WHAT GOVERNMENT UNITS ARE COVERED BY THE ACT

The government units that are covered by the Act is stated in the Act's definition of a "Presidential record".

A Presidential record is defined as "documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial

duties of the President". 44 U.S.C. 2201. The Act specifically excludes from the definition the official records of the "agency" as defined in the Freedom of Information Act. 44 U.S.C. 2201 (2bIi).

The Executive Office of the President is made up of the following government units: The White House Office, Office of the Vice President, Intelligence Oversight Board, Office of Management and Budget, Domestic Policy Staff, National Security Council, Council of Economic Advisors, Office of Science and Technology Policy, Council on Environmental Quality, Office of Administration, Council on Wage and Price Stability, Office of the Special Representative for Trade Negotiations.

The key issue involved is that the Act specifically limits its application only to a unit or individual of the EOP "whose function is to advise and assist the President" and to those government units that do not constitute an "agency" under the FOIA. In analyzing this criteria, one should closely examine three key paragraphs in the House Government Operations Committee Report dated August 14, 1978, on H.R. 1350 - Presidential Records Act of 1978.

The report reads as follows:

Presidential records does not include agency records subject to the Freedom of Information Act, stocks of publications, extra copies of documents or personal records.

The Act does not modify the applicability of the Freedom of Information Act to White House and Executive Office records of a particular Administration during its tenure. That is, it does not redefine the term agency to include entities not now covered by the FOIA. The conference report for the 1974 FOIA amendments stated that "with respect to the meaning of the term "Executive Office of the President, the

conferees intend the result reached in Soucie v. David, 448 Fed. 2nd 1067. The term is not 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". H. R. 93-1380, 93rd Congress, 2nd Session 13.

The term "Presidential records" is intended, however, to encompass all White House and Executive Office records except those of a purely private or non-public nature, which as a consequence of the conference report language, fall outside the scope of the FOIA because they are not agency records. In other words, that which is now subject to the FOIA would remain so and that which is not now subject to FOIA would be subject to the Presidential Records Act (emphasis added) including those provisions of the Act which in specified circumstances specially apply the FOIA to these non-agency records after a President leaves office. H.R. 95-1487, 95th Congress, 2nd Session 11.

Therefore, based on the above paragraphs, one must first determine whether a government unit within the EOP falls under the FOIA. If it does then it's work product does not become subject to the Presidential Records Act. If it does not fall within the FOIA then it falls within the ambit of the Presidential Records Act. (It should be noted that the preceding statement is slightly misleading in that eventually all Presidential records become subject to the FOIA at some point subsequent to the President's term of office. However, Presidential records are not subject to the FOIA while the President is in office.)

For purposes of the FOIA the term "agency" is "each authority of the government of the United States whether or not it is within or subject to review by another agency" and includes any executive department, military department ... or other establishment in the Executive Branch of government (including the EOP) or any independent regulatory agency. 5 U.S.C. 551(1); 5 U.S.C. 552(e) 1976. Congress and the courts are excluded from coverage.

The House report on the FOIA defined the term "established in the Executive Office of the President" as meaning "such functional entities as the Office of Telecommunications Policy, the OMB, the CEA, NSC,

Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or Executive Order. H.R. 93-876, 93rd Congress, 2nd Session 8 (1976).

The final conference report to the FOIA adjusted the House bill language. The conference report did not reject the House report's inclusion of Executive Office units which would be subject to the Act. It did state that "with respect to the meaning of the term EOP the conferees intend the result of Soucie v. David, 448 Fed. 2nd 1067 (CADC 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. H.R. 93-1380, 93rd Congress, 2nd Session 13 (1974). (emphasis added)

Briefly, Soucie v. David involved a suit against the Office of Science and Technology for release of documents under the FOIA. OST contended that it was not an "agency" under the FOIA, but rather a part of the Office of the President. The court ruled that OST was in fact an "agency" under the FOIA. It stated:

... 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 ... by virtue 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 Fed. 2nd, Act 1075.

Therefore, based on the above analysis the test in determining whether a government unit within the EOP falls under the Presidential Records Act is whether that unit's

sole function is to advise and assist the President. If the unit has additional independent functions, then it falls under the purview of the FOIA and the Federal Records Act and is not subject to the Presidential Records Act.

It should be noted that there are presently individuals within units of the EOP that fall under the FOIA who presently consider their work product to be "Presidential documents" not subject to the FOIA. Assuming their work product is "reasonably segregable" and meets the test as described above, then it would appear that their actions would be in conformance with the Presidential Records Act. These selected individuals will be discussed in the following paragraphs.

The following paragraphs examine the specific units within the EOP to determine whether said unit falls under the Presidential Records Act.

WHITE HOUSE OFFICE

According to the Task Force Report the White House Office (WHO) presently considers their work product to be Presidential papers. Based on the above analysis it clearly appears that this office would be included under the purview of the Presidential Records Act. In support of this argument it should be noted that the court in Nixon v. Sampson relied on the aforementioned FOIA conference report to exclude the WHO from the FOIA stating that its function is one of solely advising and assisting the President. 349 Federal Supplement 147 (DDC-1975).

INTELLIGENCE OVERSIGHT BOARD

According to the Task Force Report the IOB presently considers its work product to be classified as Presidential

Papers. The IOB does not consider itself under the purview of the FOIA. Based on the writer's present knowledge of the functions of the IOB, their actions would appear to be in conformance with the Presidential Records Act.

The IOB is a creature of Executive Order #11905 in 1976 and amended by Executive Order #12036 dated January 24, 1978 providing for the organization and control of United State foreign intelligence activities. The IOB is to "function within the White House" and is composed of three members appointed by the President from outside the government. It's functions include the review of the practices and procedures of the Inspector General and general counsels with responsibilities for intelligence agencies; review the internal guidelines of each intelligence agency with respect to legality or propriety of its activities; report at least quarterly to the President on its findings; forward to the Attorney General reports concerning intelligence activities of questionable legality; and conduct such investigations of activities of intelligence agencies deemed necessary to carry out its functions. E.O. 12036 - 43 Fed. regs. 3674. (January 24, 1978).

According to a Congressional Research Service report on the applicability of the FOIA to the Executive Office of the President (undated):

....it is not clear what, if any, independent authority the IOB exercises. It possesses broad review authority over a number of federal agencies, but whether such review includes the authority to evaluate and, on its own, recommend courses of action, it is not known nor made clear from the functions as described in the Executive Order. The Board is to

report its "findings" to the President and such "findings" appear to relate to the products of its various review activities. If that is its sole function (and its placement within the WIO may so indicate), it may not be an "agency" for the purposes of the FOIA. However, if the Board, in addition to its Presidential advisory role, evaluates and makes recommendations and decisions with respect to the policies and procedures of other federal agencies, it may, like the OST in Soucie be considered "an agency" under the FOIA.

Of course, if the IOB was considered an agency under the FOIA its work product would therefore not classify as Presidential records under the Presidential Records Act.

OFFICE OF MANAGEMENT AND BUDGET

The OMB presently considers itself under the purview of the FOIA and Federal Records Act. None of its work product are considered Presidential documents. This policy would appear to be in conformance with the Presidential Records Act.

The OMB was specifically cited as an example of a governmental unit falling within the purview of the FOIA in the aforementioned FOIA House report. It is a creature of statute and in addition to advising the President, has independent functions, among them overseeing the budgetary activities of all federal agencies. It has published FOIA regulations which not only apply to it but to all other entities within the Executive Office of the President (to the extent the FOIA is applicable) which do not have their own regulations. 5 CFR 1303 (1977); 3 CFR 101.1 (1977).

DOMESTIC POLICY STAFF

According to the Task Force Report, the DPS categorizes their work product as Presidential Papers and does not consider itself under the purview of the FOIA. This would appear to be in conformance with the Presidential Records Act except for possibly those documents of the DPS relating to the coordination of drug abuse policy which is discussed below.

According to the Congressional Research Service study heretofore referred to, under the reorganization plan of 1977 the Domestic Council was replaced by the DPS. The DPS consists of "such staff personnel as are determined necessary by the President for advice in economic and domestic policy". H.R. 95-661, 95th Congress, 1st Session 15 (1977).

According to the CRS study, the DPS also is responsible for the coordination of drug abuse policy and is to "provide an oversight capability to focus on drug abuse policy in the manner described in Public Law 237". GAO Report on Reorganization of the Executive Office of the President (B-191694, April 21, 1978) reprinted in hearings on Treasury, Postal Service and General Government Appropriations for Fiscal Year 1979 before a subcommittee of House Committee on Appropriations, 95th Congress, 2nd Session, 339, 346 (1978). (1979 Appropriations Hearings).

Public Law 94-237, the Drug Abuse Treatment Act of 1972 as amended, among other things directs the review and appraisal of drug abuse policies of other federal departments. This review and evaluation process is to be performed by the Domestic Policy Staff under the direction of the Special Assistant to the President for health issues.

According to Lee Dogoloff, DPS Assistant Director for Drug Abuse Policy, his division performs a unique role compared with other units within DPS. In addition to its advisory duties, this division has oversight responsibility over other federal agencies. Pursuant to a Congressional mandate, Dogoloff must report to Congress on an annual basis. Unlike other associate directors of DPS, Dogoloff testifies before Congress on a regular basis. In addition, Dogoloff meets monthly with various agency representatives coordinating drug abuse policy.

Therefore, it could be argued that, with respect to drug abuse policy, the DPS may be performing an "independent function" of evaluating federal programs of other agencies in the drug abuse area in addition to its functions as advisor to the President on domestic issues. As such, documents pertaining to this particular area, if "reasonably segregable," may be subject of the Presidential Records Act.

NATIONAL SECURITY COUNCIL

According to the Task Force Report, with the exception of the files of the Assistant to the President, Zbigniew Brzezinski, Deputy Assistant to the President David Aaron, and the files in the Situation Room, the NSC considers itself within the purview of the FOIA. Only the aforementioned files are considered Presidential documents not subject to the FOIA.

The NSC has promulgated FOIA regulations and has been the subject of court cases under the FOIA. It should also be noted that Mr. Brzezinski and Mr. Aaron and paid by and considered members of the White House Office. The files in the Situation Room, although in the custody of the NSC, contain communications between foreign governments, our embassies and the President. They have historically been considered White House documents.

It is the writer's opinion that the NSC's present categorization of documents is in conformance with the Presidential Records Act.

COUNCIL OF ECONOMIC ADVISORS

The CEA has a very confusing history with respect to the FOIA and Presidential Papers. According to Ms. Marie Allen, author of the Task Force Report, up until the Administration of President Ford, the CEA was not considered an "agency" under the FOIA and all appropriate documents were considered Presidential documents and property of the President. Under the Ford Administration, the CEA documents were considered federal records and not Presidential documents.

As of this date, the CEA does not consider it an "agency" under the FOIA and is presently undecided as to whether its documents are federal records or Presidential records.

The basis for concluded that the CEA should be classified as an agency under the FOIA and therefore not falling within the ambit of the Presidential Records Act, emanates from the aforementioned CRS report.

The report notes that the House report on the bill from which the final version of the definition of "agency" was taken, specifically mentions the Council of Economic Advisors as an "establishment in the Executive Office of the President" to be covered by the FOIA. H.R. 93-876, 93rd Congress, 2nd Session 8 (1974). Furthermore, the reorganization plan which established the Office of Science

and Technology - held to be an agency in Soucie under criteria subsequently adopted by the conferees in the 1974 redefinition of "agency" in the FOIA - described the OST as an administrative unit, outside the White House, but in the Executive Office of the President on roughly the same basis as the Budget Bureau, the Council of Economic Advisors, (emphasis added), the National Security Council and the Office of Emergency Planning". 448 Fed., 2nd at 1074, quoting from House Report 1635, 87th Congress, 2nd Session 9 (1962).

Therefore, based on the above argument, the CEA should be considered an "agency" under the FOIA. However, as indicated above, the CEA holds a contrary view. This is based on a legal opinion by Cecilia E. Wirtz, OMB Associate General Counsel and Legal Advisor to the CEA. This opinion is attached to this memorandum as Appendix A1.

The basic conclusion reached in this memorandum is that the CEA serves strictly in an advisory role to the President and therefore, does not fall within the ambit of the FOIA. With respect to the issue raised above whereby the FOIA House report cites the CEA as a specific example of an agency falling under the ambit of the FOIA, Ms. Wirtz submits that the subsequent conference report to the FOIA, while not contradicting the substance of the House report, dropped the House language quoted above which cited the CEA and other agencies as examples of government units falling under the FOIA. Conference Report 93-1200, 12 U.S.C., Congressional and Administrative News, pg. 6221.

This writer would concur with the opinion of the CEA legal advisor and feels that documents received or created by the CEA should fall under the ambit of the Presidential Records Act.

by subject". As indicated above, this would appear to be in conformance with the Presidential Records Act.

COUNCIL ON ENVIRONMENTAL QUALITY

The CEQ presently considers all of its documents federal records subject of the FOIA. The CEQ has promulgated FOIA regulations. No documents are considered Presidential papers. This would appear to be in conformance with the Presidential Records Act.

The CEQ was established by statute (National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321) to formulate and recommend national policies to promote the improvement of the quality of the environment. The Council consists of three members appointed by the President by and with the consent of the Senate. According to the Congressional Research Service report heretofore referred to, the CEQ has statutorily defined functions of appraising programs and policies of other federal agencies independent of its Presidential advisory role. See 42 U.S.C. 4342, 4344.

It might be suggested that the files of the Director of the CEQ be analyzed to determine whether they can and should be segregated in order that those documents which relate to the Chairman's role as advisor to the President should be classified as Presidential records and handled pursuant to the provisions of the Presidential Records Act. According to the EOP records manual heretofore referred to, a separate subject matter file does not presently exist.

COUNCIL ON WAGE AND PRICE STABILITY

The COWPS presently considers its documents federal records subject to the FOIA except for the Director's files

who also serves as advisor to the President on Inflation and is paid by the White House Office. The Director's files are considered Presidential records. This would appear to be in conformance with the Presidential Records Act.

The COWPS has significant independent duties including working with private industry and government agencies to encourage price restraint, working with labor and management, conducting public hearings, monitoring the economy, reviewing and appraising federal agency programs, and intervening in administrative proceedings. 12 U.S.C. 1904 (1976). It has published FOIA regulations. 6 CFR 702 (1977).

According to the EOP Records Program manual the Chairman's files are divided into two categories. The first is the Chairman's subject files which "include correspondence, internal memoranda and pertinent background material on issues that are coordinated through the COWPS. The file is arranged alphabetically by agency, subject and commodity."

The above file is considered a federal record and forwarded to the Federal Records Center upon departure of the Chairman.

The second file is the Chairman's alphabetical file. This file "includes copies of correspondence and internal memoranda that are included in the Chairman's subject files. These files are related to the Chairman's role as advisor to the President on inflation and are arranged alphabetically by name and chronologically thereunder". This file is transferred to the White House files upon departure of the Chairman.

As previously indicated, the above would appear to be in conformance with the Presidential Records Act.

OFFICE OF THE SPECIAL REPRESENTATIVE FOR
TRADE NEGOTIATIONS

According to the Task Force Report the OSRTN has traditionally considered its documents federal records and not Presidential records. This would appear to be in conformance with the Presidential Records Act.

The OSRTN has promulgated its own FOIA regulations. 15 CFR 2004 (1977). It advises both the Congress and the President and is responsible for the administration of internal trade agreements. 19 U.S.C. 2171.

OFFICE OF ADMINISTRATION

According to the Task Force Report, the OA presently considers its documents federal documents subject to the FOIA and not Presidential records; except for the Director's files which are considered Presidential documents. This would appear to be in conformance with the Presidential Records Act.

The Office of Administration "provides administrative support services to all units within the EOP, except those services which are in direct support of the President". 1979-80 Government Operations Manual 101.

The Director of the OA also serves as Special Assistant to the President for Information Management as part of the White House Office. According to the EOP Records Management manual, the Director has one alphabetical file. "These files are related to the Director's role as Special Assistant to the President for Information Management and include correspondence memoranda and background information related to information management. These files are arranged alphabetically by subject. These files are to be transferred to the White House files upon departure of the Director".

As previously indicated, this would appear to be in conformance with the Presidential Records Act.

OFFICE OF THE VICE PRESIDENT

According to the Act, Vice Presidential records are to be treated in the same manner as Presidential records. 44 U.S.C. 2207. It therefore appears that any documents created or received by the Office of the Vice President would be classified as Vice Presidential documents (assuming that it met the additional criteria discussed below).

The general exception to this rule are those documents created or received by the Vice President in his capacity as President of the Senate. There are many documents that are received by the Office of the Senate President that relate solely to Senate functions. There is also a ledger kept by the Senate President's staff indicating when these documents have been received and to whom they have been forwarded.

In addition, the Office of the Senate President generates correspondence by and between Senators, Congressmen and Senate staffers.

The writer submits that all documents received or created by the Vice President or members of his Senate staff in his capacity as President of the Senate, remain Senate property and are not intended to be considered Vice Presidential documents.

A counter argument to this conclusion is that Vice Presidential records are to include all documents received or created in the course of conducting activities which relates to the Vice President's constitutional, statutory or other official duties. It can be argued that one constitutional

duty of the Vice President is to serve as President of the Senate and, therefore, all documents created or received as a result of performing this duty are to be considered Vice Presidential documents.

However, the Office of the President of the Senate is an independent constitutional office created under Article I of the Constitution, separate and apart from the Office of the Vice President created under Article II of the Constitution. It can be argued that the offices have separate functions and duties and, in fact, operate within two separate branches of government. It is only that the Constitution mandates that the same individual shall hold both offices. Therefore, it is not intended that those documents created or received by the Office of the Senate President shall be included as official Vice Presidential documents.

PRESIDENTIAL ADVISORY BOARDS AND PRESIDENTIAL COMMISSIONS

The Presidential Records Act does not specifically address the question of whether records of Presidential boards and commissions constitute "Presidential records" under the Act. It is this writer's opinion that generally Presidential commissions and boards do not fall within the ambit of "Presidential records".

Traditionally, the work product of Presidential boards and commissions have been considered federal records subject to the Freedom of Information Act and have not constituted Presidential records.

The Federal Advisory Committee Act makes Presidential commissions and boards subject to the Freedom of Information Act. Public Law 92-463, 86 Stat. 770 (Section 12). Furthermore, the Advisory Act mandates that the Library of

Congress establish a depository for the reports and papers of the commissions and boards. Ed. at Section 13.

Keeping in mind the overall general intent of Congress in drafting the Act - that which is presently subject to the FOIA should remain so and that which is not now subject to the FOIA should be subject to the Presidential Records Act - it appears that these commissions and boards should remain federal records.

There may be exceptions to this general rule whereby under the test of Soucie v. David the commission was created solely to advise and assist the President and has no other independent function. A list of existing Presidential advisory boards and commissions is attached to this memorandum as Appendix A. These boards and commissions should probably be examined on an individual basis to determine whether they fall within the confines of the Act.

DOMESTIC GIFTS

The Task Force Report raised the issue of whether domestic gifts received by the President are intended to be "Presidential records" under the Act and therefore the property of the U.S. Government. Presently only foreign gifts over \$100 under the Foreign Gifts and Decorations Act are considered government property. There is nothing in the legislative history of the Presidential Records Act which specifically refers to domestic gifts.

The writer feels that domestic gifts generally should not be considered "Presidential records" under the Act.

In analyzing this issue one should focus on the intent of the legislation. Unlike the Foreign Gifts Act, the legislation was created not to avoid possible conflicts of interest and influence buying, but rather to promote the creation of the fullest possible documentary record of the Administration and to make it available to the public as soon as reasonably possible.

As previously discussed, documentary materials are defined as "all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plaques, maps, films and motion pictures". 44 U.S.C. 2201. It certainly can be argued that taken literally, certain gifts could be classified as documentary materials and therefore if received in the course of the President's official duties could be classified as Presidential records.

However, what about clearly personal gifts - such as a fishing rod given to the Vice President? Also, should not the intention of the donor be considered. Was it the donor's intent for the President to personally retain the gift? Was it Congress' intention to override basic common law and override the donor's intent?

It is the writer's contention that generally, such gifts are of little historic value and therefore were not intended to fall within the purview of the Presidential Records Act and as such do not constitute a Presidential record. This does not mean that there cannot be any exceptions to this proposed general rule and that certain domestic gifts may have such historical significance that they should be considered a Presidential record.

211
DISTINCTIONS BETWEEN PRESIDENTIAL RECORDS
AND PERSONAL RECORDS

In the writer's opinion the first test in determining whether a document constitutes a Presidential record is to ask whether same was received or created by a member of the President's immediate staff or individual of a unit within the EOP that is not considered an "agency" under the FOIA. Even if the individual falls within an agency as defined in the FOIA one still must ask whether his work is reasonably segregable with respect to that portion of his work which is related to the sole function of advising and assisting the President.

The next question is to determine whether the documentary materials received or created by this individual or government unit is specifically excluded from the Act. (It should be emphasized that a Presidential Record is not limited to only those documents created by the President's staff. It includes those documents received by any member of the staff, provided of course, it meets the criteria hereinafter discussed.)

The Act defines documentary materials as "all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plaques, maps, films and motion pictures". 44 U.S.C. 2201.

The Act specifically includes documentary materials relating to the political activities of the President if such activities relate to or have a direct effect upon his official duties.

The Act specifically excludes documentary materials relating to personal records, stocks of publications and stationery, extra copies of documents, or official records of an "agency" as defined in the Freedom of Information Act.

As indicated above, the definition of "documentary materials" is very inclusive. The House Government

Operations report acknowledges that:

the definition is an expansion upon the traditional notion of the form a government record may assume, but still relies heavily on the definition of the term "record" in 44 U.S.C., Section 301 and the practice that has evolved in the administration of chapter 29 of that title (Federal Records Act). To the extent that certain categories of documentary materials are not considered to be records under that chapter, the same categories of materials generated or received by the President and his aides would generally fall outside the ambit of what constitutes a record. (emphasis added). H.R. 95-1487, 95th Congress, 2nd Session 10 (1978).

The Federal Property Management Regulations has defined a term called "non-record" as "non-record material, such as extra copies of documents preserved by convenience of reference, stocks of processed documents, preliminary work sheets, and similar papers that need not be made a matter of record shall not be incorporated in the official files of the agency". FPMR 101-11.401 - 3(d).

The EOP Records Management Program manual describes types of non-record material as follows:

- (a) extra copies of record materials retained solely for convenience of reference;
- (b) information and reference copies of correspondence and other papers or which no action is necessary;
- (c) preliminary drafts of letters, memoranda, reports, studies, preliminary worksheets and informal notes that do not add significant data or substance to the preparation of an official record;
- (d) shorthand notes, including stenographic notebooks and stenotype tapes that have been transcribed
- (e) abstracts of correspondence, route slips and letters of transmittal that do not contain significant information;
- (f) stocks of publications and processed documents maintained for distribution purposes;
- (g) catalogues, trade journals and other publications or printed material received from other government agencies, commercial firms or private institutions that require no action or supplement the official record;
- (h) library and museum material made or re-

quired solely for reference or exhibition purposes.
EOP Records Manual, Chapter 2, pg. 7.

The writer submits that based on the House report certain materials, as described above, received or created by the President's staff of the EOP are not intended to be official "Presidential records" and therefore the permission of the archivist is not needed prior to their disposal.

The basic question is whether we want to take the position, which we clearly have the right to do, of defining what is an official record and advising the archivist of our determination or whether we want to work with the archivist in determining what types of documents constitute an official record.

Notwithstanding the above issue there are documentary materials that are specifically excluded from being defined official Presidential records under the Act. The basic categories that a staff person will have to deal with on a daily basis are as follows: (1) non-records: documents as discussed above and/or documentary materials that are considered "Presidential records" under the Act but have no historic value and approval of the archivist is received in advance of their disposal; (2) staff - personal documents: the employee's own personal documents unrelated to his official duties, i.e. personal diaries, personal insurance records, personal bills, etc.; (3) the President's personal documents: the President's insurance records, tax records, blind trust documents, (these documents are probably handled exclusively by the President's personal secretary and personal attorney); (4) "personal political" documents: political activities of the President that do not have a direct effect on the carrying out of his official duties. This specifically includes materials relating exclusively to the President's own election and materials directly

relating to the election of a particular individual or individuals to federal, state or local office.

The first category or non-record documents was discussed above. The second and third categories, Presidential personal and staff personal documents are pretty clearly understood. The fourth category, what the writer has called "personal political documents" present somewhat of a problem.

The Act specifically includes documentary materials relating to the political activities of the President that have a direct effect upon the carrying out of his official duties. It appears that Congress intended most documentary materials relating to his political activities to fall within the ambit of the Act.

The House report states:

... almost all of the President's political activities relate to or have a direct effect upon his official duties and as such records reflecting these activities would be included within the scope of what constitutes a Presidential record... while the need to protect the President's First Amendment right of Freedom of Political Association is clear, an examination of the nature of political activities in which a President becomes involved shows that few are truly private and unrelated to the performance of his duties. For example, political activities of a President might fall into the following categories: public activities as leader of his party; actions taken privately as head of his political party involving the exchange of advice and information affecting the fortunes of his party, particular candidates for office, or his legislative program; actions involving how own campaign and related fund-raising efforts seeking re-election as President; and actions involving the exercise as a private citizen, of his political preferences by voting or making campaign contributions. Records pertaining to activities in all but the last category would

appear generally to fall within the ambit of Presidential records without presenting a serious threat of infringement of the President's First Amendment Right of Freedom of Association. House Report 95-1487 at pg. 12.

It must be noted that subsequent to the publication of this report the bill was amended, adding 44 U.S.C. 2201 (3C) which specifically excluded from Presidential records "materials relating exclusively to the President's own election to the Office of the Presidency and materials relating to the election of a particular individual or individuals to federal, state or local office."

In introducing this amendment Congressman Brooks stated:

the definition of what constitutes a personal record has been modified to include those materials which relate solely to the President's own election or re-election. This change observes more closely the court's view in the Nixon case that some of the President's involvement in partisan politics may be protected by the First Amendment in that compelled disclosure through assertion of government interest in certain papers could infringe on those protected rights. The government's direct interest in campaign records is best served through enactment of special legislation dealing specifically with campaign and election practices. Congressional Record 10/5/78, pg. H. 11756-7.

Therefore, in the writer's opinion, few documents the layman calls "political documents" would be excluded from the Presidential Records Act. Political briefing memos, traditionally given to the President and Vice President prior or during his travels would fall within the ambit of the Act. It appears that only the most sensitive information relating to the President's re-election would be excluded such as overall strategy memos, memos detailing overall re-election efforts of others on the President's behalf, proposed campaign budgets, proposed long-term travel schedules, etc.

SPECIFIC ITEMS: ARE THEY OFFICIAL PRESIDENTIAL RECORDS?

Below is a list of specific items that the writer assumes will be the subject matter of questions by staff members.

(1) Diaries - "Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for or circulated or communicated in the course of transacting government business" is specifically cited as a personal document in the Act. 44 U.S.C. 2201 (3c).

(2) Datebooks - If used solely or in part for official business, then it should qualify as an official record.

(3) Stocks of publications and stationery - specifically exempted from the statute.

(4) Extra copies of documents - specifically exempted from the statute.

(5) Chronological files and subject matter files - They can be considered historically significant and therefore should probably qualify as official documents.

(6) Memo relating to political strategy to obtain passage of legislation - Since this relates to the President's official duties it should be classified as an official document.

(7) Final text of official or political speech - Both of these documents should be considered Presidential records.

(8) Drafts of speeches - Generally these documents should not be considered official records. There probably should be some exceptions to this general rule with regards to historically significant speeches (Inaugural Address - acceptance speech before Democratic Convention). It should be noted that the Task Force Report strongly dissents from this view. Ms. Marie Allen, author of the Task Force Report, feels that the use of a "historically significant" test cannot be properly implemented by a layman.

Secondly, Ms. Allen feels that the speech-writing function of the President's office plays a principal role in reflecting the development of the President's views and policies and, therefore, all drafts are historically significant and were intended to be classified as Presidential documents under the Act. (Notwithstanding this view, it is the writer's (which are forwarded by speechwriter to President and/or other staff members)

opinion that rough drafts of speeches constitute "non-record" items, and unless the President elected to do so, would therefore not be required to retain same.

(9) Xeroxes of official Presidential documents - These can be retained by staff personnel.

(10) "Political memoranda traditionally prepared for President and Vice President during travels - As a general rule, these documents should be considered official documents as, "except for the campaign season" they have nothing directly to do with the President's re-election campaign. It could be argued that if these memos were specifically constructed to contain political data only, excluded reference to any substantive issues or other topics, that same could be classified as personal documents. This argument would rest on the strongest grounds during a re-election campaign.

(11) Briefing cards prepared by advance person reflecting schedule and VIP's in attendance at each Presidential and Vice Presidential event - These documents should probably be considered official documents as they usually reflect the latest and therefore most accurate information on the President's schedule and whom was in attendance at a particular event.

(12) Documents received from the DNC - It would appear that most documents received from the DNC would be classified as personal documents. Certainly all documents received containing poll or election data in reference to the President's re-election or the election of other federal, state or local candidates would not be classified as official documents.

IMPLEMENTATION OF ACT - ESTABLISHMENT OF RECORDS

MANAGEMENT CONTROLS

It should be noted that the Act mandates that the President implement records management controls to assure that his activities are adequately documented and maintained. 44 U.S.C. 2203.

It further mandates that "to the extent practicable" documentary materials are categorized as Presidential records or personal records upon their creation or receipt and be filed separately. This essentially means that it is up to the staff to determine what is a personal document and what is an official document.

IMPLEMENTATION OF ACT - DISPOSAL OF DOCUMENTS

The Act requires that the approval of the archivist must be obtained prior to the destruction of any documentary material defined as Presidential records.

As indicated above, the term "Presidential record" is very broadly described. However, as heretofore discussed, there is legislative history which supports the argument that the Act was written with the intent that it be administered in a similar manner to the Federal Records Act; therefore, certain documents are intended to be "non-records" and therefore not requiring the approval of the archivist prior to its destruction.

The opposing argument to this approach is that to avoid a dispute with the archivist and to avoid the destruction of a documentary material that may later be the subject matter of litigation and defined as a "Presidential record", a list of all documentary materials that are intended to be disposed of should be submitted to the archivist for approval.

In any event, it should be noted that the House report specifically states that "it is anticipated that the actual examination (by the archivist) will only involve a sampling of those records about which there is a question. There is no requirement nor is there an expectation that the archivist will find it necessary to review each and every document proposed for disposal." House Report pg. 13.

RESTRICTIONS ON ACCESS TO PRESIDENTIAL RECORDS

The Act allows the President to restrict the public's access to certain categories of documents specified in

the Act for a period not to exceed 12 years. The basic issue raised by the Task Force Report is whether it is necessary for the President to specify the specific restrictive language at the commencement of his second term, or whether he need only claim the right to restrict all categories of documents as defined in the statute for the full 12-year period and subsequently define and liberalize his restrictions.

The writer feels that the President clearly has the right to initially claim the general right to restrict these documents and can later liberalize his restrictions at any time. A proposed statement to the archivist to the effect is attached as Appendix B.

FILE BREAK ISSUE

This issue basically concerns the question of whether it is necessary to implement a file break, or separation of first term and second term documents.

The reasons behind such a move would be to separate first term documents which are the President's personal property and the second term Presidential records which are the property of the U.S. Government. The writer agrees with the Task Force Report that failure to initiate a file break could jeopardize the President's ability to subsequently separate and take possession of the first term documents as there would then be a co-mingling of personal documents (the first term documents) and the official Presidential records of the second term.

From a practical perspective, in order to obtain a separation, this project would have to be implemented at the outset of the second term.

The issue basically is whether the President desires to implement a file break in order that he may retain the possession and not jeopardize his personal property rights in his first term documents.

The argument that a failure to separate first term and second term documents jeopardizes the President's subsequent to claim title to first term documents, has its basis in 44 U.S.C. 2203 (b) of the Presidential Records Act. This section reads as follows:

Documentary materials produced or received by the President, his staff or units or individuals in the Executive Office of the President, the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

Effective January 20, 1981, all first term documents become "personal" documents and therefore, must be filed separately from official Presidential documents. While the Act does not specify any sanctions for violating this provision of the Act, it would appear that failure to make such a separation is a direct violation of the Act, and as heretofore stated, could jeopardize the President's right to subsequently claim title to his first term documents.

The practical ramifications of the issue really rest with the President's and Vice President's interest in retaining their property rights to the first term documents. If they have no interest in same, then the issue is moot.

March 23, 1977

MEMORANDUM FOR: ELIZABETH KAMINSKI
Council of Economic Advisers

FROM: Cecelia E. Wirtz/s/

SUBJECT: Status of the Council of Economic Advisers
as an Agency for Purposes of the Freedom
of Information Act.

You have requested our assistance in responding to an appeal of the denial, in part, of a request for information made to the Council of Economic Advisers (CEA) pursuant to the Freedom of Information Act (FOIA) (5 U.S.C. 552). We have reviewed your functions as an entity in the Executive Office of the President (EOP), and it is our opinion that CEA is not an "agency" subject to the requirements of FOIA.

For purposes of FOIA, the term "agency" is defined as "each authority of the Government", and 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)" (Section 552(e)) (Emphasis added).

Section 552(e) was part of the 1974 amendments of FOIA. Its purpose was to clarify, and expand, the definition of the term "agency". In the Conference Report on the 1974 amendments, the expanded definition was explained as follows:

"... with reference to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Seucie v. David (443 F. 2d 1067 (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. (Emphasis added) (Conf. Rept. No. 93-1200, 12 U.S.C. Code Cong. and Admin. News at p. 6221)*.

At the the time of the Soucie case, the determining factor in deciding whether an entity was an agency, as defined by the Administrative Procedures Act (5 U.S.C. 551), was whether it had the authority to make decisions. In Soucie the Court held that the Office of Science and Technology (OST) (which had been established in the EOP by a reorganization plan) had an independent function of evaluating Federal scientific programs, and was, therefore, an agency for purposes of FOIA. OST was an agency because it had the authority to make decisions regarding this evaluation function. In addition, OST had published notice in the Federal Register describing information available under FOIA, and the procedures to be followed to obtain such material. The court viewed this interpretation by OST of its charter as lending support to the conclusion that it was a separate administrative entity (448 F. 2d at 1075).

The Soucie court did not, however, review the question of an entity whose sole function is to advise and assist the President. This issue was the focus of the 1974 amendment.**

* It should be noted that the Conference Report omitted language which had appeared in the House Report which had defined EOP to mean "such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, and the Federal Property Council and other similar establishments which have been or may in the future be created by Congress". House Rept. No. 93-876 at p. 8, 93d Cong, 2d Sess.

** It is clear that not all offices within the EOP are subject to FOIA. In Nixon v. Sampson, 389 F. Supp. 107 (D.C.D.C. 1975); stay granted, 513 F. 2d 430 (D.C. 1976) the Court held that, the term "agency" as defined in Section 553(e) did not include the White House Office. Although the Court stated in dicta that records of congressionally-created executive agencies which assist the President in the formulation of policy and programs may be accessible, that issue has not been raised directly.

And its resolution, as illustrated by the legislative history, places an office such as CEA, which strictly performs in an advisory capacity to the President, beyond the application of the Act.*

This does not, however, resolve the problem of responding to the FOIA appeal. A policy decision must still be made, independent of FOIA, whether the information will be disclosed. If that decision is to withhold the material in question, the letter attached could serve as an appropriate response.

*For example, 15 U.S.C. 1923(c)(3) provides that CEA is required to appraise various programs and activities of the Federal government and to make recommendations to the President.

Attachment

cc: Official File - GC Records
General Counsel
OGC Chron
Ms. Wirtz
DO:OGC:CEWirtz:mjr:3/23/77

PRESIDENTIAL ADVISORY COMMITTEES **

Advisory Board on Child Abuse and Neglect (HEW) (N)
Advisory Committee on Federal Pay (ACFP)
Board of Visitors, U.S. Air Force Academy (DOD)
Board of Visitors, U.S. Military Academy (DOD)
Board of Visitors, U.S. Naval Academy (DOD)

Commission of Fine Arts (CFA)
Commission on the Review of the Federal Impact Aid Program (HEW) (N)
Committee for the Preservation of the White House (DOI)
Committee on the Selection of Federal Judicial Officers (DOJ)
Federal Council on the Aging (HEW)

General Advisory Committee on Arms Control and Disarmament (USACDA)
Judicial Nominating Commission for the District of Puerto Rico (DOJ) (N)
Minimum Wage Study Commission (DOL)
National Advisory Committee for Juvenile Justice and Delinquency
Prevention (DOJ)
National Advisory Committee on Oceans and Atmosphere (DOC)

National Advisory Council on Adult Education (HEW)
National Advisory Council on Child Nutrition (USDA)
National Advisory Council on Economic Opportunity (CSA)
National Advisory Council on the Education of Disadvantaged Children (HEW)
National Advisory Council on Extension and Continuing Education (HEW)

National Advisory Council on Maternal, Infant and Fetal Nutrition (USDA) (N)
National Advisory Council on Vocational Education (HEW)
National Advisory Council on Women's Educational Programs (HEW)
National Alcohol Fuels Commission (NAFC) (N)
National Commission for Employment Policy (DOL) (N)

National Commission for Manpower Policy (DOL) (T)
National Commission for the Review of Antitrust Laws and Procedures (DOJ) (T)
National Commission on Employment and Unemployment Statistics (DOL)
National Commission on the International Year of the Child, 1979 (NCIYC)
National Commission on Neighborhoods (NCN) (T)

National Commission on Social Security (NCSS) (N)
National Commission on Unemployment Compensation (DOL)

(N) New this calendar year (includes first reporting of committees existing prior to this calendar year, and committees reestablished within this calendar year).

(T) Terminated during this calendar year (includes merged, abolished, or expired).

** Reprinted from Eighth Annual Report of the President to the Congress on the status of Federal Advisory Committees pursuant to Federal Advisory Committee Act. Report dated March 19, 1980

National Transportation Policy Study Commission (NTPSC) (T)
Peace Corps Advisory Council (PC) (N)
President's Advisory Committee for Women (Formerly National Advisory
Committee for Women) (DOL)

President's Cancer Panel (HEW)
President's Commission for a National Agenda for the Eighties (OMB) (N)
President's (Special) Commission for the Study of Ethical Problems in Medicine
and Biomedical and Behavioral Research (PCEMR) (N)
President's Commission on the Accident at Three Mile Island (PCATMI) (N) (T)
President's Commission on the Coal Industry (PCCI)

President's Commission on Foreign Language and International Studies (HEW) (T)
President's Commission on the Holocaust (DOI) (T)
President's Commission on Pension Policy (PCPP)
President's Commission on White House Fellowships (OPM)
President's Committee on Mental Retardation (HEW)

President's Committee on the National Medal of Science (NSF)
President's Council on Physical Fitness and Sports (HEW)
President's Export Council (DOC)
 Subcommittee on Export Administration
President's Management Improvement Council (OPM) (N)

Presidential Advisory Board on Ambassadorial Appointments (DOS)
Presidential Commission on World Hunger (PCWH)
Select Commission on Immigration and Refugee Policy (SCIRP) (N)
Small Business Conference Commission (SBA)
United States Advisory Commission on Public Diplomacy (Formerly United
States Advisory Commission on International Communication, Cultural
and Educational Affairs) (ICA)

United States Circuit Judge Nominating Commission (DOJ)
United States Court of Military Appeals Nominating Commission (DOD) (N)
United States Tax Court Nominating Commission (TRES)

APPENDIX B

PROPOSED LETTER TO ARCHIVIST

Dear :

Pursuant to 44 U.S.C. 2204 of the Presidential Records Act of 1978, you are hereby notified that I elect to restrict access to all Presidential records in all categories 1-6 of 44 U.S.C. 2204(1) for a period of 12 years.

You are further advised that I reserve my right to remove or shorten said restrictions at a later date.

Very truly yours,

President Jimmy Carter



OFFICE OF THE VICE PRESIDENT
WASHINGTON

July 18, 1980

MEMORANDUM FOR MICHAEL BERMAN

FROM: JIM TERMAN

RE: RESPONSE TO MARIE ALLEN'S COMMENTS ON
LEGAL ANALYSIS OF REPORT OF WORKING GROUP,
PRESIDENTIAL PAPERS TASK FORCE

Attached is Marie Allen's comments to the legal analysis of the working group report. I've incorporated certain suggestions into my revised memo. Other points raised by Marie Allen I have not incorporated into the memo but have discussed below for your edification.

Although Marie did not specifically request that I present her comments to you, I feel that, at a minimum, her point of view merits your attention notwithstanding the fact that I may disagree with some of her views.

The points discussed below correspond to the numerical items raised in Marie's memorandum:

(1) I have concurred with Marie's suggestion and added the Situation Room and Director of the Office of Administration to the list of decision items.

(2) I have followed Marie's suggestion and have contacted the DPS Associate Director for Drug Abuse Policy and the CEA. I have incorporated their response to my inquiries into the body of the revised memo. Basically, I have revised my opinion with respect to the CEA and stated in the memo that same should fall within the ambit of the Presidential Records Act. However, I still feel there is a strong argument to exclude the DPS Associate Director for Drug Abuse Policy and his subordinates from the Act. This is discussed in detail in the body of the memorandum.

Marie also raises the question of whether the House report on the Presidential Records Act, which states that

"that which is now subject to the FOIA would remain so and that which is not now subject to the FOIA would be subject to the Presidential Records Act" conflicts with my proposition that the DPS Office of Drug Abuse Policy should now fall under the FOIA.

My proposition is based on the fact that presently the Office of Drug Abuse Policy of DPS is improperly excluded from the FOIA. While the above captioned quotation represents the general intent of Congress, it certainly is not Congress' intent not to correct an impropriety in the implementation of the FOIA.

(3) Marie is correct in her statement that the Presidential Records Act does not apply to Cabinet officials. However, I believe we do have a strong legal basis in allowing the division of files within specific units of the EOP.

Presidential records are defined as "documentary materials or any reasonably segregable portion thereof created or received by the President, his immediate staff or a unit or individual of the Executive Office of the President whose function is to advise and assist the President..."

Based on the above I believe it is clear that any individual within the EOP who has a function of advising and assisting the President may segregate those documents relating solely to their function as advising and assisting the President from other files within that government unit.

(4) Marie raises the same issue here as she did in point number 2 above. From a legal perspective, I believe that our initial answer is the correct one. From a practical perspective of what administrative and policy ramifications the application of the FOIA to the Drug Abuse division of DPS would have, probably merits further examination.

(5) I have reexamined the question of the applicability of the Act to those documents created or received by the Vice President in his capacity as President of the Senate. I have found that these documents should not be considered Vice Presidential documents. The reasons are stated in the revised memo.

(6) If, in fact, it is decided that only those gifts which are historically significant would fall under the Act, I believe that guidelines could be drawn up to that effect.

(7) This issue probably represents Marie's strongest dissent with my memorandum. She has real problems in considering rough drafts of speeches to be non-record items as opposed to Presidential records. The first point raised is a difficulty in establishing a test of considering only those drafts of "historically significant" speeches to fall under the ambit of the Act. Secondly, she feels that speech-writing is a major function of both the President's and Vice President's Office and essentially reflects the thinking of the President and his policies. As such, they should be considered Presidential documents.

I still believe that, from a legal perspective, generally speaking, rough drafts of speeches are "preliminary working documents" and as such, should be considered non-record items. If the President and or Vice President elect to consider these documents as official records, it is my position that that is their privilege, but not their obligation.

(8) Marie raises a practical question of how one is going to determine whether or not their xerox is, in fact, an extra copy of official or record or whether this xerox is, in fact, the only copy of the record. This is a legitimate practical question. Nevertheless, I believe it is clear that extra copies of documents do not constitute official Presidential records under the law.

(9) Marie raises the question of whether staff have the right to xerox official Presidential documents. She does raise a good point. Theoretically speaking, the official documents are U.S. property, and not the property of the staff. Certainly the President or his agent has the authority to prevent the copying of government property. In some situations this procedure may be necessary. However, as a general rule it would obviously be foolish to attempt to implement same.

(10) Marie raises the issue of whether her disposal categories in the Task Force Report are sufficient. I believe it is premature to examine the disposal schedule until decisions are made with respect to the points raised in the memorandum.

(11) I have attempted to examine the file break issue in further detail and clarify my position in the body of the memorandum.

(12) As you and I discussed, I will hold off on preparation of a definition statement until we get a sign-off on our memo.

COMMENTS ON JIM TERMAN'S LEGAL ANALYSIS OF REPORT OF WORKING GROUP,
PRESIDENTIAL PAPERS TASK FORCE

(1) List of Decision Items, pages 1 & 2

Add Situation Room records (a large quantity of important materials) to NSC list. Add Director's files as Adviser to President to OA decision items.

(2) Jim suggests, in the Decision Items and in the body of the report, expanding the applicability of the Freedom of Information Act (FOIA) to two units within the EOP to which it does not now apply: the DPS office of Drug Abuse Policy and the CEA. Because of the large administrative and policy consequences of this decision, wouldn't it be advisable to include DPS and CEA officials in the decision process?

How does such a change in determination of FOIA status relate to the House Report concerning the Act (Presidential Records Act) quoted by Jim on page 5 of his report: ". . . that which is now subject to the FOIA would remain so and that which is not now subject to FOIA would be subject to the Presidential Records Act"?

(3) In the first several pages of the report, Jim discusses the authorities for determining whether units within the EOP are agencies or not, and therefore subject or not subject to the FOIA. Do we have a strong legal basis for separating specific files of the unit? This has never been done, as far as I know, for Cabinet officials: their files as advisers to the President are not separated from their departmental files. Are we on strong legal ground doing such a division as long as we stay within the EOP? This issue also bears directly on the DPS office of Drug Abuse Policy, OSTP, OA, COWPS, etc.

(4) On pages 11-12, Jim discusses whether or not the CEA should be considered an agency. His decision to choose agency is based on references in House reports at the time of the amending of the FOIA statute and to 1971 references in the Soucie v. David case. This is certainly a reasonable position. Would it be in the President's or CEA's interest to consider an alternative argument based on a comparison of CEA's functions with those of OMB and OSTP? I have heard the argument made that CEA's functions are more clearly advisory than these other units. The current policy of the National Archives is to consider CEA an agency.

(5) On page 18, Jim discusses the VP office briefly, but he does not mention the Senatorial documents held by the VP that are separately mentioned in the list of decision items. How strong a legal basis do we have for considering the ledgers, nomination papers and other Senatorial types of papers held by the VP as being Vice Presidential? I have been informed by Senate staffers that they consider these materials to be Senatorial and that they believe no other Vice President has considered the materials to be Vice Presidential. I have no personal opinion in this matter, I just wonder what the legal bases are for a decision one way or the other.

- (6) On page 20, Jim discusses the domestic gift issue. It would be very useful to the Gift Unit if the arguments discussed on page 20 could be translated into specific guidelines. How would Gift Unit personnel separate "personal" gifts from "documentary materials relating to the Presidency"?
- (7) Jim raises first with regard to the domestic gift issue, and then on page 26 with regard to drafts of speeches, the issue of whether an item or paper is "historically significant." I am very troubled by the application of this test. For one thing, the Presidential Records Act does not apply this test at any point--the direction of the Act is toward preserving the most complete documentary record that is practicable, not just those aspects of the documentary record that seem to a layman to be historically important. So, on the one hand, I don't think this is an appropriate kind of test. Secondly, the determination of what is "historically important" is an extremely difficult, if not impossible, determination to make. Lincoln's Gettysburg Address was considered, at the time it was given, to be of very little significance; only in retrospect, did it become an important and historic address. Historians of the future will define what is historically important by what they are interested in studying. Historians may be much more interested in speeches on a particular subject important to the Carter Administration than they will be in speeches on more ceremonial or "historic" types of occasions, such as the State of the Union address or the Inaugural address.

Historians and students in the future will come to the speech files of the Carter Library and the Mondale Archives primarily looking for major drafts of Carter and Mondale speeches: the final texts of the speeches are usually available in published form. The major drafts of these speeches (usually those circulated for review) are important documentary evidence of the way in which the speechwriting function was carried out, and will be of increasing value in the archival depositories as the years go by. Any destruction of major speech drafts would be a great loss to both the Carter and Mondale Archives.

- (8) I am also troubled by the possible misunderstanding of the nonrecord category--"extra copies of documents." Who makes the determination when a copy is an extra copy? If one office received a Xerox copy of a memorandum for study, does that office assume that since the document in question is a Xerox, it is therefore nonrecord? In fact, this Xerox copy may be the only copy in the office or it may be the only copy with special marginal notations from staffers. This should, I think, be qualified to read "extra copies of identical documents within the same file folder," with the provision that, when in doubt, documents should be routed to Central Files for a determination concerning their record status.

- (9) On page 26, Jim states that Xeroxes of official Presidential documents can be retained by staff personnel. In the past, the President and Vice President have frequently established guidelines concerning what types of material could be copied by staffers. The Presidential Records Act still gives the President/Vice President responsibility for administering their official papers during their tenure in office. Would the President and Vice President wish to give up their right to establish guidelines for Xeroxing by staff members in favor of a blanket approval policy?
- (10) In Jim's discussion of disposal, he does not specifically refer to the disposal categories in the proposed disposal schedule. Are these appropriate? Sufficient? It was never intended that archivists would examine each document destroyed: that is the purpose for a disposal schedule that lists recurring categories of documents for disposal with a one-time approval by the Archivist.
- (11) On page 29, Jim brings up the file break issue raised in the Task Force Report. It is not clear to me whether he recommends for or against the break. Is it important enough from a legal point of view to merit the trouble?
- (12) One of the documents called for by the Act is a definitions statement, which was prepared in draft form by the Working Group of the Task Force. I don't see any specific comment by Jim concerning the legal acceptability of this draft document. Should the draft definition be expanded to also include a list of nonrecord items, as mentioned by Jim on page 22 of his report?



MARIE B. ALLEN
Director
Presidential Papers Staff
National Archives and Records Service

Maximum restriction periods for various types of restrictions applicable to Presidential records created on or after January 20, 1981

<u>Category</u>	<u>Time Period</u>		<u>Remarks</u>
	1985-1997	Post 1997	
(1) Security classified	[REDACTED]	[REDACTED]	Pres/VP & FOIA restriction, & Procedures of EC 12065 apply
(2) Relating to appointments to Federal office	[REDACTED]		Pres/VP mandatory restriction
(3) Specifically exempted from disclosure by statute	[REDACTED]	[REDACTED]	Pres/VP & FOIA rest. category. Also pertinent statutes would contain rest. criteria and perhaps recommended time periods
(4) Trade secrets & commercial of financial information that is privileged or confidential	[REDACTED]	[REDACTED]	Pres/VP & FOIA rest. category
(5) Confidential advice given to President or between advisers	[REDACTED]		Pres/VP rest. category only
(6) Personnel and medical files, when disclosure would be unwarranted invasion of personal privacy	[REDACTED]	[REDACTED]	Pres/VP & FOIA rest. category
(7) Investigatory records	[REDACTED]	[REDACTED]	FOIA rest. category

Marie B. Allen

Category

Presidential/VP Restriction Category

FOIA Restriction Category

Other

Security Class.
Documents (Top Secret,
Secret, Confidential)

Act* Section 2204(a)(1)
"(1)(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) in fact properly classified
pursuant to such Executive Order"

Pres/VP may impose mandatory
restriction for up to 12 yrs

Title 5 U.S.C. 552
Exemption category (b)(1):
"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"

Most recent pertinent
E. O. is #12065, which
calls for automatic
declass. of most
documents in 5 yrs; all
doc. to be reviewed
for declass. in 20 yrs;
requesters may demand
review of any doc.
at least 10 yrs old

Relating to appoint-
ments to Federal office

Act § 2204 (a)(2)
"relating to appointments to Federal
office"

Pres/VP may impose mandatory
restriction for up to 12 yrs.

No comparable FOIA exemption

Specifically exempted
from disclosure by
statute

Act § 2204 (a)(3)
"specifically exempted from disclosure
by statute (other than sections 552
and 552b of title 5, United States Code),
provided that such statute (A) requires
that the material be withheld from the
public in such a manner as to leave no
discretion on the issue, or (B) establishes
particular criteria for withholding or
refers to particular types of material to
be withheld;"

Pres/VP may impose mandatory restric-
tion for up to 12 years

Title 5 U.S.C. Section 552
Exemption (b)(3):
"Specifically exempted from dis-
closure by statute (other than
section 552b of this title), provided
that such statute (A) requires that
the matters be withheld from the public
in such a manner as to leave no
discretion on the issue, or (B)
establishes particular criteria for
withholding or refers to particular
types of matters to be withheld;"

Privacy Act does not apply

There is no complete list
of all possibly pertinent
statutes here. The House
Subcomm. on Govt. Infc.
& Indiv. Rights is
compiling such a list.

Some examples:
Census info 5 USC 9
Statistical & Comm
15 USC 176
Tax returns 26 U
& 7213
Patents 35 USC

Trade secrets &
commercial & financial
information that is privileged
and confidential

Act § 2204 (a)(4):
"trade secrets and commercial or
financial information obtained
from a person and privileged or
confidential;"

Pres/VP may impose mandatory
restriction for up to 12 yrs

Title 5 U.S.C. 552
Exemption (b)(4);
"trade secrets and commercial or
financial information obtained
from a person and privileged or
confidential;"

There are two specific
statutes which also
include: statistical
commercial information
restricted in 18 U.S.C.
176; trade secrets
restricted in 18 U.S.C.
1905. No time period
specified.

Confidential advice
President or between
President and advisers

Act § 2204 (a)(5):
"confidential communications requesting
or submitting advice, between the
President and his advisers, or between
such advisers;"

Pres/VP may impose mandatory
restriction for up to 12 yrs

No comparable FOIA exemption

Exemption 5 U.S.C. 552 (b)(5),
which might have covered similar
documents, was specifically
excluded by Act

Personnel and medical
files

Act § 2204 (a)(6):
"personnel and medical files and similar
files the disclosure of which would
constitute a clearly unwarranted
invasion of personal privacy."

Pres/VP may impose mandatory
restriction for up to 12 yrs

Title 5 U.S.C. 552
Exemption (b)(6);
"personnel and medical files and
similar files the disclosure of
which would constitute a clearly
unwarranted invasion of personal
privacy;"

It is my understanding
that the Privacy Act
does not apply to
Presidential records

Investigatory records

No Pres/VP mandatory restriction

Title 5 U.S.C. 552, exemption (b)(7)
"investigatory records compiled for
law enforcement purposes, but only to
the extent that the production of such
records would (A) interfere with
enforcement proceedings (B) deprive
a person of a right to a fair trial or
an impartial adjudication (C) consti-
tute an unwarranted invasion of personal
privacy "

A file break is ~~practically~~ impractical if not impossible here in Central Files as well as in the staff offices.

- 1) In our file rooms, the space is already limited. To divide it into two sections would be ~~extremely difficult~~ not be impossible, but nevertheless extremely difficult.
- 2) It would require upwards of 100,000 additional folders for our files alone to say nothing of the staff offices' requirements.
- 3) The staff's needs for documents and correspondence from the first term and the inevitable subsequent commingling of those with the second term simply could not be prevented. Nor in many cases should it be. Much of the first term material is absolutely essential to ongoing projects in second term. It should be commingled.

It seems to me that the President's interest in pursuing the goals of his Administration should take precedence over his personal legal interest in his first term papers. I would recommend that he bite the bullet, risk forfeiture of his rights to the first term papers, not worry about this relatively minor loss, and get on with the bigger battle of achieving his Administration's goals without putting such unnecessary "file break" roadblocks in his staff's path