RLS – extra (unsolicited)

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Walter W. Barnett
FOI Control Officer
Civil Rights Division

DATE:

FROM : Leon Ulman
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Office of Legal Counsel

SUBJECT: Removal of Papers by Departing Employees and Related Problems.

This is in response to your memorandum on the same subject dated December 17, 1975. We have ascertained, after consulting with the Office of Management and Finance, that there are no current Departmental policies or guidelines concerning the removal of papers by departing employees of the Department. 1/

At the outset it should be noted that problems are likely to be encountered concerning the removal of four types of records. Classified documents and information are separately

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1/ "Removal of papers" implies a permanent removal, rather than simply taking work home overnight. Such removal may of course involve a variety of consequences, ranging from unauthorized disclosure of confidential information contained in the papers through loss to the agency of important records. Policies favoring employee access and removal rights may also have some effect on enhanced public understanding or support of an agency's mission. The significance of removal will frequently turn on particular facts or on the anticipated consequences of release (through removal) of particular types of information. While removal need not invariably lead to the consequences anticipated, their risk must nonetheless be considered in the development of agency policy.

controlled by statute, executive order, and regulation. Their removal in any form is generally prohibited without proper authorization. See E.O. 11652 and 28 C.F.R. part 17. Second, documents which qualify as official public records (generally the retained original or file copies 2/ of documents) are public property which may not be removed at all. For these reasons any Division policy regarding removal of papers should include safeguards to protect classified information and also public records in the sense noted above. Third, some recorded information may also be inappropriate for removal by reason of the effects of 18 U.S.C. §1905, forbidding unauthorized disclosure of presumably confidential information held by a department or agency which relates to the business and financial affairs of identifiable business firms. Fourth, the Privacy Act of 1974 might also create problems if a departing employee were to retain and remove records subject to that Act which pertain to another individual without the latter's consent, in circumstances where that Act might require such consent.

A policy of usually permitting the removal by departing employees of carbon or xerographic non-file copies of most unclassified documents not involving the privacy of others or business information within the ambit of 18 U.S.C. §1905 would perhaps be useful and desirable, at least in many offices or components. This is particularly the case as to copies of documents as to which the departing employee was the author or

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2/ 18 U.S.C. §2071 makes it unlawful to conceal, remove, or mutilate public records. The phrase "file copy" means the copies which are filed in a central and/or other officially prescribed file for the continuing or permanent use and reference of an office or agency. It does not refer to copies made for convenience purposes by those individuals who deal with a particular document.

a contributor. However, the delicate nature of ongoing studies, investigations, negotiations, and court actions undertaken or contemplated by the various subdivisions of the Department of Justice must counsel discretion in any such policy, leading to some exceptions. The Department serves as the principal legal representative of the federal government, and many of its unpublished documents are prepared for law enforcement purposes or in the rendition of legal services. Removal of documents likely to lead to a premature release or disclosure that would prejudice the interests of the government or infringe on the attorney-client relationship ought not be allowed.

As you indicated, the Freedom of Information Act certainly defines the extent to which a departing employee might ultimately enforce access to copies of agency records in his or her possession. However, the general absence of any uniform screening procedure for such persons contrasts rather sharply with the carefully measured consideration usually given to formal FOIA requests. Moreover, the FOIA standards are frequently complex and it is often uncertain whether a particular document falls within one or more FOI exemptions. The numerous uncertainties of interpretation and application which exists under several FOI exemptions may militate against blanket adoption of FOIA as the sole standard for permissible removal. For example, the former departmental policy of allowing removal of all unclassified legal research memoranda (even ones which could and would be withheld under Exemption 5 of the FOIA) would be replaced by a standard less liberal to the departing employee should the FOIA be adopted as the sole standard in such instances.

We also note that FOIA procedures require decisions by responsible Departmental personnel as to the release of records, whereas the informal removal of documents by departing employees would as a rule include no such expert judgment as to whether the papers qualified for removal. We do, of course, agree that it

would usually make no sense to deny a departing employee permission to remove a copy of a record to which he would clearly be entitled under FOIA, if permission has been expressly sought.

The last official Department of Justice memorandum on this subject seems to have been rescinded over four years ago, according to OMF. I am enclosing a copy of it for your convenience. No replacement has yet been issued although the question is currently receiving consideration from that office. I am also attaching a detailed staff memorandum prepared in connection with your inquiry. In addition, I am enclosing several memoranda on this and related issues prepared by various members of the OLC staff over a period of years. Finally, I am forwarding copies of this memorandum and the accompanying staff memorandum to the Office of Management and Finance for their consideration in developing any future statements of Departmental policy which may be issued. 3/

3/ Such a directive might, for example, forbid removal of classified material, material containing confidential business of financial information, official public documents, and material containing personal information on other individuals of the sort protected by the Privacy Act. The directive might also require that departing employees proposing to take with them papers acquired during their employment must notify their superiors of that intention, and make such papers available for examination prior to any physical removal.

MEMORANDUM

Re: Removal of Papers by Departing Employees.

The question has been raised whether departing employees of the Department of Justice may take with them copies of papers, documents, and records they have acquired during their employment. This memorandum examines that question and concludes that -- in the absence of any current and comprehensive Departmental guidance or regulation -- the various subdivisions of the Department may within certain limits establish policies which best suit their individual circumstances.* Some of the more significant statutory and non-statutory considerations affecting such policies are discussed herein.

Outline of Discussion

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* Three subdivisions or agencies apparently have such policies now in effect: the FBI, the LEAA, and the Immigration and Naturalization Service. None of the three appears to be inconsistent with the discussion found in the body of this memorandum, because the memorandum does not specifically prescribe or define policies, but rather discusses the legal and other factors which should be considered in formulating policy on this subject.

III. Distinguishing Private and Official Documents.

IV. Summary of Recommendations.

Discussion

I.

The Federal Interests.

a. Interests Favoring Limitations on Removal.

The federal interests at stake in the retention of adequate operating and reference files are not insubstantial. The efficiency, continuity, and consistency of many governmental activities depend increasingly on the existence and availability of complete information concerning previous actions. No federal agency can afford to so divest itself of basic information and records of its past decisions, actions, or advice that future decisions or actions are divorced from its experience or precedents. Not only may the records removed by an employee themselves be federal property, and so subject to divestment only by means authorized by the Congress, but their absence may impose insuperable handicaps to the efficient functioning of that employee's successors in office.

These broad considerations of government-wide scope apply equally to the Department of Justice. But there are other factors unique to the special role of this Department as the legal arm of the federal government which must also be taken into account. The Justice Department is, in effect, the lawyer for the United States of America. Much of the information it receives, the documents it prepares, the actions it takes, are in response to

requests for legal advice or services on behalf of other operating agencies of the government. An attorney-employee who leaves the Department is of course subject to the duty imposed by Canon 4 of the Code of Professional Responsibility to preserve his client's confidences and secrets. But most of the Department's employees, whether professional or non-professional, are employed essentially in aid of the provision of legal services to and by the federal government. All must respect the privileged nature of the information with which they deal, and their attorney supervisors who establish Departmental and subdivisional policies must protect the confidentiality of that privileged information wherever necessary.

Other major tasks of the Department of Justice are law enforcement and civil litigation, undertakings which produce a significant amount of sensitive and possibly damaging information concerning individuals and organizations who may violate the law or become involved in litigation with the United States. Unwarranted release of investigatory information, including some which may be preliminary or unverified, may work unjustified hardships on its subjects. Moreover, similarly unauthorized release of investigatory information or information relating to the legal tactics, strategy, and advice of government lawyers can seriously prejudice the conduct of criminal investigations, the outcome of pending cases, or the welfare of persons furnishing the information. Even those recent statutes which place greatest emphasis on public availability of information recognize the need to avoid some releases of data which may impede the enforcement of Acts of Congress or the proper representation in adversary proceedings of the legitimate interests of the United States. That need is substantially increased when the federal agency in question is the one charged with enforcement and trial of most of the nation's criminal and civil laws and regulations.

present and former government employees) to be informed as to the conduct of public affairs should be limited only in carefully defined and obviously needful cases. This rationale is a basic policy of the United States and should be a central feature of any federal policies or practices in this area.

A third consideration is drawn from simple realities. Extra copies of public papers and documents are a fact of life in most agencies. They are retained for convenience of access and ease of reference by both individual employees and organizational units, and serve a valuable function in reducing the time and expense of demands for services involving access to official, "record-copy", files and information systems. Another and probably related fact is that many government employees, when leaving employment, commonly take with them copies of such files and papers as they wish and consider proper. This is especially likely to be true in agencies where there is no effective agency policy prescribing the terms for such removals or requiring examination of documents proposed for removal. Thus, in view of the prevalence of extra copies and of the practice of allowing employees to remove such copies with considerable freedom, any policy affecting removal must consider both the necessity and enforceability of any restrictions to be imposed on these practices.

II.

Constitutional, Statutory, and Regulatory Limitations

a. Federal Property and Federal Papers

Only the Congress has ultimate power to prescribe the treatment and disposition of federal property.

Thus, the sensitive and important nature of the several kinds of legal duties performed by Departmental employees, as noted above, requires special care to be exercised when dealing with information the release of which might impair the conduct of the Department's professional responsibilities.

b. Interests Favoring Employee Access to Papers Upon Departure.

Nevertheless, there are convincing reasons to support a Departmental or subdivision policy allowing removal by departing employees of many papers, and a legitimate concern for the confidentiality of law enforcement and litigation materials ought not obscure the liklihood that such policies can be developed with no harm to the federal or public interests involved. The most obvious reason for such a policy is its relationship to employee morale, efficiency, and fairness. There should be little surprise that public employees, particularly those most interested in their work, wish to retain copies of their work products accumulated over years or decades of public service: such copies may well represent an employee's life work, his or her chief professional achievement and principal source of pride. As well, they may serve as invaluable educational, historical, and reference materials during later service with other organizations. When the employee is in high public office, the historical rationale may become particularly significant, but even less exalted public servants often have understandable wishes to retain copies of papers reflecting their periods of service.

A second principal reason favoring substantial employee access to public documents may be found in the policies which underlie the Freedom of Information and Privacy Acts. In a representative democracy the right of the people (including

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.
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> Constitution, Art. IV, §3, cl 2.

The Congressional authority includes all real and personal property of the United States, Ashwander v. T.V.A., 297 U.S. 289, 294, and is exclusive of other powers of disposition or control, United States v. California, 332 U.S. 19, 27; Alabama v. Texas, 347 U.S. 272, 273, 274. However, as the Congress cannot pass on the care and disposition of each element of the property of the United States, it has established broad statutory procedures to accomplish the same end.

The Heads of Executive departmens have long been authorized by express statute to regulate the custody and management of each Department's papers, 1 Stat. 28, 49, 65, 68. That authority is now codified in 5 U.S.C. 301:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.
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> (Emphasis supplied)

The Department of Justice is, of course, such an Executive department headed by the Attorney General with full powers of administration over its operations, 5 U.S.C. 101; 28 U.S.C. 501, 503, 509. The Attorney General may delegate to other officers of the Department of Justice such of his authority to prescribe rules and regulations as he may consider appropriate, 5 U.S.C. 302; 28 U.S.C. 510. Such delegations are made to the heads of bureaus, divisions, offices, and other major subdivisions of the Department in 28 C.F.R. Part 0. Thus, within the limits imposed by other statutes, both the Attorney General and the heads of major departmental subdivisions have substantial authority to prescribe policies relating to treatment of papers, documents, and records within their areas of responsibility.

b. Department of Justice Regulations

There is no longer a single Department of Justice policy concerning employee removal of papers. The last such policy statement was contained in Memo #185, Supplements 1-3, 1/ issued by the Assistant Attorney General for Administration on behalf of the Attorney General. That memo was rescinded without comment by Memo #701 and its successors, none of which addresses the matter.

There are, however, several sections of the Departmental Regulations which provide useful guidance to a Division or Office considering policies on removal of papers. For example,

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1/ It permitted a departing employee to take with him the following types of documents: 1) extra copies of printed briefs and other pleadings; 2) copies of memoranda on legal research; and 3) Personal papers as distinguished from official papers.

This policy was in some respects broader, in some respects narrower, than analogous standards under the FOIA. See §IIf, infra.

procedures for the production or disclosure of material or information are contained in 28 C.F.R. Part 16. While these procedures are somewhat more formalized than might seem necessary for Divisional policies on employee-papers, they are nonetheless clear statements of the Department's position with respect to releases of information generally. See, especially, 28 C.F.R. §16.1(a) [Freedom of Information requests], 28 C.F.R. §§16.21-26 [Subpenas or Demands of Courts or other Authorities], and 28 C.F.R. §§16.30-34 [FBI Identification Records -- only to the subject thereof].

Many persons within the Department of Justice have access to information or documents classified under Executive Order 11652. Departmental regulations concerning the use and safekeeping of such documents and information are codified at 28 C.F.R. Part 17. It is important to note that these regulations protect both the classified materials (papers, documents, etc.) and the information which they contain, 28 C.F.R. §17.1(a). A document held by the Department which contains classified information, therefore, should be considered in light of the regulations even though it may not yet have received formal classification. In general, classified information may not be disseminated to or removed by a departing employee, 28 C.F.R. §§17.47, 17.61-64, 18 U.S.C. 798.

Standards of Conduct for present and former employees of the Department of Justice are contained in Part 45 of 28 C.F.R. They apply to all employees regardless of their professional status, and are essential to consider in the development of related policies by subdivisions of the Department. Basic standards and goals are set out in §45.735-2, and elaborated in subsequent sections. Removal of papers may properly be denied whenever such removal might tend to violate one or more of the Standards of Conduct. Sections worthy of special note are:

§45.735-7: Disqualification of former employees in matters connected with former duties. 2/

§45.735-10: Improper use of information acquired by reason of employment. 3/

§45.735-12: Speeches, lectures, and publications.

§45.735-16: Misuse of Federal Property.

Other positions of the Department of Justice which may be pertinent here are contained in Part 50 of 28 C.F.R., Statements of Policy. The release of information relating to unresolved civil and criminal proceedings is strictly controlled by §50.2. Departing employees may not take with them information relating to a pending or contemplated civil or criminal court or other proceeding when that information is of a type described in section 50.2. The Department bears a particular responsibility for unwavering adherence to this limitation, since premature release of such information might not only violate the Department's (and the employee's) duty of confidentiality to the United States, but might also prejudice the possibilities of a just resolution of the proceeding itself. Other sections of Part 50 which may

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2/ This section is in terms concerned with former employee's actions as agent or attorney for another. Where the circumstances of an employee's departure reveal a substantial likelihood that the departure may ultimately occasion a violation of the section, stricter scrutiny of papers may be justified than in other instance

3/ See 18 U.S.C. 1905, making such disclosures a criminal offense in defined cases. See also 18 U.S.C. 1902, 1903, 1904, 1911. Other confidential-information statutes are discussed infra.

be applicable in particular instances are:

§50.8: Access to investigatory records of historical interest, and

§50.12: Exchange of FBI Identification Records.

c. Statutes on the Retention of Public Records, Generally.

There are a large number of relatively specialized federal statutes affecting the treatment of papers and information held by federal agencies. However, basic policies concerning the retention of public records are contained in Chapters 27-33 of title 44, United States Code. Under these provisions, GSA (Archives) coordinates the records management practices of federal agencies. However, the operative definition of "records" in those chapters expressly excludes convenience copies or copies kept merely for ease of reference, 44 U.S.C. 3301. Thus, while qualifying (or "official") public records themselves may not be removed, the status of carbon or other copies of those records is not protected under title 44.

A statute of more general application, but only occasional use, is 18 U.S.C. 2071. That section makes unlawful the unauthorized concealment, removal, mutilation, obliteration, falsification, or destruction of documents or papers deposited in a federal office or courthouse. Documents, records, and material protected by §2071, if read literally, include far more than "records" as defined in 44 U.S.C. 3301, but the exact scope of coverage of §2071 is uncertain. The statute's purpose is said to be to preserve the public records and papers intact from all kinds of spoliation, mutilation, or destruction, United States v.

De Groat, 30 F. 764, (D.C. Mich., 1887)(construing predecessor to §2071 using same language). The words "record" and "document" are said to include every paper filed and which becomes a part of the records of the court or office, McInerney v. United States, 143 F. 729 (1906), but some more recent treatments of the section seem to indicate that the papers removed must be of real utility to the government, not simply on file within federal custody. See, e.g., United States v. Rosner, 352 F. Supp. 915 (D.C.N.Y. 1972)(purpose of section is to prevent any conduct which deprives the government of the use of its documents, be it by concealment, destruction, or removal). Rosner also indicates that subsection (a) of §2071 (relating to all persons, not just federal officers or employees) does not of its own force prohibit merely photocopying - rather than physically removing - government records. It is possible that this conclusion may also apply to the conduct of federal employees under §2071(b), dealing with the unauthorized removal of documents in their official custody. That is, an employee's action in making photocopies or carbon duplicates of such documents and then removing such copies may well be held not to violate the statute. 4/

4/ Of course, where Departmental or Divisional policy clearly prohibits personal retention by employees of such copies or use of photocopy machines to prepare personal copies, the federal interest in control of its own employees and machinery becomes more apparent. Where such a policy was in force its violation would presumably be enforceable by ordinary disciplinary means, entirely apart from the physical removal of the copy resulting from that violation.

d. Statutes Requiring Confidential Treatment of Information Held by Federal Agencies.

Many federal statutes require that certain kinds of information acquired or held by federal agencies be held in confidence. Any officer or employee of the United States who without authority "makes known inany manner" certain broadly described types of business information discussed below coming to him in the course of his employment can be held criminally liable under 18 U.S.C. §1905. That section is, however, rather complex and difficult of proof; the court decisions interpreting it have been in civil rather than criminal cases. Divisions should note that it applies only when the information is actually disclosed, a term which is neither defined by the statute nor explicated by the available case law. Where the information disclosed is an income tax return or copy thereof, however, disclosure is defined as being "seen or examined by any person except as provided by law," ... 26 U.S.C. §7213(a), and is separately prohibited.

The classes of information protected from disclosure by §1905 are those which concern or relate:

> ... to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association....

Although many subdivisions of this Department will possess papers that seem literally to contain these classes of information, Federal trial courts have generally shown little tendency to

interpret this criminal statute other than narrowly. For example, they have held that any information which is discoverable under Rule 26 of the Federal Rules of Civil Procedure in a civil suit cannot be said to be confidential information under this section; Exchange Nat. Bank of Chicago v. Abramson, 295 F. Supp 87, appeal dismissed 407 F.2d 865 (1969); Pleasant Hill Bank v. United States, 58 F.R.D. 97 (D.C. Md. 1973). Nonetheless, where the information contained in documents removed by departing employees is plainly of the sort covered by 18 U.S.C. 1905, its disclosure would seem to be unlawful. This probably is the case where information literally within the statute would, if released, tend to injure the business firm that furnished it. See Charles River Park "A," Inc. v. HUD, 519 9F.2d 935 (D.C. Cir. 1975). A reasonable interpretation of "publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law" would be any action which results in dissemination of the information from its official file and which is not in itself authorized by law. The mere transition of an employee to private life while holding such information would not of itself be such a disclosure.

A number of other statutes require that particular kinds or sources of information be held confidential. A partial but lengthy list identifying several such statutes is attached as appendix A. Of course, many of these confidentiality provisions are directed to public officials outside the Department of Justice and will not apply to employees of this Department in most instances. Yet the wide-ranging responsibilities of Departmental employees, and the scope of their duties in the investigation and litigation of cases both civil and criminal, necessarily produce a great deal of information in Departmental files which is within the protection of one or another of the statutes cited above (most particularly information derived from

lawful examination of income-tax returns, 26 U.S.C. §§6103-6104, 7213). Divisions whose employees come into contact with statutorily-confidential information should accordingly take measures to assure that departing employees will not violate that confidence.

e. Public Policy.

There is a further meaning to the numerous confidentiality statutes which goes beyond their individual applications. Some of them are examples of a generalized recognition that the Government must necessarily encounter and deal with items of information concerning individuals and firms which these subjects may legitimately expect to be protected from access by persons outside the Government. For example, there is no justification for the general release of tax returns to interested onlookers, and unauthorized release of an income tax return is a violation of law. 26 U.S.C. 7213. Many of the statutes listed [on the preceding pages and at appendix A] are of this sort.

Several other statutes recognize that the Government sometimes comes into possession of information which is simply too dangerous to the public welfare to be bandied about without limits. The classified information discussed earlier is one form of such information, where unauthorized release might damage the national defense or foreign relations of the United States. But there are other aspects to the public welfare, and other forms of damage. And so "restricted data" relating to Atomic plants and processes may be limited in access and dissemination independently of the classification system, just as information on weather modification techniques may be protected by the Secretary of Commerce (15 U.S.C. 330) and information on economic poisons and pesticides may be restricted by the Environmental Protection Agency (7 U.S.C. 135).

f. Privacy and Freedom of Information.

This policy of protection of individuals and firms against official or private misuse of information held by federal agencies is most strongly expressed, as regards individuals, in the Privacy Act of 1974, 5 U.S.C. 552a. The purpose of that Act is to provide safeguards against invasions of personal privacy by limiting the sorts of information which federal agencies may acquire and retain, by allowing the subject of such information a right of access to verify its propriety and accuracy, and by limiting the uses which federal agencies may make of personal information. Among those latter limits are ones on disclosure, set out in 5 U.S.C. 552a(b). Agencies are forbidden to allow or make any disclosure of personal information except under the conditions described in 552a(b), and unauthorized disclosure is subject to criminal penalties under 552a(i)(1). These restrictions apply whether the disclosure is to another person or to another federal agency. Thus, Divisions should assure that departing employees do not take with them information on other individuals of a sort which is protected from disclosure by the Privacy Act.

A countervailing public policy is embodied in the Freedom of Information Act, 5 U.S.C. 552. Whereas the purpose of the various confidentiality statutes and the Privacy Act is to protect, in varying degree, sensitive information from indiscriminate publication, the Freedom of Information Act is expressly designed to increase the right of public access to information and records held by the federal government. The FOIA requires each agency, upon request for identifiable records, to produce any such records unless they fall within one of nine generally described exceptions. §552(b)(1)-(9). Yet while at first glance it might seem that the FOIA right of access is determinative of an employee's right to

remove papers which he might also acquire under the FOIA, the FOIA limits are not always appropriate in employee departure situations.

It is first necessary to note that the FOIA procedures, while implementing a qualified right of access, are also designed to assure that information released will not inadvertently infringe upon one of the interests protected by the Act's exemptions. Every FOI request for release must be made in writing, as a specific act brought to the attention of the agency; disclosure is not undertaken casually or even without specific agency knowledge as may occur in matters of employee removal of papers. Each FOI request must receive agency handling by designated officials, with an agency determination that the information requested is not within one of the exempted classes, or that in any event it should be released. This sort of positive review and determination, which may be quite burdensome and costly, is generally lacking in employee removals of papers.

Moreover, we note that while the FOIA probably defines most of the outer limits of an employee's legal entitlement to information or records held by his agency, these limits may also be affected by the numerous statutes discussed above, which can narrow the entitlement. Such statutes are not inconsistent with the FOIA, since they are generally recognized by Exemption 3 of the Act. Furthermore, comparison of the FOIA and earlier Department of Justice policy statements on removal of papers demonstrates that the FOIA itself may be more restrictive in some respects than Departmental policies. Thus, earlier Department policy permitted employees to take with them copies of "legal memoranda", even under conditions where those memoranda might constitute inter-agency (or intra) memoranda otherwise

exempt from disclosure under Exemption 5 of the FOIA. Because of this and other such instances where the terms of the FOIA may actually be more restrictive than the policies which a Department or Division would otherwise enforce as to employee removal of work-related papers, we do not believe that the FOIA itself should be employed as an automatic test of entitlement. Indeed, the Department's policy in administering the FOIA itself is to give outside requesters access to records that may be legally withholdable when there is no good reason not to grant access, thus following the general policy of the FOIA rather than the legal standards in its exemptions, which in themselves are merely options to withhold. A somewhat similar approach, using FOIA policies rather than FOIA legal standards, may be appropriate in departing employee situations.

III.

Distinguishing Private and Official Documents

Governments generally have an overriding interest in materials received or prepared under their aegis. Both State and federal courts have accepted that proposition, although they generally agree that employees may assert valid claims to what is clearly personal or expressly available by statute. Even though the papers or information were not directly ordered by his superiors, an employee may not lay claim to them against the interests of the United States if acquired or produced during and as a result of the employee's responsibilities to the United States. See, e.g., United States v. Chadwick, 76 F. Supp. 919, 923 (N.D. Ala. 1948).

On the other hand, where documents are clearly personal the official status of their preparer will not automatically deliver them to exclusive governmental custody. For example,

United States v. First Trust Company of St. Paul, 251 F.2d 686 (8th Cir. 1958), was an action to quiet title to certain historical documents written mainly by William Clark of the Lewis and Clark Expedition. Although the Court of Appeals noted that Clark's records, if the written records of a government employee made in the discharge of his official duties, would be public documents with ownership in the United States, it found that Clark had made the notes as a matter of personal interest and not -- as had Lewis -- in the conduct of his official duties. Thus, the notes were not the work product of a government representative engaged in the performance of his duties, and accordingly not the property of the United States. And in Public Affairs Assoc., Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967) (on remand from 369 U.S. 111), the district court held that speeches made by a prominent vice admiral of the United States Navy to private organizations on the admiral's own time were not a part of his official duties and were private property of the admiral subject to copyright, even though the admiral had used government facilities to duplicate his speeches. The court thus implied that the speeches would have belonged to the United States (and so would not have been subject to private copyright) if they had been prepared as a part of official duties on government time. See also Sawyer v. Crowell Publishing Co., 108 F.2d 28 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1939); Scherr v. Universal Match Corp., 417 F.2d 497 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1940), and Smith, Government Documents: Their Copyright and Ownership, 5 Texas Tech. Law Review 71 (1973).

The State court cases also hold that papers obtained or made by public officers in the discharge of their public duties belong to the State and are not private. Coleman v. Commonwealth, 66 Va. 865, 881 (1874); People v. Peck, 138 N.Y. 386, 34 N.E. 347,

351 (1893); Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, 668-9 (1911); Commonwealth v. Desilver, 3 Phila. 37 (1859-60). These cases do not appear to be based on specific statutes, but rather on the extension to public officers and employees of concepts which would ordinarily apply in private employment to the work product of employees.

This common judicial acceptance of the principle that papers or information made or obtained by public employees in the discharge of public duties belong to the government and not to the individual employee serves, like the policies inherent in many of the statutes discussed in section II of this memorandum, to limit employee claims of a right to remove papers. Such claims by an employee must ordinarily be grounded on personal ownership of the papers, on access rights under the FOIA, or on formal or informal agency policy or practice. The heads of agencies have wide discretion to prescribe rules and regulations governing the care and custody of public papers and the conduct of federal employees. Those rules must respect statutes protecting individual privacy and government property, and the statutes mandating confidentiality for many classes of information. They must also respect the confidentiality of information properly classified under an applicable executive order. Subject to such limits, there is reasonable discretion as to the policy on the furnishing or removal of extra or convenience copies of records and the material which they contain.

Persons desiring access to documents held by the government, including departing or former employees, have a highly responsive and well-articulated path to follow through Freedom of Information procedures, especially if an agency hesitates to grant access informally. Those procedures envision a considered agency determination that information released does not invade the privacy or business interests of another or compromise the interests of the

several exemptions. Although an agency may determine that the full range of FOI procedures is inappropriate for use in the absence of a formal request, their general tenor should be respected in any agency or division policy regarding employee removal of papers.

IV.

Summary of Recommendations

Subject to the foregoing discussion, some general recommendations for agency and division use can be offered, as follows:

1. Preserve Official Records. As a general rule, no document should be removed by a departing employee if that document can be described as within 44 U.S.C. §3101.

2. Copies only. Even though documents may not qualify as "official records", as a general matter official or record file copies of agency records should not be removed under any circumstances. Where removal is otherwise appropriate, a copy should be made for removal and the original or official file copy retained.

3. Purely Personal. Obviously, an employee has a right to remove papers which are his own property. However, it may sometimes be unclear whether a particular paper belongs to the agency or to an employee. Generally, an agency record is any record in the possession of the agency, whether prepared in the agency or received from outside sources, unless it can clearly be demonstrated that the paper belongs to a person other than the agency. Records which clearly are predominantly personal

in nature and which will not affect the future conduct of agency business are presumably devoid of substantial federal interest and ordinarily may be removed by the employee. Diaries and desk calendars maintained voluntarily for personal convenience are commonly within this class of documents. The fact that papers or forms furnished by the government may have been used in maintaining such documents is not controlling, although it may be considered in determining whether the documents were produced in the course of an employee's duties. Letters addressed to an employee at his or her office may be either personal or official, dependent upon their content and purposes. In most such cases where letters are addressed to an employee by name there would be no substantial objection to an agency policy allowing removal of copies of such letters, even though largely official in character.

4. Classified Documents and Information may not be copied or removed without declassification by authorized officials.

5. Confidential Information. Documents containing information of a sort which would fall within one of the statutes requiring confidential treatment for such information may not be removed by departing employees for so long as the information remains confidential. This restriction also applies to documents falling within one of the FOIA exemptions, save that the responsible official may decide to waive such exemptions, 5/

5/ Waiver of an FOIA exemption may be by individualized determination or by a departmental or divisional policy applicable to a category of records or to departing employees. See also the reference to records that are "furnished customarily" to the public set forth in 28 C.F.R. 16.1(a).

while waiver of the confidentiality statutes may be done -- if at all -- only in accordance with the terms of those laws.

6. Interests of the United States. Information which might reveal or prejudice the conduct of criminal and civil investigations under federal laws, the conduct of civil or criminal enforcement proceedings or litigation involving the interests of the United States, or information which falls within the attorney-client privileges of the United States or of the party furnishing the information may not ordinarily be released other than in the manner prescribed in those sections of 28 CFR which are discussed in Part IIb of this memorandum. This paragraph is a limitation on the possible waiver of FOIA exemptions referred to in the preceding paragraph.

7. Use of Copiers, etc. The Attorney General and the heads of principal operating subdivisions of the Department of Justice may prescribe policies relating to the number of copies made of documents, the retention of personal convenience files, procedures required to assure the completeness of official records and files, and limits on the use of copying equipment on federal premises. These officials are also responsible, under regulations implementing the Privacy Act and FOIA, for assuring that requests for documents or information under those Acts are processed in accordance with the procedures applicable to those Acts, and can waive fees and procedural defects in such requests.

8. Counseling and Physical Review. Agencies or principal subdivisions thereof may provide for counseling of departing employees on their rights and responsibilities with respect to information acquired as a part of their duties while employed by the federal government, together with physical review as may be necessary or appropriate. Such policies should be uniformly applied and widely distributed to be of maximum effectiveness and equity.