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March 4, 1975

To: Bill Casselman

From: Phil Buchen



NATIONAL SECURITY COUNCIL

March 4, 1975

MEMORANDUM FOR: PHILLIP W. BUCHEN

FROM: Jeanne W. Davis *JWD*

SUBJECT: Operating Under the Amended
Freedom of Information Act

Since the amended Freedom of Information Act became effective on February 19, 1975, two issues have been raised on which we would like an opinion from White House Counsel. Because we must respond to an existing FOI request involving the first of these issues, we would appreciate an answer by Friday, March 7.

Reproduction and Distribution of Documents Otherwise Available

The National Security Council procedure for handling requests for information under the amended FOI does not address the issue of whether the NSC must itself furnish copies of documents which have already been declassified and published and which are available in printed form. A case has arisen where an individual has asked for copies of 1948 NSC papers that were printed in the State Department's publication, Foreign Relations of the United States. The price of each Foreign Relations volume is \$13.00. The requestor has three options:

- purchase a copy of the volume containing the text of the NSC papers;
- obtain a copy from a library and xerox the pages containing the papers; or
- ask the NSC to reproduce the documents from record copies at \$0.25 per page.



We have tried to release NSC documents through the FRS for several reasons:

- so that they may be read in the context of events and other documents of the period;
- so that they may be available to all scholars at the same time; and
- to avoid the burden on the small NSC staff of leaving to reproduce and distribute copies in response to public requests.

We are concerned, however, that if we refuse to furnish copies of documents that have already been published in the FRS, someone might claim that this is an indirect charge in excess of fees listed in the published fee schedule. The question, then, is whether or not the NSC may direct persons requesting declassified NSC documents to public records, and transfer to the individual the responsibility for obtaining reproductions of specific items.

Obligation to Seek Approval of Foreign Governments

The criteria for exempting documents from declassification under Section 5 (B)(1) of Executive Order 11652 and Subpart F, Section 2101.54 of the published NSC FOI procedures state that "classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence" may be withheld. When this criterion is used, is it obligatory on the U. S. Government to approach the foreign government(s) involved for their views on declassification and release of the information? Or, may the request be denied on these grounds, based on the knowledge of the U. S. Government, without approaching the foreign government?



MEMORANDUM

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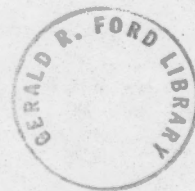
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*Freedom of
Information*

Thursday 3/6/75

Meeting
3/6/75
11:15 a.m.

9:40 Mr. Casselman wanted you to know that Mr. Scalia is coming over at 11:15 a.m. to discuss Freedom of Information.

The meeting will be held in the Roosevelt Room.

Monroe Leigh, OMB and NSC people will be there.

Thought you might want to join.



THE WHITE HOUSE
WASHINGTON

3/17/75

Rad:

Would appreciate
your views on what
type of response, if any,
should be made to
letter of 2/18.

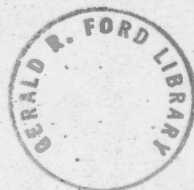
P.

↑
I suggest no
answer.

R.

see also

Cory -
(Cory mass)



JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON

LEGISLATIVE ASSISTANT
TOM GREENE



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PHONE (916) 449-3543

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE:
RANKING MAJORITY MEMBER SUBCOMMITTEES ON
FOREIGN OPERATIONS & GOVERNMENT INFORMATION
CONSERVATION & NATURAL RESOURCES

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
COMMERCE & FINANCE SUBCOMMITTEE

DEMOCRATIC STEERING AND POLICY COMMITTEE

February 18, 1975

Philip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

I appreciate your letter of January 29, but I am afraid that it misses my point entirely. I concede the three points made in your letter, but I maintain that the briefing of former President Nixon falls in an entirely different category than the three cited in your letter.

We will stipulate that he has access to classified material accumulated during his Administration, and we will concede that he is a former President of the United States, but the fact is, Mr. Buchen, that he is a unique exception among all of our former Presidents in our history. He accepted a pardon for unspecified offenses; that acceptance was characterized by President Ford as analogous to an admission of guilt. That being the case, Mr. Nixon would not be clearable by any agency, nor under the circumstances does he have a need to know regarding the ongoing policies of our government.

Certainly, Sir, it is not your contention that President Ford is going to seek the advice of this man on any matter of domestic or international policy, or perhaps it is. If so, I would be most interested



Philip W. Buchen

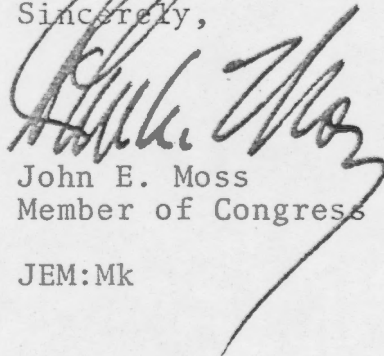
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February 18, 1975

in having that fact confirmed, because to me, it is indeed strange that any case could be made for a need to consult Mr. Nixon on future policies of this government or to make him privy to current, ongoing developments, either in domestic or international policy areas.

I think the whole idea of his having access is repugnant to the overwhelming majority of Americans who feel that he betrayed their trust in him through his misconduct of the Office of the Presidency.

Sincerely,



John E. Moss
Member of Congress

JEM:Mk



THE WHITE HOUSE
WASHINGTON

12/24/74

To: Mr. Buchen
From: Eva

I have checked Timmons' office and they can find no record of a reply being sent to Cong. Moss. Central Files has nothing.

Dudley said to let you know that we think it hasn't been answered; he said he thought it might just as well go unanswered -- possibly.



THE WHITE HOUSE

WASHINGTON

12/23/74

3:00 Dudley said Mr. Buchen told him to follow up with me about the draft letter Dudley sent to you replying to Cong. Moss' letter protecting sending briefings to former President'' as he's a security risk.

It was sent to Timmons ---
November 12 .

Central files said there was a similar ltr to Cong. Koch.



THE WHITE HOUSE
WASHINGTON

Evs:

Please route to
Wm. Timmons
right away from
me.

Draft
letter from
Cong Mess
re
Freedom of
Information



THE WHITE HOUSE
WASHINGTON

Date 11/12

TO: Phil Buchan

FROM: DUDLEY CHAPMAN

Per your request



D R A F T

Dear John:

Thank you for your letter of September 26 in which you contend that former President Nixon should no longer have access to classified material. The basis for your request is that the charges made against the former President, and his acceptance of a pardon with its implicit admission of guilt, would render him a security risk under all pertinent criteria. I cannot agree with that judgment.

Nothing in any of the charges against the former President that has ever come to my attention raises even the slightest question of his loyalty to the United States. However serious and tragic the charges made against the former President, they are not of a kind that raise any question as to his loyalty or reliability in protecting classified information.

The former President, of course, has already been in possession of confidential information for many years. There are many subjects untouched by the tragic circumstances of his leaving office on which his accomplishments are widely acknowledged and concerning which his knowledge and continued informed judgment are a potential resource of the United States. I believe that I would



be remiss in carrying out my own responsibilities in office if I failed to preserve the availability of that resource for such use, and at such times, as the national interest may require.

Your very proper concern for the protection of vital national secrets is appreciated; but in this instance I must conclude that the national interest is in no way harmed, and in fact strengthened, by keeping the former President fully informed.

Best regards.

Sincerely,



Fa Dudley

THE WHITE HOUSE
WASHINGTON

Date 10/30/74

TO: PHIL BUCHEN

FROM: WILLIAM TIMMONS

FOR YOUR INFORMATION _____

FOR YOUR COMMENTS _____

FOR APPROPRIATE HANDLING _____

OTHER CAN YOU DRAFT
PRESIDENTIAL REPLY +
ROUTE THRU ME FOR
CONTROL PURPOSES?
THANKS



THE WHITE HOUSE
WASHINGTON

Oct 30, 1974

SJ:

This has just come in -- would you
please ask Mr. Timmons how we
should handle it?

Copy sent to Ron Nessen.

ef



JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON

LEGISLATIVE ASSISTANT
TOM GREENE



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PHONE (916) 449-3543

*Memorandum
September 26, 1974*

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE:
RANKING MAJORITY MEMBER SUBCOMMITTEES ON
FOREIGN OPERATIONS & GOVERNMENT INFORMATION
CONSERVATION & NATURAL RESOURCES

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
COMMERCE & FINANCE SUBCOMMITTEE
DEMOCRATIC STEERING AND POLICY COMMITTEE

Oct
September 26, 1974

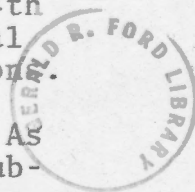
BT
The President
The White House
Washington, D. C.

Dear Mr. President:

As you recall, during our twenty-one years of service together in the House of Representatives, I spent many of those years working upon Federal information policy matters. You may also recall that I was the author on the House side of the Freedom of Information bill.

The initial issue which directed my attention to a study of information policies of the Federal government occurred during the first year of my service. At that time, there was a great outcry against so-called "security risks" in the Federal government.

Upon the election of a Democratic majority in the 84th Congress, I was selected as the Chairman of a Special Subcommittee of the Committee on Government Operations. This was the beginning of a sixteen-year assignment in the field of governmental information policies. As a consequence, I have carefully studied the law's subtle balancing of the interests of government in security against the legitimate interests of the public in access to information. The matter I now bring to your attention is done so after the most careful reflection



September 26, 1974

on this study and a full consideration of the very serious nature of the issues implicit in the views I will express.

It is my opinion that due to the circumstances which led to the resignation of your predecessor, Richard M. Nixon, and his subsequent acceptance of a pardon, that Mr. Nixon is guilty of illegal acts. In response to a press conference question, you indicated that Mr. Nixon's acceptance of a pardon could be construed as analagous to an admission of guilt. The question and your precise words were, "Throughout your Vice Presidency you said you didn't believe that former President Nixon had ever committed an impeachable offense. Is that still your belief, or do you believe that his acceptance of a pardon implies his guilt: Or is it an admission of guilt?" Your reply was "...the acceptance of a pardon I think can be construed by many, if not all, as an admission of guilt." The Honorable Nelson Rockefeller, Vice President Designate, echoed this view when in response to questions asked of him by the United States Senate Committee taking testimony preparatory to his confirmation by the Senate wherein he characterized the acceptance of a pardon as "tantamount to admitting guilt".

I submit that under these conditions that Richard M. Nixon would be judged under all pertinent criteria as a security risk and would be denied access to the material made available to him in secret briefings. If there is not to be a two tiered system of justice in this country, these briefings should be stopped. I submit that unlike his three predecessors who were routinely briefed, the Honorable Harry Truman, the Honorable Dwight D. Eisenhower, and the Honorable Lyndon B. Johnson, that former President Nixon left office under conditions analagous to less than an honorable discharge of his responsibilities given him by the American electorate in the 1972 election. I question whether the briefing of Richard Nixon, who is no longer an employee of the government, does not in itself constitute a breach of rules, regulations or laws proscribing the publication of highly classified material.



The President

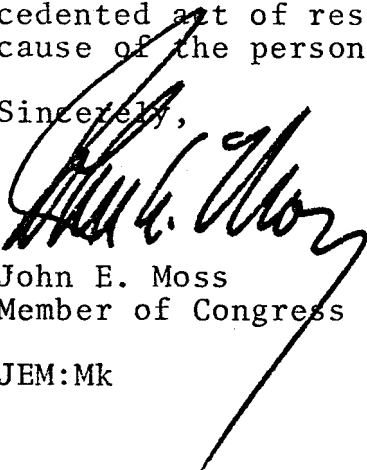
-3-

September 26, 1974

Your own action in the issuance of a pardon implicitly carried with it the assurance that violations of law would be subsequently disclosed and that they would be of an extent and nature, if spread upon the public records, to clearly bar Richard Nixon from access to classified defense or national security information.

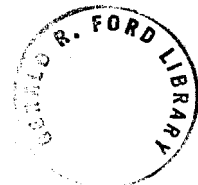
I respectfully suggest, therefore, that it is appropriate that these briefings be discontinued and that finally a recognition be made of the obvious fact that this unprecedented act of resignation was indeed brought about because of the personal misconduct of Richard Nixon.

Sincerely,



John E. Moss
Member of Congress

JEM:Mk



April 18, 1975

MEMORANDUM FOR: Jeanne Davis

FROM: Philip Buchen

Memo responding to Jeanne Davis' memo of 4/11/75
is filed in the safe under "NSC -- Freedom of Information".



Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

OPEN GOVERNMENT: GAINS AND LOSSES

How Freedom of Information Act Is Working Out

THE CRUSADE to abolish secrecy in government got off to a slow start when it was born a decade ago, but is now moving into high gear with some unexpected results.

Floods of information, some highly sensitive, are flowing from the once-guarded files of the federal bureaucracy.

Secrets now stream out of agencies ranging from the Central Intelligence Agency and the Federal Bureau of Investigation to the Securities and Exchange Commission and the Internal Revenue Service.

Officials of these and other federal bureaus are spending thousands of man-hours trying to keep up with demands for their files, but still they are falling behind.

Examples of what is happening—

The FBI has been forced to make public the records of its counterintelligence activities directed against "radical" organizations.

Its arrest and conviction records—rap sheets, they're called—must be opened up to persons involved.

Information is pouring from the CIA, and more is yet to come.

The Soviet Union asked for, and got, a State Department report on U.S. aid to Africa. This document was originally intended only for the eyes of American diplomats.

All this and much more is resulting from the Freedom of Information Act passed by Congress in 1966, tough new amendments enacted last year, and decisions of the federal courts.

The background. Exactly what is this law, and why was it passed? Its principal author, Representative John E. Moss (Dem.), of California, recalls:

"We tried to develop a way that all Government information would be available to interested persons, unless it would impair the security of the U.S."

The 1966 Act was passed after Congress had prodded federal bureaucrats since the early 1950s to cool their passion for secrecy. Mr. Moss recalls that, back then, "most everyone claimed the authority to withhold information—even from Congress."

The impetus for the Act goes back to 1953 when, according to Mr. Moss, the

Chairman of the Civil Service Commission was putting out stories about the number of people fired as security risks.

"When the House Post Office and Civil Service Committee asked for details," as the Californian tells it, "we were refused. I was shocked at the way we were treated."

The result, after 13 years of congressional study, was the Freedom of Information Act.

Says Mr. Moss: "It immediately freed many areas of information for the public. But it also tended to create more artful ways of withholding—many delays, many devices developed."

Then, in 1972, the House Government Information and Individual Rights Subcommittee, after hearings, complained: "The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious."

Official roadblocks. Major obstacles were noted. Federal agencies sometimes required precise descriptions of information requested, including the exact file number. On the average, agencies took 33 days to reply to a request, and 50 days to act on appeals if requests were denied.

It was foot-dragging such as this that the 1974 amendments were designed to overcome.

President Ford vetoed the 1974 bill, contending that it was unworkable and that it would threaten American military and intelligence secrets, and compromise diplomatic relations with other countries. Congress overrode the veto.

Until then, little had happened under the original statute. But the 1974 amendments opened the floodgates.

Some ways are still being found to protect sensitive information. For example, the Federal Communications Commission has destroyed a list of more than 10,000 persons who had violated communications laws. The list had been kept for staff-reference purposes.

Some advisory groups set up to give the Government confidential advice on sensitive matters have been disbanded



rather than run the risk of having their workings made public.

But more-open Government is now the rule.

Taxpayers have access to more information about how the Internal Revenue Service operates. The IRS has made public nearly all of its training manuals and handbooks which tell agents when and how to audit tax returns—and what to look for.

Big orders. Some requests involve thousands of documents, including highly sensitive material. The CIA, for example, has been asked for records of "all expenditures" since the Agency was formed in 1948. The request has been rejected, and the matter is now in the courts.

The State Department, however, has been forced to unveil "background" briefings on last year's meeting in Vladivostok between President Ford and Russia's Leonid Brezhnev.

Officials expect more and more use to be made of the law as the public learns more about it.

Only 66 requests were made of the State Department during the first three months of last year. Up to mid-March in 1975, it had received some 200 demands—well over half of them since the new amendments became effective on February 19.

The FBI averages 20 requests a day, up from only two or three a year ago. And each document must be carefully screened before it goes public. The agency has quadrupled its Freedom of Information staff in two years, and still can't keep up. It has a backlog of 400,000 pages awaiting review.

It's not just current information that is being disgorged. Some disclosures go back into history.

Files on old FBI cases are being re-



UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

Freedom of Information Act
IN REPLY PLEASE REFER TO

YOUR REFERENCE

MEMORANDUM FOR:

JUN 16 1975

Honorable Philip W. Buchen
Counsel to the President
The White House

SUBJECT: Relationships with Congress which undercut use of Freedom of Information Act exemptions

The purpose of this memorandum is to alert you to recent events which, while at the moment relate only to the Civil Service Commission, may have significant implications for the entire executive branch.

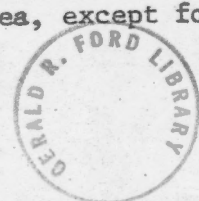
The Civil Service Commission's Evaluation Reports

You may have noticed recent press accounts which relate the disclosure to various newspapers by Congressman John Moss of separate batches of evaluation reports which this Commission has furnished him. Each report contains factual data, opinions and recommendations which reflect the Commission's evaluation of the effectiveness of personnel management in a single agency.

These reports are made in great number, and for calendar years 1973 and 1974 exceeded 900. With respect to those same two years, we made available to Congressman Moss at his request about 650 reports. Some reports are general in scope and reach into virtually all areas of personnel management, such as equal employment opportunity, promotions, training, adverse actions, etc. Others deal specially with a single such area, or with several such areas.

Some are agency-wide in scope, and some relate only to a specific agency installation. There are approximately 4000 inspectable establishments in the executive branch, and we conduct about 400-600 evaluations per year.

The evaluation reports are essentially problem oriented and, hence, are typically critical in content and tone. We do not usually describe how well an agency is doing in a particular area, except for



the purpose of comparison with what we may have identified as agency shortcomings in that area. Our aim is to discover errors or problems for the purpose of achieving correction, in the expectation that agencies will understand the difference, correct serious past errors which have affected their employees, and prospectively make systemic improvements which will result in more effective use of their civilian personnel resources, and will insure compliance with the statutes, rules and regulations which govern the Federal personnel system.

It is important to note that findings made in such reports are not the result of an adversary process (such as notice of complaint, answer, cross-examination, etc.) but are ordinarily the determinations of the Commission office making the evaluation. They are sometimes disputed by agency officials and by affected individual employees -- but they are nonetheless observations of agency activities made by knowledgeable evaluators, and we rely on them in our dealings with agencies to achieve improved compliance with merit system requirements. The tentative nature of these preliminary determinations in many of these reports constitutes the identical policy base upon which the Supreme Court, in two cases decided only a month ago, determined that confidentiality, prior to the taking of final administrative action, was wholly appropriate.

Availability of Reports to Congress

For many years we have made such reports available to Members of Congress upon request, with an explicit statement as to their confidentiality and use only for official government purposes. Until this year, no Member of Congress has ever acted contrary to that statement by making the reports public. Plainly, such reports despite their tentative nature, could be very valuable to a Member serving on the Committee on Government Operations or on the Committee on Post Office and Civil Service, since they could be used to make very pointed what might otherwise be amorphous discussions of program or personnel operations within an agency. In addition, a report on a particular agency could also be useful to a Member of Congress serving on an appropriation or oversight committee for that agency.

Reports Not Available to the Public

We have not made such reports available to members of the public, and that determination has been challenged in court under the Freedom of Information Act (FOIA) in a case entitled Vaughn v. Rosen. The Federal Court of Appeals for the District of Columbia Circuit remanded the case to the Federal District Court for further proceedings in line with its opinion, and the District Court rendered its decision, a copy of which is enclosed. That decision is currently pending on appeal to the Court

of Appeals. In essence, the District Court authorized us to protect from disclosure to the public those portions of our reports (1) which linked our evaluations to identifiable individuals or made other references to individuals which would violate their privacy, and (2) which consisted of "Action Items" and advice and recommendations, tentative in nature, as to how agency managers could improve the effectiveness of personnel operations.

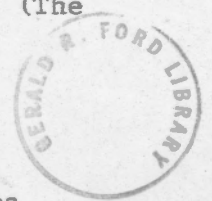
Fragmentary Nature of Single Reports

In the normal working out of our evaluation process, our submission of a report to an agency generally constitutes the beginning of a series of discussions and actions in which the agency takes corrective actions both in individual cases and as a matter of prospective systemic improvement. Some of these matters are documented in our files, and only by looking at the reports and this attendant documentation can a balanced judgment be made on the effectiveness of an agency's performance. Subsequent correspondence and reports on a single agency will contain reflections of the shortcomings stated in earlier reports, and assessments of whether the former ills have been cured.

What has been happening with Congressman Moss' disclosures is that he has released only reports containing seriously deficient conditions, and those which reflect inadequate agency action toward curing the ills complained of in an earlier report. He has not requested from us, hence, has been unable to take into account, information on agency improvement which occurred subsequent to completion of any single report. This kind of ad hoc and selective release of information from our reports is (1) unfair to agencies, (2) perhaps unfair to individuals whose functions make them readily identifiable, (3) damaging to the evaluation program, and (4) misleading to the public, and therefore unwarrantedly impairing the citizen's confidence in Government. The general impression created by the disclosures and by Congressman Moss' attendant public statements about them reflect badly, and erroneously, on executive branch agencies. While they also reflect adversely on Congressional oversight capability, Mr. Moss is reported by Reporter Love of the Washington Star, in an article appearing May 22, 1975, as suggesting that inadequate oversight "could have been due to a lack of time or staff." (The quotation is of Mr. Love.)

Current Commission reaction to requests and disclosures

Over several months in late 1974, we had communication with Congressman Moss, and some of this dealt with why the reports deserved confidential treatment. We offered to furnish information that would satisfy legislative needs concerning particular programs for specific agencies, but he declined to accept this. At one point,



in early October 1974, the Commission's Executive Director, its General Counsel and I met with Mr. Moss, and while he expressed his displeasure at the fact that our reports were not released to the public, he said nothing to lead us to believe he would engage in wide-ranging disclosures of the kind he has made. In a letter dated August 23, 1974, he had told us that "As a Member of the Government Operations Committee these reports will be invaluable to me." Subsequently, his investigative assistant, Frank Silbey, told members of our staff that Congressman Moss believed that the kind of systemic subversion reflected in our GSA and HUD special investigative reports had probably been discovered in other agencies. When we finally determined to make reports available to him in late October, we requested in a letter dated October 23, 1974, that he treat the reports in their entirety "For U.S. Government Use Only." He responded by letter dated November 21, 1974 stating "I regretfully cannot accept these reports with such a caveat attached to them, and must reject any attempt, however sincere, to prevent me from exercising my discretion as a Member of the House on any information I receive in that capacity." In furnishing reports to him we have continued to show that they are for "U.S. Government Use Only." A letter dated April 7, 1975, which thanks the Commission for making additional reports available recites that "In the future, I may have a need to obtain some further documentation in order to further my investigation."

From the beginning we believed that Congressman Moss was not acting on a frolic of his own but related his demands to Committee business. Despite his disclaimer of being bound either by judicial decisions under the Freedom of Information Act or our request that he maintain the confidentiality of the reports, until very recently he made no disclosures and we assumed he would treat the reports as all Members of Congress had done in the past.

Obviously in releasing our evaluation reports on his own decision, Congressman Moss is effectively negating the exemptions in the FOIA, and undermines the Congressional policy which authorized their use, a policy which the Federal District Court has already recognized as a valid claim of protection for parts of these reports.

Congressman Moss has released these reports while the Manpower and Civil Service Subcommittee of the House Committee on Post Office and Civil Service is in the midst of investigative hearings into the integrity of the merit system. Of course, under the Rules of the House, other Committees are informed of such hearings and it is customary for members with an interest in the matter to either be a witness or otherwise communicate with the investigating unit. The reach of the Manpower and Civil Service Subcommittee investigation can readily include all of the allegations which Congressman Moss had made in the



public prints. So far as we know Congressman Moss has not attempted to become a witness in the investigation.

In any case, it must be remembered that in dealing with the availability of executive branch information to Congress we are outside the range of the FOIA; so that the only basis for declining to furnish information is executive privilege. We do not believe that the contents of these reports raises any suggestion that it would be appropriate, at any early time, for the President to assert executive privilege with respect to them. However, there is the broader issue which we believe may very well be a matter of Presidential concern; that is, where a Congressman in his individual capacity undertakes to negate an exemption for the executive branch in the FOIA.

And, in this connection, if Congressman Moss may be treated as an individual Member of Congress, there is useful legislative history in the FOIA which indicates that a single Member of Congress has no greater rights under the Act than any member of the public. Thus, if it can be established that Congressman Moss is not acting responsibly with respect to Committee business, but is acting as an individual member, we can decline to furnish him any information reasonably covered by the exemptions of the FOIA. Since it seems clear that Congressman Moss plans to persist in his systematic disclosure of whatever additional reports are made available and, further, since we remain unpersuaded that his activities in this regard are properly anchored in the oversight responsibilities of the Government Operations Committee, we feel confident that we could properly deny his request under exemptions 2, 5 and 6 of the Freedom of Information Act. As explained immediately below, however, we are not at this time prepared to deny Congressman Moss' request on this basis.

The Immediate Future

We have determined that, in view of his recent activities, Congressman Moss' pending request for additional inspection reports raises important questions which require our thorough review and consideration. We wish to examine further our past policies and practices when dealing with Members of Congress who are acting in what is tantamount to a personal capacity, and we think that it may also be useful to explore these and related issues with others in the executive branch. Again, in our judgment, the issues presented here do have general implications.

In any case, we have advised Congressman Moss, as the attached letter reflects, that we are extremely troubled by his activities and that we wish to give further consideration to his request. As this matter plays itself out, we will keep you informed on the prospects for



forcing these requests and disclosures into the normal mode by which Congress conducts oversight, namely, balanced investigation, hearings (including opportunity for agency rejoinder), consideration by subcommittee or committee, and publication of a formal committee or subcommittee report, which would, of course, furnish opportunity for concurring and dissenting views. As we have made plain to all who are involved, we are not at all fearful of this kind of oversight; and as I think we evidenced in extensive testimony before Congressman Henderson's investigative committee, we are most mindful of the needs of the service, are not "anti-employee" oriented, have with considerable effectiveness improved personnel management in many agencies, and will continue doing so in the future.

It remains to be said that if our efforts to achieve balanced and effective oversight fail (i.e. oversight in which we have opportunity on a formal record, in public, to counter the erroneous assertions he makes about us and other agencies) we will reassess the nature and extent of the damage disclosures will cause (1) to the current evaluation program, (2) to this Commission's ability to achieve personnel management improvement and (3) to the public's ability to maintain adequate confidence in a deserving, but erroneously characterized executive branch. If the estimated damage is too severe to be tolerated, we would then ask you to reassess whether, indeed, the President could fairly assert executive privilege with respect to documentation the disclosure of which in piecemeal fashion would have these dire effects. The only alternative we see to that suggestion is major changes in the Commission's evaluation reporting system, changes that at this point do not appear to me to be in the public interest.

We will keep you informed of significant developments as they occur and would welcome any comments you might have.



Robert E. Hampton
Chairman





CHAIRMAN

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C. 20415

JUN 16 1975

Honorable John E. Moss

House of Representatives

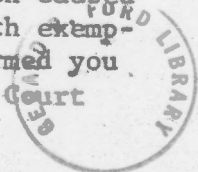
Dear Mr. Moss:

This will constitute an interim response to your letter dated May 16, 1975, requesting 283 evaluation reports completed in 1972, plus additional evaluation reports completed in or after December 1974. Coming quickly on the heels of recent disclosures to the press, from similar reports we have furnished to you in the recent past--disclosures the press reports attribute to you--your current request raises serious questions which require careful consideration.

We will explain below what facets of this matter we are presently considering, but first a few introductory comments. It is very clear to us that there is an obvious relationship between effective personnel management by an agency and its effectiveness concerning the very program operations which constitute the jurisdictional basis for the Committee on Government Operations on which you serve. As a general matter, we welcome your recently expressed interests in the improvement of personnel management in the Federal personnel system; and recognizing the impact of personnel management on agency program operations, we are eager to assist the Committee and its Subcommittees to perform its oversight functions.

It is also clear to us that our evaluation reports on specific agencies might also be useful to other Congressional oversight committees and to appropriation committees as well. For many years, we have made our evaluation reports available, on request by Members of such committees, with the clear designation as to their use only for official Government purposes. Until the release of the reports by your office, to our knowledge no such reports have been released by an individual Member of Congress. The reports of our special investigations of organized efforts in GSA and HUD to subvert the merit system were published in their entirety as a committee print by Chairman Henderson, and these of course were not reports of the type being discussed in this letter.

The reason for limiting their use is the same reason which caused you, many years ago, to place the second, fifth, and sixth exemptions in the Freedom of Information Act. And as we informed you by furnishing a copy of the most recent Federal District Court

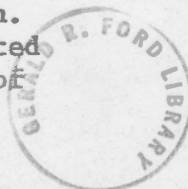


decision in Vaughn v. Rosen, the courts have confirmed the validity of your judgment. Even the Supreme Court, in two Freedom of Information Act decisions published within the past month, found wholly appropriate and consistent with the Act the maintenance of confidentiality for documentation which reflected the tentative nature of determinations entertained between agencies prior to final agency action.

You will remember that for several months in late 1974 we had fairly extensive communication with you, and some of this dealt with why the reports deserved confidential treatment. We offered to furnish information that would satisfy legislative needs concerning particular programs of specific agencies, but you declined to accept this. While, when Mr. Rosen, Mr. Mondello, and I visited with you, you expressed your displeasure at the fact that our reports were not released to the public, you said nothing to lead us to believe you would engage in wide-ranging disclosures of the kind you have made. Your letters affirmatively led us to think the reports were needed for Committee use. Your letter dated August 23, 1974, for example, told us that "as a Member of the Government Operations Committee these reports will be invaluable to me." When, in your letter dated November 21, 1974, you declined to accept the "caveat" calling for "U.S. Government Use Only," you based your discretion on being a "Member of the House." And in the letter dated April 7, 1975, you state a need to obtain further documentation in order to further your "investigation." We were therefore disappointed in the ad hoc and selective releases made, and the erroneous statements which attended them.

It should be very clear that the reports are essentially problem oriented and, hence, are typically critical in content and tone. We do not usually describe how well an agency is doing in a particular area, except for the purpose of comparison with what we may have identified as agency shortcomings in that area. Our aim is to discover errors or problems for the purpose of achieving correction, in the expectation that agencies will understand the difference, correct serious past errors which have affected their employees, and prospectively make systemic improvements which will result in more effective use of their civilian personnel resources, and will insure compliance with the statutes, rules, and regulations which govern the Federal personnel system.

It is important to note that findings made in such reports are never the result of adversary procedures (such as notice of complaint, answer, cross-examination, etc.) but are ordinarily the determinations of the Commission office making the evaluation. They are sometimes disputed by agency officials and by affected individual employees--but they are nonetheless observations of



agency activities made by knowledgeable evaluators, and we rely on them in our dealings with agencies to achieve improved compliance with merit system requirements. The determinations in many of these reports are tentative.

In addition, it seems that only reports containing evidence of seriously deficient conditions and those which reflect inadequate agency action toward curing the ills complained of in an earlier report have been released. No account was taken of information on agency improvement which occurred subsequent to completion of any single report. As a result, this piecemeal and dated release has been (1) unfair to agencies, (2) perhaps unfair as well to individuals whose functions make them readily identifiable, (3) damaging to the evaluation program, and (4) misleading to the public--therefore unwarrantedly impairing the public's confidence in Government.

This ad hoc approach is to be contrasted with more characteristic forms of Congressional oversight where a subcommittee assures itself that it has seen all relevant documents and interviewed all major participants, holds hearings on the open record which are fair to all concerned, and issues a report of its findings and conclusions (including comment on the necessity or desirability of new legislation) after discussion among subcommittee members and with opportunity for concurring and dissenting statements. The public would, in that fashion, get all of the facts.

We would not shrink from such measured accountability and oversight, as we have proved in recent hearings held by Chairman Henderson on integrity in merit system affairs. Those hearings may well result in new legislation which will advance the cause of effective personnel management, including some of the matters of which you complain.

Had we known that the reports would be used differently from their invariable past use, we would either have insisted on the request being confirmed over the signature of the Committee or a Subcommittee Chairman, or we would have declined to furnish the reports.

In any case, and as I believe you know, the legislative history of the Freedom of Information Act makes it clear that an individual Congressman has no greater right to documentation than any member of the public. And, in this connection, we have regularly denied disclosure of these reports to the public on the basis of exemptions 2, 5, and 6 of the Freedom of Information Act. Before finally



deciding whether to invoke those exemptions in connection with your request, however, we wish thoroughly to review our past policies and practices in this area. Also, and since we think that the issues raised here may well have implications for the Government generally, we shall probably discuss these matters with others in the executive branch before reaching a final decision.

To be sure, we do not have a fixed view that the current evaluation program is the best that can be devised. We are certain, however, that the current spate of disclosures will in time cause major changes in its effectiveness for any purpose. Because we feel keenly our responsibility as the Federal Government's principal personnel agency, we must, of course, act to protect against deterioration of the system's salutary processes. It is for this reason that we feel obliged to take the time necessary thoroughly to consider your request and all of its implications. Obviously, we would welcome any additional comments you may have. In any case, however, you may be assured that we will be writing to you further as soon as we have completed our review of Commission policies and practices with respect to the release of reports to individual Members of Congress.

In the meantime, should you wish to discuss this further, I will be glad to meet with you.

Sincerely yours,

Robert Hampton

Robert E. Hampton
Chairman



*Freedom
of
Information*

July 30, 1975

To: Barry

From: Eva

Mr. Buchen asked that a
copy of the attached be sent
to you.



THE WHITE HOUSE

WASHINGTON

July 29, 1975

MEMORANDUM FOR PHILIP W. BUCHEN

FROM: L. WILLIAM SEIDMAN *LWS*

SUBJECT: CONFIDENTIALITY OF THE WORKING PAPERS
OF THE EPB EXECUTIVE COMMITTEE

As you know, the Economic Policy Board Executive Committee meets daily to coordinate domestic and international economic policy within the U.S. Government.

The standard procedures under which the Executive Committee operate is the publication in advance of a weekly agenda, supplemented as necessary by daily agenda. In most instances, the lead department or agency will deliver a paper on a scheduled agenda item to my office for distribution to Executive Committee members 24 hours in advance. Minutes of each meeting are written and distributed to the Executive Committee which record the decisions made.

Please advise me as to the confidentiality of our agenda, discussion papers, and minutes if requested under the Freedom of Information Act, by the Congress, or the GAO.

I would appreciate a response by August 15, 1975



THE WHITE HOUSE
WASHINGTON

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August 21, 1975

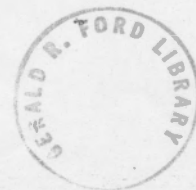
MEMORANDUM FOR: BILL SEIDMAN
FROM: PHIL BUCHEN *P.W.B.*
SUBJECT: Confidentiality of EPB
Executive Committee Documents

In response to your inquiry, we should, as a general rule, be able to maintain the confidentiality of agendas, discussion papers and minutes of the Economic Policy Board (EPB) Executive Committee in response to Congressional, GAO, and Freedom of Information Act requests.

I. Executive Privilege

With respect to Congressional and GAO requests, the only basis at law for withholding documents is a formal claim of executive privilege. Although not specifically mentioned in the Constitution, executive privilege is derived from the concept of the separation of powers between the three co-equal branches of our Federal Government.

The basic rationale for executive privilege is to protect the effectiveness of the Presidency. One threat to this effectiveness is the restraint on the free flow of advice from the President's closest advisers if disclosure of such advice is required. For this reason, the privilege is available with respect to various internal documents which are relevant to the Presidential decision-making process. On the other hand, materials of a purely factual nature or those outside the legitimate sphere of the President's decision-making process do not normally require protection and ordinarily would have to be disclosed. Agendas, discussion papers and minutes of the EPB are each a part of the internal, decision-making process of the Executive, and are advisory rather than factual in nature. Thus, ordinarily they would not need to be disclosed.



However, it is the President's preference to invoke executive privilege only when it is absolutely necessary. Thus, any Congressional requests for EPB documents should normally be the subject of negotiation at the staff level, in the hopes of avoiding a confrontation, while still preserving the privilege.

II. FOIA: Scope

In amending the Freedom of Information Act (FOIA) last year, Congress demonstrated its awareness of a sphere of Executive confidentiality. Although the FOIA now specifically includes the Executive Office of the President, the legislative history indicates that the FOIA was not intended to extend to the principal personal advisers and assistants to the President.^{*/} The test here is basically the closeness of the operations of the persons in question to the President, and whether such persons are involved only in advising the President.

Executive Order 11808, as amended by Executive Order 11865, establishes the EPB for the purpose of advising the President on all facets of domestic and international economic policy. The Civil Division of the Department of Justice shares the view of my office that a strong case can be made that the EPB is not an agency for purposes of the FOIA, and is not subject to its mandatory disclosure provisions. In terms of EPB documents that are found at the Departments and agencies of the EPB members, our office believes that such documents remain outside the FOIA, regardless of location. However, both of these positions have been formulated in the absence of precedents under the newly amended FOIA. What treatment the courts will give to these positions remains subject to at least some uncertainty at this time.

III. FOIA: Exemptions

Even if the EPB is subject to the FOIA, the FOIA exempts from mandatory disclosure internal communications, consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy-making processes. Purely factual information or reports may be protected only if they are inextricably intertwined with policy-making processes. On the basis of various court decisions,

^{*/} House Report No. 93-1380, 93rd Cong., 2d Sess., page 1.



you should be able to withhold minutes of meetings and agendas, as well as the advisory portions of discussion papers.

While it is not possible to predict with absolute certainty the outcome of any litigation that may result from Congressional or FOIA requests, we believe that we will be able to protect these documents.

Should you have additional questions in this regard, or in the event any requests are in fact made for these documents, please do not hesitate to contact either myself or members of my staff.



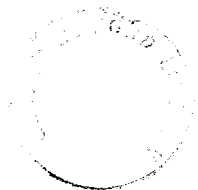
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