



DEPARTMENT OF STATE
ACTION MEMORANDUM

S/S

CONFIDENTIAL

TO : The Secretary

FROM : T - Carlyle E. Maw
L - Monroe Leigh

Telephone Monitorings --
Safire Request

Problem:

William Safire has requested under the Freedom of Information Act (FOI) the transcripts made by secretaries of your telephone conversations. The request, dated January 14, 1976, covers only a portion of the transcripts (Tab 1). Specifically, Safire's request asks for transcripts of those telecons which either (1) mention him by name, or (2) contain discussions between you and Mitchell, Hoover, other FBI officials or former President Nixon on the subject of "leaks". Under the Act, we have until COB January 28 to respond. We are entitled to an extension of ten working days if we show "unusual circumstances."

Discussion:

Before considering the alternatives to be considered in responding to the Safire request, we should first address the preliminary legal question as to whether the making and retaining of the transcripts of your telephone conversations was consistent with relevant laws and regulations. The Supreme Court in 1971 in the case of United States v. White, upheld the legality of one party to a telephone conversation making a record or recording of that conversation. Although that case involved the use of recordings in police investigations, we believe its principles are clearly applicable to a high public official who has his own conversations monitored. In our view, this

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practice, in and of itself, offends neither the constitutional guarantees of the Fourth Amendment, nor the provisions of Section 605 of the Federal Communications Act.

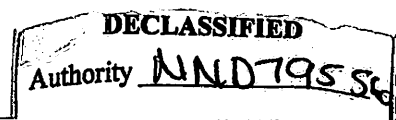
We have found no other statute that precludes a party to a telephone conversation from having that telephone conversation monitored. In fact, the Omnibus Crime Control and Safe Streets Act of 1968 specifically states that:

"It shall not be unlawful ... for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception ..."
18 U.S.C. 2511(b).

Another question raised is whether there was any legal restriction on your transferring the telecons from the White House when you became Secretary of State. First, it is clear to us that you did not violate any of the court orders issued in the Nixon papers litigation. Those orders applied only to documents and materials in the custody of the named defendants in that litigation or their agents or superiors. The first of these orders was not issued until October 21, 1974, at a time when all of the telecons were already here at the State Department.

Nor do we know of any inconsistent statute or regulation, except perhaps the internal White House procedures under the Nixon Administration. Those procedures required each White House staff member, "upon termination of employment with the staff," to turn over to the White House central files all papers in any way related to his performance of official duties at the White House (Tab 2). Those procedures, according to Buchen, ceased to be effective after President Nixon's

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resignation on August 9, 1974. Since you had not terminated your White House position when these procedures expired, you were not required under the procedures to turn your telephone records over to White House central files. Moreover, as the Halperin suit has demonstrated, you had need to use the records even if they be regarded as White House papers.

You should, however, be aware that on September 23, 1970, the Department of State issued a notice stating that whenever it was necessary to monitor telephone calls, "advance notice must be given whenever a secretary or any other person is placed on the line for any purpose whatsoever." This notice appears to have had the force of a procedural directive, which you presumably would have had the authority to rescind or modify. We have found no formal, government-wide prohibition on monitoring. The only thing that comes close is a GSA pronouncement that in the future, it would not install dead-keys on telephones. This does not preclude the retention of dead-keys on telephones already in existence.

With this background, we turn to the alternatives in responding to the Safire request.

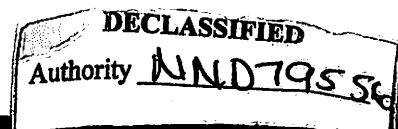
Response to Safire -- Legal Alternatives.

In responding to the Safire FOI request, the principal alternatives are: (1) treating the telecon transcripts as personal records, (2) treating the transcripts merely as non-agency records, without getting into their status as personal or government property, (3) treating the transcripts as subject to the FOI, but protected under the specific FOI exemptions, (4) treating transcripts made at the White House prior to August 9, 1974, as part of the Nixon papers, and (5) treating some of the transcripts as personal records and some as government records. These are discussed below in order.

1. Treating the transcripts as personal records.

We believe a strong argument can be made that your telecon records are private records and not government documents. From a legal standpoint, success in maintaining this position would have several advantages:

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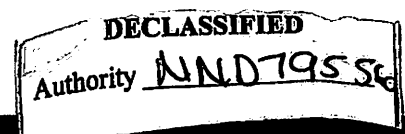
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- Under the FOI, only "agency records" are subject to production. If a document is a personal and not an agency record, it is not covered by the statute.
- Personal records which contain no direct references to Halperin or wiretaps would probably be exempt from discovery in the Halperin litigation.
- If the records are personal, you presumably would be able to retain them after you left office, or at least to control their disposition.

It is not clear, however, that a court would accept our argument that these memoranda are personal in nature. The FOI is a fairly recent statute; it contains no definition of the term "agency records," and there has been little judicial construction of the difference between an agency and a non-agency record. It could be argued that insofar as records relate to any government business, they should not be treated as personal in nature. This view finds support in an early opinion in the Nixon papers litigation, in which Judge Richey said that any material "generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public official belongs to the government and may not be considered the private property of the official." Nixon v. Sampson, 389 F. Supp. 107, 133 (D.D.C. 1975). That opinion also cites a number of other cases which hold that materials made by a public official in the course of his employment are government property, and that whenever a public officer keeps a written record of government transactions, the record becomes a public document.

On the other hand, it does not make sense to maintain that a high public official may not keep a personal record, exclusively for his own use, of the matters he discusses over the telephone. Such records protect

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one against misquotation. They also protect against possible future attacks against the official's reputation. It would seem that a court should look at the reason a record was made and the ultimate use made of the record. If a record is not intended for others in the government and if it is restricted to personal use, then arguably it should not be considered government property. Our position on this would be considerably bolstered if we were to receive a favorable opinion from the Justice Department.

It must be acknowledged, however, that in order to establish this position, we would have to break new legal ground.

2. Treating the transcripts merely as non-agency records, without getting into their status as personal or government property.

Under this approach, we would simply argue that your White House telecons are not agency records within the meaning of the FOI. It would put off the question of whether the records belong to you or to the government.

There are two legal grounds for concluding that these records are not "agency records" under the FOI. First, as the Assistant to the President for National Security Affairs, you were a member of the immediate Office of the President. It is clear that under the FOI, the Office of the President itself is not an "agency" and papers generated in the Office of the President need not be disclosed. Technically, this would not be the case if the transcripts were deemed to be NSC records, because the NSC is considered to be an "agency" under the Act.

Second, we could make an argument similar to the one outlined under alternative one -- i.e., that records intended solely for personal use are not agency records. Even though the telecons may one day be held to be government property, they are not the type of records that Congress intended to subject to public access under the FOI. This approach, again, has considerable logic, but unfortunately, no judicial authority to support it.

3. Treating the transcripts as subject to the FOI, but protected under the specific FOI exemptions.

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Even if some of the telecons were deemed to be agency records, there would still be other defenses available under the FOI. For example, if the telecons were classified and appropriately marked as classified, they would be exempt under section (b)(1). Moreover, many of the telecons might be deemed to be intra-agency or inter-agency records which are exempt under section (b)(5). The difficulty with this type of argument is that individual transcripts must be examined to determine under which FOI exemption it might fall. Moreover, our determination that a particular exemption is appropriate is subject to judicial review by means of in camera inspection of the documents.

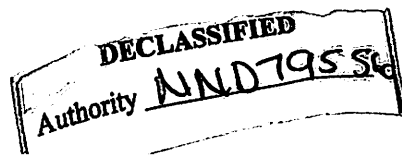
4. Treating the transcripts made prior to August 9, 1974 as part of the Nixon papers.

This possibility was suggested to us by Phillip Buchen. On further reflection, we see a number of disadvantages to it, although the approach is helpful insofar as the Safire request is concerned. The transcripts covered by Safire's request mostly appear to have been made during the Nixon Administration. As part of the Nixon papers, they would be subject to the Presidential Materials Preservation Act of 1974, and, therefore, according to the White House lawyers, beyond the reach of the FOI.* Support for adopting this alternative is provided by the Nixon Administration's procedures on White House office papers. (Tab 3). Those procedures which remained in effect until August 9, 1974, provide that all White House office papers "are the personal property of the President." The term "White House office papers" was defined to include all papers or records relating to official business made or received in the course of official business at the White House.

One practical disadvantage of this approach is that it would associate your transcripts with the Nixon tapes. From a legal standpoint, this alternative would not protect transcripts made during the Ford Administration, or transcripts made during the Nixon Administration but at the State Department.

* We understand this legal conclusion has not been specifically approved by the Attorney General.

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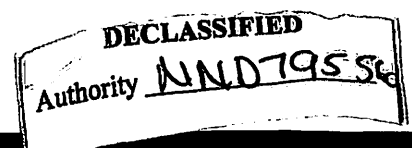
Moreover, those transcripts which were protected under the Presidential Materials Preservation Act would ultimately have to be transferred to the GSA Administrator who is given custody and control of the papers under the Act. GSA has issued regulations for administering and processing the Nixon tapes and papers. Under these proposed regulations, a team of archivists would initially review materials. The archivists would segregate private or personal materials from the collection for return to the author. However, the term "private or personal materials" is defined in the regulation to mean only those materials having no connection with a person's "constitutional or statutory duties or political activities as President or as a member of the President's staff." The practical effect of this is to leave to the GSA all materials relating to government business.

Also under the proposed regulations, the GSA Administrator would be required to afford public access to all of the materials, except those which were classified or those whose release would violate either a federal statute or a person's constitutional right or privilege. The GSA would decide claims of privilege. In sum, you would not be certain of access to or control over those transcripts included in the Nixon papers.

5. Treating some of the transcripts as personal records and some as government records.

Under this approach, we could concede that those transcripts which were materials of significant government business which had been transacted by you would fall within the category of government records. Or we might try, however difficult the task, to establish some less inclusive definition of government record. For those transcripts which were categorized as government records, some or all may be withholdable because they were classifiable, or because they come within one of the other FOI exemptions. To implement this alternative, we would have to make an immediate examination of all the transcripts in order to segregate the personal from the governmental and also, for those in a government category, to determine whether any of the FOI exemptions might apply.

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Recommendation:

Since the legal questions will require detailed analysis, we recommend that you authorize us to request a 10-day extension before responding to the Safire request.

Approve _____ Disapprove _____

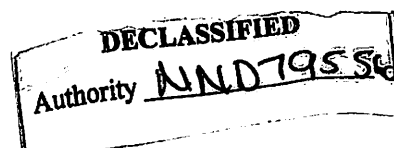
Attachments:

- Tab 1 - Request from William Safire dated January 14, 1976.
- Tab 2 - White House Papers Procedures during Nixon Administration.

cc: S - Mr. Eagleburger

Drafted: L:MDSandler/MLeigh:edk
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- 8 -

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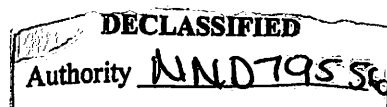
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The New York Times

WASHINGTON BUREAU
1020 L STREET, N.W.
WASHINGTON, D.C. 20036
(202) 293-3100

WILLIAM SAFIRE

January 14, 1976

The Secretary of State
State Department
Washington, D. C.

Sir:

Under the provisions of the Freedom of Information Act, as amended, I request information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department.

For verification of the existence of such records, your attention is called to "Federal Defendant Kissinger's responses to plaintiffs' first set of interrogatories", Civil Action No. 1187-13 in the U. S. District Court for the District of Columbia, pp. 46-47, which reads:

"With respect to records of telephone conversations in which I participated and correspondence I wrote or received during the period January 21, 1969 through February 12, 1971:

"Business telephone conversations from my White House office during this period were usually monitored by my personal secretaries and records prepared, in accordance with routine government practice, in order to facilitate implementation

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and follow-up of business transacted.

"Correspondence was deposited with White House Central Files or Substantive Files.

"71 B. Where and in whose custody are such records now? If you do not know where they are now, where and in whose custody were they last, to your knowledge?

"Response: All such records, with the exception of the records of my telephone calls, are in the White House. They are in the custody of the NSC staff. The telephone records are in the State Department, in the custody of Mr. Lawrence S. Eagleburger.

signature

HENRY A. KISSINGER"

1. Please send me photocopies of all transcripts (including rough drafts, if such exist) in which my name appears.

2. Please send me photocopies of all transcripts (including rough drafts, if such exist) of conversations between Mr. Kissinger and General Haig, or Mr. Kissinger and Attorney General John Mitchell, or Mr. Kissinger and J. Edgar Hoover, or Mr. Kissinger and any other official of the FBI, or of Mr. Kissinger and President Richard Nixon, in which the subject of "leaks" of

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information was discussed.

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

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

I am prepared to pay costs specified in your regulations for locating the requested files and reproducing them.

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

If you have any questions regarding this request, please telephone me at the number on this letterhead.

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

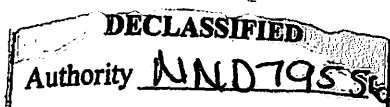
Sincerely yours,

William Safire

Social Security #: 103 22 7703

Date of Birth: 12/17/29

Place of Birth: New York, USA



WHITE HOUSE OFFICE PAPERS

Mr. Lantieri

By custom and tradition, all White House Office papers are regarded as the personal property of the President and subject to such control and disposition as he may determine. At the close of the Administration, the entire collection of papers now being created may be expected to be deposited in a Presidential library similar to the libraries that preserve the papers of the last six Presidents. To provide the President with a complete and accurate record of his tenure in office, the White House staff must oversee the preservation of the papers it generates.

The procedures set forth in this document represent the collective thinking of many members of the staff as to how best to preserve papers and documents for the President. Compliance with these procedures is an expression of loyalty by the staff to the President. For these procedures to be effective, it will require cooperation and assistance of every staff member.

The security classification of each document prepared in the White House is determined by the individual staff member writing it in accordance with Executive Order 10501—or other applicable Executive Orders. He is responsible for insuring that the classification assigned to his work reflects the sensitivity of the material concerned, and also for making certain that this classification is not excessively restrictive.

White House Office Papers: Filing with Central Files

1. *It is requested that the maximum possible use be made of Central Files, and the procedures listed below be followed.* This will aid in the faster and more complete retrieval of current information, eliminate unnecessary duplication of files, prevent excessive xeroxing, and maximize preservation of White House papers.

2. *Each staff member shall maintain his personal files separate from any working files he may keep on official business and clearly designate them as such.* Personal files include correspondence unrelated to any official duties performed by the staff member; personal books, pamphlets and periodicals; daily appointment books or log books; folders

of newspapers or magazine clippings; and copies of records of a personnel nature relating to a person's employment or service. Personal files should not include any copies, drafts or working papers that relate to official business or any documents or records, whether or not adopted, made or received in the course of official business.

3. *Each staff office shall forward regularly to Central Files three copies of all outgoing official business consisting of correspondence and memoranda. One copy of all other outgoing related materials should also be filed.*

4. *Each staff office shall forward regularly to Central Files any incoming official business from sources other than White House staff offices after action, if any, has been taken. Each staff office, if it so desires, may keep a copy of such incoming official business for its own working files.*

5. *Each staff office shall forward regularly to Central Files any originals of incoming official business from other White House staff offices after action, if any, has been taken and if such originals were not intended to be returned to the sender. If desired, a copy may be kept for the staff's working files.*

6. *Each staff office shall forward to Central Files at such times as it determines to be appropriate all working files of official business which are inactive and no longer needed. These files will be stored by office as well as listed by subject matter. They will, of course, always be available for later reference.*

7. *Each staff office at its own discretion may segregate any materials that it believes to be particularly sensitive and which should not be filed by subject matter. Such sensitive materials should be forwarded to the Staff Secretary on the same basis as outlined in paragraphs 3 through 6 in an envelope marked SENSITIVE RECORDS FOR STORAGE with the office or individual from which they are sent marked on the outside and (as appropriate) a list of inventory in general terms attached. This list of inventory should also be sent to Central Files so that notations can be made in subject files that certain material is missing from the file. These materials will be filed in locked containers and will only be made available to the in-*

individual or office from whom they were received.

8. No defense material classified under Executive Order No. 10501 with a classification of TOP SECRET or Restricted Data under the Atomic Energy Act of 1954 should be forwarded to Central Files. All such material should be forwarded to the Staff Secretary for storage.

9. No exceptions to the above shall be made without the express consent of the Counsel to the President. Additional advice on the operation of Central Files may be obtained from Frank Matthews, Chief of Central Files (Ext. 2240).

White House Office Papers: Disposition of Papers Upon Leaving Staff

1. Upon termination of employment with the staff, each staff member will turn over his entire files to Central Files with the exception of any personal files he might have maintained.

2. Personal files include: correspondence unrelated to any official duties performed by the staff member; personal books, pamphlets and periodicals; daily appointment books or log books; folders of newspaper or magazine clippings; and copies of records of a personal nature relating to a person's employment or service. Personal files should not include any copies, drafts, or working papers that relate to official business; or any documents or records, whether or not adopted, made or received in the course of official business. The White House Office of Presidential Papers, staffed by representatives of the National Archives, is available to assist staff members in the determination of what are personal files. Any question in this regard should be resolved with their assistance by contacting John Nesbitt, supervisory archivist of the Office of Presidential Papers (Ext. 2545).

3. A staff member, upon termination of employment, at his discretion make copies for his personal use of a carefully chosen selection of the following types of documents within his files:

(A) Documents which embody original intellectual thought contributed by the staff member, such as research work and draftsmanship of speeches and legislation.

(B) Documents which might be needed in future related work by the individual.

4. No staff members shall make copies as permitted in paragraph three of any documents which contain defense material classified as CONFIDENTIAL, SECRET OR TOP SECRET under Executive Order No. 10501, Restricted Data under the Atomic Energy Act of 1954, or information supplied to the government under statutes which make the disclosure of such information a crime.

5. Each staff member who decides to make copies of such documents described in paragraph three shall leave a list of all such documents copied with Central Files. This will enable retrieval of a document in the event that all other copies of it and the original should be later lost.

6. The discretionary authority granted in paragraph three is expected to be exercised sparingly and not abused. All White House Office papers, including copies thereof, are the personal property of the President and should be respected as such. Any copies retained by a staff member should be stored in a secure manner and maintained confidentially.

7. All confidential and sensitive materials will be protected from premature disclosure by specific provisions of the Presidential Libraries Act of 1955 (44 U.S.C. 210S).