UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
National Archives and Records Service
Washington, DC 20408

FEB 11 1977

Honorable Cyrus R. Vance
Secretary of State
Washington, D. C. 20520

ACTION is assigned to L

Dear Mr. Secretary:

As you may know, there has been some correspondence between former Secretary of State Henry A. Kissinger and me regarding certain material which Dr. Kissinger has deposited with the Library of Congress. Since official records of the Department of State may be involved, and since Dr. Kissinger received advice on the matter from the former Legal Adviser to the State Department, Mr. Monroe Leigh, I believe it is desirable that you be kept informed. I, therefore, enclose a copy of the letter I have sent today to Dr. Kissinger as well as a copy of the legal opinion of the General Counsel of the General Services Administration on the subject.

RECEIVED DEPARTMENT OF STATE

Sincerely,

James B. Rhoads

JAMES B. RHOADS
Archivist of the United States

2 Enclosures

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UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
National Archives and Records Service
Washington, D.C. 20408

FEB 11 1977

Honorable Henry A. Kissinger
1908 K Street, NW.
Washington, D. C. 20006

Dear Dr. Kissinger:

This is in reply to your letter of January 18.

In that letter you declined to permit professional archivists from the staff of the National Archives and Records Service to examine the transcripts or notes of telephone conversations which you have deposited with the Library of Congress. You included with your reply copies of your letter to the Honorable Jack Brooks, Chairman of the House Committee on Government Operations, and a January 14 legal memorandum from the Legal Adviser to the Department of State, Mr. Monroe Leigh.

While these enclosures add some information regarding the deposit of this material with the Library of Congress, they do not resolve the basic issue of whether some or all of the transcripts or notes are Federal records, Nixon historical materials, or personal papers.

Consequently, I am writing to you once again to enlist your cooperation in making it possible for qualified archivists from my staff to examine this material in order to make the necessary determinations. As I indicated in my letter of January 4, this work would be done by professional archivists who will protect any confidential information they may encounter. It is my intent to select for this purpose a small team of archivists experienced in diplomatic records, personal papers, and the appraisal of Federal records.

With regard to the legal issue involved and Mr. Leigh's memorandum, I enclose the opinion of the General Counsel of the General Services Administration. As you will note, this opinion concludes that: "The Archivist of the United States has the authority and responsibility to

make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by Former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in these positions."

In view of this opinion and in order to resolve the basic issue expeditiously, I would appreciate it if you would make the necessary arrangements with the Librarian of Congress so that the members of my staff may have access to the materials in question.

Sincerely,

James B. Rhoads

JAMES B. RHOADS
Archivist of the United States

Enclosure

cc: Honorable Cyrus R. Vance

[redacted]

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Office of General Counsel
Washington, DC 20405

DATE: FEB 03 1977

REPLY TO ATTN OF: General Counsel - L

SUBJECT: Archival inspection of Kissinger telephone transcripts and related documents

Received NA-N
FEB 3 1977

TO: James B. Rhoads
Archivist of the United States - N

Pursuant to your request, this office has examined the legal questions posed by your request to the Honorable Henry A. Kissinger, former Secretary of State and Assistant to the President for National Security Affairs, that a team of archivists be permitted to inspect certain telephone transcripts and related documents, the former constituting the corpus of the most recent donation by Dr. Kissinger to the Library of Congress. In examining these questions, we have paid particular attention to the memorandum of law dated January 14, 1977, of then Department of State Legal Adviser Monroe Leigh, which was an enclosure to Dr. Kissinger's letter to you of January 18, in which he rejected your request for archival inspection.

FACTS

Recent news accounts, which have been confirmed by subsequent events, disclosed that former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger had his secretary transcribe certain of his telephone conversations that had taken place during the course of his service in these positions. These accounts further disclosed that Dr. Kissinger had concluded that these transcripts were his personal property and, accordingly, that he could dispose of all or part of them as he chose to do. On December 24, 1976, Dr. Kissinger donated the only copy of these transcripts to the Library of Congress, pursuant to an instrument accepted by the Library which provides for lengthy and frequently indefinite periods of restricted access. Concerned that all or part of the transcripts might be federal records or Nixon historical materials rather than personal papers, you wrote to Dr. Kissinger on January 4, 1977, and requested that he permit a team of experienced archivists to inspect them and related documents, and subsequently issue a report to him on your findings. By a letter to you dated January 18, Dr. Kissinger, enclosing undated correspondence with the Honorable Jack Brooks, Chairman, House Committee on Government Operations, and a memorandum of law dated January 14, of then Department of State Legal Adviser Monroe Leigh, rejected your request for archival inspection of the transcripts and related documents. In his letter to Chairman

Brooks, Dr. Kissinger stated that he had assigned then Deputy Under Secretary of State Eagleburger the task of making extracts of those portions of the transcripts which reflect "significant government activity or decision . . .. These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files."

ISSUES

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a cabinet officer in the course of his service in that capacity are federal records as defined in the Federal Records Act (44 U.S.C. 2101 et seq.)?

Does the Archivist of the United States have the authority and responsibility to make an independent determination of what documentary materials created or received by a White House adviser to former President Nixon in the course of his service in that capacity are Presidential historical materials of the Nixon Administration as defined in Title I of the Presidential Recordings and Materials Preservation Act (P.L. 93-526; 88 Stat. 1695; 44 U.S.C. 2107 note), as implemented by the proposed public access regulations of the Administrator of General Services (40 CFR, Part 105-63)?

CONCLUSION

The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

DISCUSSION

I. There is one glaring oversight in the memorandum of law which accompanied Dr. Kissinger's rejection of your request for archival inspection of the telephone transcripts and related documents. It totally ignores any examination of the statutory and regulatory authorities and responsibilities of the Administrator of General Services, as delegated to the Archivist of the United States, which flow from the Federal Records Act and Presidential Recordings and Materials Preservation Act. Instead, the memorandum confines

its examination of pertinent statutes and regulations to only that portion of the Federal Records Act which relates to the records management responsibilities of agency heads, as implemented by State Department regulations. (Throughout the entire memorandum there is no reference or discussion of Title I of the Presidential Recordings and Materials Preservation Act; hence, there is no consideration whatsoever of Nixon historical materials.) Viewed in this limited perspective, the memorandum concludes that the responsibility for determining the character of the transcripts rests solely with the agency head, i.e., Dr. Kissinger. The heart of Mr. Leigh's rationale is expounded in one of his initial paragraphs:

> Whether the notes in question are personal or official papers must, in the final analysis, be considered in light of the Federal Records Act, 44 U.S.C. 3101 et seq., and the Department of State regulations, promulgated under that Act. There is not under present law any carefully defined, government-wide legal standard for distinguishing personal from official papers. (Indeed the absence of such a government-wide standard is the reason why the present National Study Commission on Records and Documents of Federal Officials was created.) Instead, existing legislation leaves it to each federal agency to determine how records should be made and preserved, and to provide for "effective controls over the creation, maintenance and use of records." 44 U.S.C. 3101 and 3102.

Each of the sentences in this "definitive" paragraph contains a statement that is either erroneous or incomplete, or both. The first sentence implies that chapter 31 of title 44, United States Code, "Records Management by Federal Agencies", contains standards by which an agency head is instructed on making determinations of what documentary materials constitute federal records. To the contrary, there is no section of chapter 31 that provides this guidance. Indeed, the emphasis of the chapter reflects the oversight function of GSA and supports your request for archival inspection of the transcripts. For example:

> The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for . . . (2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance

and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value . . ..

* * *

The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Administrator of General Services.

* * *

The head of each Federal agency shall notify the Administrator of General Services of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Administrator shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency . . ..

(44 U.S.C. 3102, 3105 and 3106, respectively)
[Emphasis added.]

These sections of chapter 31 make it quite clear that every agency head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA. To dismiss the oversight authorities and responsibilities of the Administrator, as delegated to the Archivist, is to ignore the plain reading of even this particular chapter of title 44.

The second sentence of the subject paragraph, which states that there are no carefully defined, government-wide standards under present law to distinguish federal records from personal papers, is, in our view, wholly erroneous. While we assume Mr. Leigh would argue that present standards are not "carefully defined," we believe the current definition of federal records, considered by the Congress as recently as October 21, 1976, provides a great deal of insight on a complex subject:

> "[R]ecords" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public

> business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included. (44 U.S.C. 3301)

While there is no definition of "personal papers" in the Federal Records Act, NARS has issued government-wide standards concerning their scope for over 10 years, and as recently as November 15, 1976. Quite logically, the definition of "personal papers" is derived from the converse of the definition of federal records:

> The definition of official records involves materials made or received either in pursuance of Federal law or in connection with the transaction of public business. The definition of personal papers covers material pertaining solely to an individual's private affairs. In other words, correspondence, designated "personal," "confidential," or "private," etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records. Official records are public records and belong to the office rather than to the officer.
> (GSA Bulletin FPMR B-65, Para. 3(c), November 15, 1976)

Given a subject matter as complex as federal records, it would be foolish to suggest that every document created or received by a federal official falls neatly in one category or another. But it is the very existence of a "gray area" that argues so strongly for the input of professional archivists in the decision-making process. These archivists within NARS are the persons most experienced in applying the criteria (subject matter, adequacy of alternative documentation, circulation, etc.) necessary for making these determinations.

In addition to the standards pertinent to federal records, there are also standards pertinent to the Presidential historical materials of the Nixon Administration. This subject, while ignored in the Leigh memorandum, is most important to the proper disposition of those transcripts

created in the course of Dr. Kissinger's service as Assistant to the President for National Security Affairs. Title I of the Presidential Recordings and Materials Preservation Act requires the Administrator of General Services to

> receive, retain, or make reasonable efforts to obtain complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon . . ..

The Administrator is further instructed to

> issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials . . . from loss or destruction . . ..
>
> (Sections 101(b)(1) and 103, respectively, of the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695, 44 U.S.C. 2107 note)
> [Emphasis added.]

Pursuant to this authority, GSA has proposed regulations which include definitions of Nixon "Presidential historical materials", which must remain in or be transferred to the custody and control of the Administrator, and "private or personal materials", which are to be returned to former President Nixon or the member of his staff having a proprietary interest in them.

> The term "Presidential historical materials" . . . shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory duties or political activities as President and retained or appropriate for retention as evidence of or information about these duties and activities. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stocks of publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.

> The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities, including private political association, and having no connection with his constitutional or statutory duties or political activities as President or as a member or the President's staff.
>
> (41 CFR §105-63.104(a) and (b), respectively, as most recently transmitted to the Congress on April 13, 1976)
> [Emphasis added.]

It should be noted that elsewhere in Mr. Leigh's memorandum, where he states that GSA advocates too narrow a definition of personal materials, he cites the Congress' rejection of the latter definition as support for his contention. Contrary to his implication that the Congress does not support this narrow view of personal materials, the Congress has rejected this definition because it deems the proposed definition too broad. In particular, the House of Representatives has rejected the definition because of the inclusion of the phrase, "including private political association," in describing those materials which are private or personal.

The third sentence of the pertinent paragraph states that the Congress created the National Study Commission on Records and Documents of Federal Officials in an effort to clarify the definitions of official records and personal papers. This is a clear misstatement of the basic purpose of the so-called Public Documents Commission. As you are so keenly aware, the Congress created the Commission in the aftermath of the "Nixon-Sampson Agreement", which concerned the ultimate disposition of the Presidential materials of the Nixon Administration, and had nothing to do with federal records. There is nothing in the language of Title II of the Presidential Recordings and Materials Preservation Act (44 U.S.C. 3315 et seq.) or its legislative history which focusses the Commission's attention to an overhaul of existing statutes which regulate access to and the disposition of federal records, notably the Federal Records Act, the Freedom of Information Act and the Privacy Act of 1974. While there is a great deal of law pertinent to the disposition of federal records, there is almost no law pertinent to the disposition of the papers of constitutional office-holders. The primary purpose of the Public Documents Commission is to examine this dearth of law and to make recommendations to the Congress on the scope of remedial legislation.

The final sentence of the subject paragraph reiterates the memorandum's conclusion that it is within the sole province of each agency "to determine how [its] records should be made and preserved." In addition to those sections of chapter 31 cited above, this analysis again ignores those other portions of the Federal Records Act which establish the oversight authority and responsibility of the Administrator, as delegated to the Archivist. For example:

> When the Administrator finds that a provision of chapter 21, 25, 27, 29, or 31 of this title has been or is being violated, he shall inform in writing the head of the agency concerned of the violation and make recommendations for its correction. Unless corrective measures satisfactory to the Administrator are inaugurated within a reasonable time, the Administrator shall submit a written report of the matter to the President and the Congress.
> (44 U.S.C. 2111(b)) [Emphasis added.]

In the present instance you are aware of a possible violation falling within your area of responsibility. You have informed the agency head of your concern, and have recommended an archival inspection of the subject transcripts and related documents as a means of aiding in the resolution of the dispute. These actions are clearly within the purview of section 2111(b), quoted above. If you deem Dr. Kissinger's rejection of your request an unsatisfactory corrective measure, ultimately it is encumbent upon you to report thereon to the President and the Congress. In the interim, pursuant to section 3106 of title 44, quoted above, you might also refer the matter to the Attorney General for such action as he deems appropriate.

In like manner, section 2906 of title 44 authorizes the Administrator to "inspect the records or the records management practices and programs of any Federal agency" for the purpose of recommending improvements in those practices and programs. It is important to note that records management is elsewhere defined (44 U.S.C. 2901(2)) to include records disposition.

II. As an affirmative basis for the determination by Dr. Kissinger that the transcripts are personal, the Leigh memorandum cites a State Department records management regulation which provides a clear standard for distinguishing federal records from personal papers:

> The Department's regulations establish a pragmatic test for determining what papers a retiring official may retain as personal. If a paper has been explicitly designated or filed as personal from the time of origin or receipt, it is considered to be personal and may be retained; on the other hand, if a paper has not been so designated or filed, or if it has been circulated within the agency, it is considered to be an agency record.

This regulation is apparently derived from a provision of the Federal Property Management Regulations:

> Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all

> times be filed separately from the official records of his office.
> (41 CFR §101-11.202-2(d)) [Emphasis added.]

The distinction between the internal State Department directive and the government-wide FPMR, which dates from February 1967, is striking. When the Leigh memorandum later states that your directive of November 15, 1976, is the first time NARS established "so far-reaching a definition of official records," the author apparently overlooked this precedent going back over 10 years.

Further, while the State Department regulation is certainly "pragmatic" to the extent it minimizes the "gray area", we suggest that, in limiting the applicable criteria to the document's designation, filing and/or circulation, it is invalid. Even though each of these criteria is important in determining the distinction between federal records and personal papers, a federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal, filing it separately, or withholding it from circulation. Were that the intent of Congress in enacting the Federal Records Act, the Freedom of Information Act, and related legislation, some of the most significant documents reflecting the conduct of public business would never be subject to public scrutiny.

The State Department regulations appear to recognize this discrepancy. As explained in the Leigh memorandum, the remedy is sought in an extraction requirement:

> However, even though a paper may be considered personal, official policy matters discussed in such a paper must be extracted and forwarded for inclusion in Department records. [Cite omitted.] The Department has consistently construed this provision as requiring a departing official to extract any significant government activity or decision that may be reflected in such a paper.

This particular regulation is apparently derived from a second proviso of FPMR 101-11.202-2(d):

> In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files . . ..

Again there is a clear distinction between the extraction standard established in the government-wide FPMR and that standard established internally at the State Department, at least as that regulation is interpreted by the Leigh memorandum. While the FPMR requires the extraction of "the portion . . . that pertains to official business," the State Department standard requires the extraction of only "any significant government activity or decision." Conceivably, in some instances an extraction performed under State Department standards may be synonymous with an extraction performed under FPMR standards. But at the same time it is reasonable to conclude that in many instances the extraction of information about "significant government activity or decision" will encompass less material than information "that pertains to official business." These differing standards highlight the rationale of archival review and oversight.

There is another significant aspect to the affirmative reliance on the State Department regulations in the Leigh memorandum. Inasmuch as these regulations are apparently derivatives of the Federal Property Management Regulations, they represent the delegation of government-wide records management authority vested in the Administrator to the Secretary of State for purposes of managing State Department records. It is a maxim of the law of agency that the principal, i.e., the Administrator (or in this instance the Archivist), may revoke fully or partially the authorities delegated to the agent, i.e., the Secretary of State. Your request to Dr. Kissinger is consonant with this maxim.

III. The myriad quotations and citations of statutes and regulations make unequivocal the oversight authority and responsibility of the Administrator of General Services, as delegated to the Archivist of the United States, in resolving the questions which have arisen concerning the disposition of the Kissinger telephone transcripts. There are, however, certain other points raised in Mr. Leigh's memorandum which warrant our attention. First, on page 3 he states: "It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations." While we reserve judgment on the question of whether any statute requires their retention pending the resolution of their character, we call into question the significance of the fact that no statute mandated their creation. With rare exception, this is true of any particular documents we call federal records. The significance to the custodial agency and GSA is not that they didn't have to be created, but that they were created. Given the fact of their creation and existence, they may be disposed of only in accordance with applicable statute and regulation (44 U.S.C. 3314).

Second, the memorandum rejects GSA intervention because of a disqualifying advocate's interest in the ultimate resolution of the controversy. This is a patently absurd reason for rejecting your request. Your interest in the

matter derives from your statutory authorities and responsibilities over the subject matter. That your conception of the scope of personal papers might differ from that of Dr. Kissinger has absolutely no bearing on your authority and responsibility to intervene.

Third, the memorandum cites an oral opinion of the Justice Department's Office of Legal Counsel that the transcripts in question are not federal records. In subsequent conversations between attorneys in this office and the officials in the Office of Legal Counsel who were instrumental in issuing that opinion, we have learned that the issue presented that office by the State Department concerned a Freedom of Information request for access to certain transcripts created by Dr. Kissinger in his capacity of Assistant to the President for National Security Affairs. Because the "White House Office" is specifically excluded from the definition of agencies subject to the FOIA, these transcripts were logically determined not to be records subject to the FOIA. Of course, such an opinion does not confront the issues of whether the transcripts created in the course of Dr. Kissinger's service in the Nixon White House are Nixon historical materials, or if the transcripts created in the course of his service as Secretary of State are federal records.

Finally, we touch on the question of the potential harm caused by archival examination of what are truly personal materials. While conceding the possibility of some invasion of the privacy of Dr. Kissinger or certain of the persons with whom he was speaking, we believe this threat is far outweighed by the public interest served by archival inspection. It is also noted that the instrument deeding these transcripts to the Library of Congress incorporates a provision for access to the transcripts by approved Library of Congress employees during their period of restriction. If these federal librarians or archivists can be so entrusted with access to the transcripts, we question the logic in the exclusion of archivists employed by NARS. To be sure, a three-judge panel of the United States District Court for the District of Columbia has recently recognized the "unblemished record" of GSA archivists for protecting individual privacy while rejecting former President Nixon's contention that archival inspection of his materials will result in an unconstitutional invasion of his privacy. (Nixon v. Administrator of General Services, 408 F. Supp. 321, 365-67 (D. D.C. 1976), probable jurisdiction noted, Supreme Court of the United States (No. 75-1605, November 29, 1976)).

RECOMMENDATION

This office recommends that you renew your request for archival inspection of the transcripts and related documents to Dr. Kissinger, providing a copy of your request to the present Secretary of State. Should your request be rejected or go unanswered, we recommend consultation with appropriate officials of the Department of Justice in determining your next course of action.

DONALD P. YOUNG
General Counsel