

SERIAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, DC 20408



January 4, 1976

Honorable Henry Kissinger
Secretary of State
Washington, D.C. 20520

Dear Mr. Secretary:

It has come to my attention that materials relating to your public service are being deposited in the Library of Congress under terms that are based upon the presumption that such materials are or were personal property. Among these materials you have included a set of transcripts or notes that were systematically kept reflecting the substance of telephone conversations.

I recognize that you obtained the advice of legal counsel in the Department of State concerning these telephonic transcriptions. I also appreciate fully the sensitive nature of your responsibilities in the national security and foreign relations areas and the concomitant requirement that candid and unguarded conversation in the conduct of foreign relations must be duly protected.

Nonetheless, as Archivist of the United States, by authority delegated to me by the Administrator of General Services, I am responsible by law (sections 2103, 2904, 2905, and 3303a of title 44, United States Code) for ascertaining that Federal agencies create, maintain and dispose of their records in an efficient and lawful manner, and that they preserve records of permanent historical value for eventual deposit in the national archival system. Further, in accordance with Title I of the Presidential Recordings and Materials Preservation Act (P.L. 94-526; 44 U.S.C. 2107 note), I am responsible for assuming custody and control of the Presidential historical materials of the Nixon administration. I believe these statutory authorities and responsibilities require that I conduct an inspection of the documentary materials mentioned above to verify the conclusions made and actions taken concerning them.



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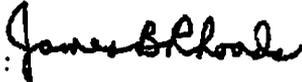
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To carry out these responsibilities I enlist your cooperation in permitting qualified archivists from my staff to be given the opportunity to examine the telephonic transcriptions and any related documents that you have deposited with the Library of Congress. These professional archivists will determine whether such materials are, indeed, personal property or whether some portions of them may be Federal records or Nixon historical materials. I guarantee the protection of any confidential information which these archivists may encounter during their inspection. In addition, I ask your cooperation as Secretary of State in providing access to any memoranda of conversations or other pertinent records in the Department of State that may assist our archivists in carrying out their task.

I would appreciate your making arrangements with the Librarian of Congress so that my staff can have access to these materials for the purposes of this determination. When the process is completed I plan to formulate a report, including recommendations, which I shall transmit to you and, as appropriate, to officials in the White House and the Department of State.

Sincerely,



JAMES B. RHOADS
Archivist of the United States

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THE SECRETARY OF STATE
WASHINGTON

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January 18, 1977

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Dear Dr. Rhoads:

I write in response to your letter of January 4, in which you inquire about the donation of my papers to the United States for preservation at the Library of Congress and, in particular, about that portion of the donation that comprises the secretarial notes of my telephone conversations.

Apparently, there has been some misunderstanding or at least incomplete information concerning this donation. So that you may be apprised of what has occurred, I enclose a copy of a letter I have sent to the Chairman of the House Committee on Government Operations, which describes in detail the scope of the donation and the steps taken to assure completeness of Department of State records.

I also enclose a copy of a memorandum by counsel to the Department, which discusses several problem areas that might arise if the additional procedures contemplated in your letter were followed. With respect to the procedures which have been followed to date, I have requested the records officers of the Department to answer any further questions you may have concerning the steps taken.

Best Regards,


Henry A. Kissinger

Enclosures:
as stated above

Dr. James B. Rhoads,
Archivist of the United States,
National Archives and Records Service.

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WASHINGTON

Dear Mr. Chairman:

I write in response to your letters of January 3 and January 11, concerning the donation of my papers to the United States for preservation at the Library of Congress.

In confirmation of your conversation with the Deputy Under Secretary of State, Mr. Lawrence Eagleburger, I wish to reiterate the following details concerning the scope of the donation and the steps undertaken to assure the completeness of Department of State records.

First, all government papers that have been donated to the Library of Congress are copies and not original records. Documents officers have carefully reviewed all of these papers to make certain that all original or record copies are included in the appropriate files at either the Department of State, National Security Council, or White House, and that only copies have been included in the files that have been transferred to the Library.

Second, in addition to government papers, I have donated papers relating to my personal life, both before and during my years of government service. This portion of the donation includes, for example, papers from my years at Harvard University.

The Honorable
Jack Brooks,
Chairman,
Committee on Government Operations,
House of Representatives.

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Third, I have donated under a separate instrument, the secretarial notes of my telephone conversations. These papers have been consistently treated as personal work aids. The special privacy considerations raised by these notes are reflected in the separate instrument of gift. Counsel to the Department of State has thoroughly reviewed the applicability of Department of State regulations to these papers, and has advised that under these regulations and other legal authority, the papers are personal. The only copies of these papers are at the Library of Congress.

However, also pursuant to Department of State regulations, Deputy Under Secretary Eagleburger is at my direction reviewing these notes of telephone conversations and is extracting any significant government activity or decision that may be reflected in them. These extracts will be forwarded to the appropriate government offices or agencies for inclusion in government record files.

Both in executing and in implementing the donations to the Library of Congress, I have endeavored to follow in both letter and spirit the applicable Department of State regulations. I am advised that these regulations, which have been in effect since 1967 and which were promulgated pursuant to 44 U.S.C. 3101 and 3102, have been scrupulously followed with respect to my papers.

I wish to note that the Department's regulations serve a number of relevant policy considerations. They assure that the Department has continuing access to information needed for the conduct of foreign policy. They also respect privacy expectations in papers that have been consistently treated as personal. This aspect of the regulations has enabled numerous Department officials to originate candid diaries and notes which reflect their official activities and which have proved to be invaluable historical legacies. Although I am

not in a position to make a similar claim for the minor portion of my papers that I have treated as personal, I am convinced that the policy reflected in the Departmental regulations of 1967 serves to promote candid accounts of government service which would not otherwise be created. Such accounts would certainly not be created if the accompanying privacy expectations did not continue to be respected.

I wish to assure you, as I have assured others, that the Department of State will have complete records of the foreign policy actions and decisions in which I have participated as Secretary of State. With respect to the donations I have made, all of the papers in question are to be preserved for future scholars at an institution of unquestioned integrity, the Library of Congress. As you may know, the Library has preserved the papers of 27 other Secretaries of State. It is my sincere hope that when the donation is considered in this perspective, it will be viewed as a positive and responsible contribution.

Best regards,

Henry A. Kissinger

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

January 14, 1977

MEMORANDUM

By a letter dated January 4, 1977 to Secretary of State Kissinger, the Archivist of the United States has inquired about Secretary Kissinger's donation of papers to the Library of Congress, and, in particular, about that portion of the donation consisting of secretarial notes of Secretary Kissinger's telephone conversations. The letter requests that GSA archivists be permitted to review these notes, so that they might make their personal assessments as to whether these notes consist of personal or agency records.

It appears that the request has not taken into account the following factors: (1) that the nature of the notes in question must, under present law, be determined according to the Department of State regulations; (2) that the Department's records interest is met by the "extract" requirement; (3) that the GSA is not an appropriate entity to review the notes, because of its advocate's interest in seeking a government-wide rule for distinguishing personal from official papers; (4) that other legal authority fully supports the policies reflected in the Department of State regulations; and (5) that Department policies would be prejudiced by the requested review. This memorandum discusses each of these points in detail.

1. Role of Department of State Regulations

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.

Pursuant to this statutory authority, the Department of State in 1967 promulgated regulations concerning maintenance of records and, in particular, concerning what papers a retiring official may retain as personal. 5 FAM 417.1 and 432. Inasmuch as these Department regulations are controlling, it is the responsibility of Department of State officers, and not GSA archivists, to ascertain what steps are being taken to assure continuing Department access to information which may be reflected in the notes in question and which might be needed for the conduct of foreign policy.

2. The "Extract" Requirement

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. 5 FAM 417.1. This working test for distinguishing personal from official papers attempts to respect, in a realistic fashion, privacy expectations that an individual Department employee or official may have with respect to a paper.

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. 5 FAM 432. 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. (Note that the very existence of an extract requirement is based on the premise that there are categories of personal papers which may and do contain discussions of official activities and that such discussions of official activities do not alter the personal nature of these papers.)

At present, the secretarial notes of Secretary Kissinger's telephone conversations are being reviewed at his direction, in order to ascertain which portions of them must be extracted for inclusion in appropriate foreign policy record files. In light of this review, it would be highly unusual if these same papers were to be subjected to a second review by persons unfamiliar with the current state of foreign policy. We would, of course, anticipate that in future years, when foreign policy records are normally reviewed within the State Department to determine whether they should be transferred and preserved at the National Archives, these extracts will also be reviewed for that purpose.

It should be noted that no statute required Secretary Kissinger to make and retain candid notes of telephone conversations. The only requirement is that significant government activities or decisions undertaken by a Secretary of State by telephone be reflected in government records. This requirement is being fully satisfied, so that the agencies of the United States Government concerned with the conduct of foreign policy will have the information needed for the conduct of foreign policy in coming years. Also, in the event that some of these extracts may pertain directly to the Nixon or Ford Presidencies (as opposed to National Security Council or Department of State business), they are to be forwarded for inclusion in the White House files for those periods.

3. GSA's Advocate's Interest

Recently, the GSA has espoused a view that personal papers are limited to material pertaining solely to an individual's private affairs, and not at all to his official activities. This view implies that traditionally personal materials (like diaries, notes and family correspondence) which discuss a person's official activities, are official records. The GSA advocated this position in proposed regulations under the Presidential Recordings and Materials Preservation Act, but it was expressly rejected twice by the Congress in the past year. S. Res. 428; H. Res. 1505; see H. Rep. No. 94-1485 of 4-5 (1976). This approach, among others, has also been suggested to the National Study Commission on Records and Documents of Federal Officials, which has the task of proposing for the first time, government-wide legislation on the personal-official paper distinction. In that forum, GSA is a proponent for a definition of official records that is inconsistent with Department of State regulations. In view of this advocate's interest, it would not seem appropriate for GSA archivists to preempt the Department of State by reviewing the notes in question.

We, of course, are aware of the recent GSA Bulletin FPMR B-65 (November 15, 1976), which undertakes to summarize existing law with respect to records. Significantly, the only paragraph in that "summary" that is not supported by a statutory citation is paragraph 3c, which advances the GSA's recent proposal on the distinction between official and private papers. In this regard, no provision of the GSA Federal Property Management Regulations of February 1967 contains so far-reaching a definition of official records as that contained in paragraph 3c of GSA Bulletin FPMR B-65.

4. Other Legal Authority

Recent judicial decisions have firmly supported the view, embodied in Department of State regulations, that personal papers can include discussions of official activities,

United States v. First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958), and that such personal records of official activity are not agency records, Porter County Chapter v. A.E.C., 380 F. Supp. 630 (W.D. Ind. 1974). The same conclusion is set forth in the OMB Guidelines to the Privacy Act (40 F.R. 28952), which makes clear that "agency records" do not include "uncirculated personal notes, papers and records" -- even if such materials are "in possession of agency employees and used by them in performing official functions."

Also, in the last government-wide pronouncement on what papers a retiring official may retain -- Cabinet Paper CP-59-58-4, July 27, 1959 -- it states that "since such work-aids as office diaries, logs, memoranda of conferences and telephone calls are usually reflected in actual agency records, such work-aids ordinarily can be removed."

In a related context, the Department last January received a Freedom of Information Act request relating to some of the notes in question. Before responding to the request, we consulted with the Office of Legal Counsel at the Department of Justice, which orally concurred in our position that the notes sought were not agency records subject to the Freedom of Information Act. Attached for reference is a recent Department of Justice press guidance concerning these events. I call attention to the conclusion that one of the grounds for denying the request "was that the request included documents which were not 'agency records' within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger."

5. Prejudice to Department Interests

The Department of State regulations serve a number of important policy interests -- in particular, access by the Department to full information needed for the conduct of foreign policy, and respect for privacy expectations which an individual may have in regard to a paper that has been consistently treated as personal. It should be noted that the respect for privacy expectations implicit in the Department's regulations has enabled numerous Department officials to originate candid diaries and notes which have proved to be invaluable historical resources.

If present practices were changed so as to preclude an official's private papers from containing material concerning his conduct in office, these candid and intimate sources of history would not be created. And, of equal concern to the Department, matters that are currently set down on paper might cease to be recorded.

In summary, it is my view that the procedure contemplated in the Archivist's letter of January 4 would present a number of difficulties for the Department and the administration of its records policies.

Monroe Leigh
Monroe Leigh

Department of Justice Press Guidance (12/23/76):

The Department of Justice has received requests for copies of a formal legal opinion thought to have been issued by the Department concerning the ownership of secretarial notes of telephone conversations of Secretary of State Kissinger. No such opinion exists. Early this year, however, in accordance with normal practice, the Office of Legal Counsel of the Department was consulted informally with respect to the proposed denial of a Freedom of Information Act request which sought such material relating to certain of Mr. Kissinger's telephone conversations. On the basis of a general description of the material involved which included both transcribed and untranscribed notes, the Assistant Attorney General for the Office of Legal Counsel orally approved the propriety of denying the request on several grounds, one of which was that the request included documents which were not "agency records" within the meaning of the Freedom of Information Act, 5 U.S.C. §552, but rather personal notes and records of Mr. Kissinger.

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