DEPARTMENT OF STATE

Washington, D.C. 20520

3/29/76

Dear Mr. Safire:

This is with respect to your letter of February 24, 1976, in which you "appeal the denial of [your] request for information from transcripts of telephone conversations now in the custody of Mr. Lawrence S. Eagleburger of the State Department."

Your original Freedom of Information Act request of January 14, 1976, seeks two categories of materials from telephone conversations that Dr. Kissinger participated in between January 21, 1969, and February 12, 1971:

1. "All transcripts (including rough drafts, if such exist) in which my name appears."

2. "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 Mr. Kissinger and President Richard M. Nixon in which the subject of 'leaks' of information was discussed."

Mr. William Safire
New York Times Bureau,
1920 L Street, N.W.,
Washington, D.C.

In the Department's letters of February 11 and March 2, it was indicated to you that since the documents encompassed by your request were not "agency records" within the meaning of the Freedom of Information Act, you were not technically entitled to an appeal under the Department of State's regulations. 22 C.F.R. 6.8. Although we are still of the view that you are not entitled to an appeal, we have employed the same procedures to your request as would be applicable to an appeal.

Your letter of February 24 raises the following points concerning the legal status of the documents encompassed by your request:

1. Your letter asserts that the documents encompassed by your request must be agency records of the Department of State, because they are physically located at the Department of State in the custody of the Executive Assistant to the Secretary who is also a Department of State employee. The Department's Office of the Legal Adviser, however, advises us that the law is clear that the current location of a document does not control the document's status under the Freedom of Information Act, and that documents which are originated in a White House office by a member of the President's immediate staff, such as the President's Special Assistant for National Security Affairs, are not subject to the Act. Senate Report No. 93-1200, at 15 (1974). It should also be noted that the memoranda of telephone conversations have not been preserved as evidence of Department of State business. As indicated in the Department's earlier letter, the Department's Office of the Legal Adviser determined that the documents you seek are not "agency records" within the meaning of the Freedom of Information Act. The Office of the Legal Adviser has again reviewed this issue and has reaffirmed its original view.

2. Having reviewed the documents covered by your request, the Department's Council on Classification Policy has determined that, in the event the documents you seek should be deemed to be agency records, exemption 5 under the Freedom of Information Act would be clearly applicable. The documents reveal the detailed mental processes of government officials, as well as portray some discussions of policy and decision alternatives.

3. Your letter asserts that "an additional claim of invasion of privacy, especially in those matters concerning this appellant [i.e., yourself], is in error." The Department's Office of the Legal Adviser advises, however, that yours are not the only privacy interests which may be at stake. For example, if a memorandum of conversation mentioned the names of several persons, including yours, privacy interests might be at stake for all of the persons mentioned, as well as for the actual parties to the conversation. If your Freedom of Information Act request turned on the privacy interests of others besides yourself, these interests could not be ignored.

4. Your letter suggests a government official circumvents the Privacy Act "simply by refraining from indexing material that ought to be available to citizens." The Department's Office of the Legal Adviser has indicated to us that the Privacy Act does not require indexing; that it would be incongruous for legislation designed to protect privacy to require government officials to index all documents in their custody, and thereby arm themselves with greater access to information about individual citizens; and that since the documents covered by your request are not contained in any file which is retrievable or indexed by any name or identifying symbol or code, they are not subject to disclosure under the Privacy Act. Having examined the documents, the Council on Classification Policy has found that the documents are not contained in files which are indexed by any name or identifying symbol or code.

In summary, having reviewed your letter of February 24, the Department has concluded that the documents you seek are not subject to disclosure under the Freedom of Information Act because they are not agency records. Even if they were deemed to be agency records, the Council on Classification Policy has determined that exemption 5 under the Freedom of Information Act would clearly exempt these documents from disclosure.

Sincerely,

John Reinhardt
Chairman
Council on Classification Policy

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DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM
LIMITED OFFICIAL USE/EXDIS

March 26, 1976

TO : PA - Mr. John Reinhardt, Chairman
Council on Classification Policy

FROM : L - Monroe Leigh ML

SUBJECT: Safire FOI Requests of January 14 and February 24

On January 14, 1976, William Safire of the N.Y. Times requested under the Freedom of Information Act (FOI) memoranda of telephone conversations of Dr. Kissinger for the period January 21, 1969, to February 11, 1971 (Tab 2). Specifically he requested all "transcripts" of telephone conversations in which (a) he is mentioned by name, or (b) in which the subject of "leaks" is discussed between Dr. Kissinger and either Mitchell, Haig, FBI Director Hoover, other FBI officials, or former President Nixon.

On February 11, the Department denied the request (Tab 3) on the ground that documents sought by Safire are not "agency records" within the meaning of the FOI. Other possible grounds for denial were also cited.

On February 24, Safire sent a letter (received on March 1) in which he "appeals" the denial of his request (Tab 4). We have sent an interim reply (Tab 5) in which we reiterate that although Safire is not technically entitled to an appeal because the documents he seeks are not agency records, we would give prompt and thorough consideration to the points he raises.

Recommendations:

1. Because of the sensitive nature of the documents involved, we recommend that you appoint a special three person panel for the members of the Council on Classification Policy (CCP) to review, as soon as possible, Safire's request and the documents Safire seeks. Part III A(2) of the CCP rules provide for such a procedure (Tab 6).

2. Having again reviewed Safire's request, we recommend that the CCP deny Safire's request on the ground that the documents Safire seeks are not agency records within the meaning of the FOI.

3. If the CCP concurs with our analysis, we recommend that you sign and send by March 29 the letter at Tab 1.

Discussion:

The telephone conversation memoranda sought by Safire fail to qualify as "agency records" under the FOI on either of two grounds: (a) the memoranda were originated at the White House at a time Dr. Kissinger was the President's Special Assistant for National Security Affairs; and (b) the memoranda have not been preserved as evidence of any agency business, but as work aids of Dr. Kissinger.

a. It is settled that an agency record under the FOI does not include documents that have been prepared at the White House by the President's immediate staff of advisers. Thus, in the Conference Report to the 1974 amendments to the FOI, it states:

> The term ("agency") is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. (Senate Report No. 93-1200, 93rd Cong. 2nd Sess., at 15 (1974)).

The Conference Report also states that Congress wished to affirm the result in Souci v. David, 448 F. Supp. 1067 (D.C. Cir. 1971). In that case, the court held that a separate office located in the larger Executive Office of the President, and vested with special statutory functions, was an "agency" under the FOI; but it also indicated that presidential advisers sering on the President's immediate staff were not part of any "agency" for FOI purposes. This view was also confirmed in Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), where the court said that documents originating in the immediate office of the President are not agency records subject to the FOI. For this reason, the telephone conversation memoranda requested by Safire, which were originated in the office of the National Security Adviser to the President between January 1969 and February 1971, are not agency records within the meaning of the Freedom of Information Act.

b. In order for a document to qualify as a "record" of an agency, it must be "preserved as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities" of an agency. 22 C.F.R. 6.1(b); 44 U.S.C. 3301. Dr. Kissinger's memoranda of telephone conversations have not been preserved as evidence of any agency's business or activities. Rather, they have been preserved as a work aid, to give Dr. Kissinger some basis for recalling the innumerable conversations he had on foreign policy matters while serving as the President's Special Assistant for National Security Affairs.

There is some authority which holds that an individual's work aids, even if originated within an agency, are not agency records for FOI purposes. In Porter County Chap., Etc.v. Atomic Energy Commission, 380 F. Supp. 630 (N.D. Ind. 1974) it was held that handwritten notes which were prepared by AEC staff members in connection with their official duties and which were not circulated to or used by anyone other than the authors, were not agency records under the FOI. The court made the following findings:

> In executing their responsibilities relating to the AEC's health and safety and environmental reviews, individual AEC staff members frequently prepare assorted handwritten materials for their own use. Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records," nor is there any indication in the record that anyone other than the author exercises any control over such documents. [380 F. Supp. at 633.]

Having noted that the handwritten notes were not "circulated to or used by anyone other than the authors," the court concluded:

> On the basis of its review of the documents in issue, ... the Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff

> members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to dissemination publicly. Even if the records were "agency records," their disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. Such notes would not be available by discovery in ordinary litigation. [Id.]

In sum, there is very strong support for the conclusion that the documents which Safire seeks are not agency records and, thus, need not be disclosed under the Freedom of Information Act.

The present location of documents. The fact that a document is presently located in an agency such as the Department of State is not a determinative of the question of whether the document is an agency record. What is critical is where the document was originated. There are cases which hold that a document presently located in the Office of the President, but originated in an agency, are considered to be records of the originating agency. Nixon v. Sampson, supra, 389 F. Supp. at 145-46; see EPA v. Mink, 410 U.S. 73. The converse should follow particularly where, as with the Secretary's memoranda, the documents have not been circulated within an agency and have not been preserved as evidence of any agency's business.

Although the Safire request should be denied on the ground that the documents he seeks are not agency records, it would be helpful in future litigation to reiterate that even if the memoranda were deemed to be agency records, other defenses would undoubtedly be available. We believe that virtually all, and perhaps all, of the memoranda are withholdable under one or more of the following defenses: Exemption 5 for intra-agency memoranda; exemption 1 for classified material; and invasion of privacy.

Exemption 5: Intra-Agency Memoranda. Memoranda of conversations between two government officials readily fit within the concept of an inter-agency or intra-agency memorandum under FOI Exemption 5. As for conversations between Dr. Kissinger and persons outside the government, two cases indicate that memoranda of such conversations would be covered

by Exemption 5 if the conversation involved the expression of opinions or recommendations to Dr. Kissinger. Wu v. National Endowment for Humanities, 460 F. 2d 1030 (5th Cir. 1972); Soucie v. David, 448 F. 2d 1067, 1978 n. 44 (D.C. Cir. 1971).

Not all intra-agency memoranda are protected under Exemption 5, but only those which "would not be available by law to a party...in litigation with the agency." Clearly, this would encompass advice and recommendations as to what decision or policy the government should adopt. There is also a growing doctrine that the "mental processes" of a government official in arriving at a decision or policy should also be protected. Montrose Chemical Corp. v. Train, 491 F. 2d 63 (D.C. Cir. 1974) citing Morgan v. United States, 313 U.S. 409, 422 (1941); International Paper Co. v. FPC, 438 F. 2d 1349, 1358-59 (2d Cir. 1971); Soucie v. David, supra, 448 F. 2d at 1067; cf. Vaughn v. Rosen, 523 F. 2d 1136 (D.C. Cir. 1975), holding that not all "pre-decisional" documents are exempt, but only those which express "opinions on legal or policy matters" or are "a part of the agency give-and-take...by which the decision itself is made."

Most of the memoranda sought by Safire clearly involve a "give-and-take" on foreign policy matters between Dr. Kissinger as National Security Adviser and other persons. Moreover, to reveal these memoranda would reveal the "mental processes" by which decisions or policies were ultimately considered and formulated. Thus, we believe that Exemption 5 would be available, even if the memoranda were deemed to be agency records.

Exemption 1: Classified Material. FOI Exemption 1 protects material properly classified under Executive Order 11652. Some of Dr. Kissinger's memoranda contain national security information, but they have been neither reviewed for classification nor marked as classified. Although there are no court decisions on belated classification, E.O. 11652 and regulations thereunder indicate a basis for now classifying those memoranda which have national security information. Also, the Justice Department has taken the view that where an agency has treated a document with the same precautions as would be appropriate for classified material, it may later give the document a classification

if the document contains national security information. Thus, even though the memoranda have not been formally marked as classified, a large portion of them would be subject to classification because of their content -- e.g., candid references to foreign countries and foreign leaders; discussions of subjects which are still treated as classified, etc.

Invasion of Privacy. The doctrine of invasion of privacy is still at a relatively young stage. It is clear that Dr. Kissinger did not violate privacy laws by having a record made of telephone conversations in which he himself participated. 18 U.S.C. 2511(b). However, this does not mean that he can be compelled to disseminate what others have told him, or what he has told others, in private telephone converations. The participants in these conversations, as well as persons referred to in the conversations, may have privacy interests at stake if the memoranda are disclosed. Although this is an unsettled area of the law, it would be prudent to mention potential privacy interests in a response to Safire.