

November 11, 1976

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MEMORANDUM TO THE SECRETARY

Legal Status of Transcribed Notes
of Your Telephone Conversations

In light of today's story in the Washington Post (copy attached), I thought it would be useful if I summarized the advice and opinions I have given over the last eleven months on the question of whether the transcribed secretarial notes of your telephone conversations should be considered as the records of any government agency, or as essentially personal papers that you are entitled to retain when you leave office.

The question first arose last January, when a request was filed under the Freedom of Information Act for some of these papers. At that time, I expressed my opinion that these papers were not "agency records" within the meaning of the Freedom of Information Act. Instead, they had consistently been treated as personal in nature, and there were rights of privacy at issue if telephone conversations between two people had to be disclosed to third parties or to the public. For these reasons, I was of the opinion that these papers were personal rather than agency records.

In February, I raised the Freedom of Information Act questions with the Assistant Attorney General for the Office of Legal Counsel at the Department of Justice. He concurred in my view that the pending Freedom of Information Act requests for the transcribed notes of your telephone conversations could properly be denied on the basis that they were not agency records.

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Finally in March, I was called upon to review an appeal of the Department's denial of the initial Freedom of Information Act request for these papers. I advised the Department's Council on Classification Policy that there was "very strong support" for concluding that these papers are not agency records. Incidentally, I gave this advice despite an assumption that some of the transcriptions contained classified material. The Council on Classification Policy reviewed the requested papers and found that they did not contain classified information.

Independently of these formal occasions when my legal opinion was sought by bureaus of the Department, I have on several occasions discussed with you my view that you would be entitled to retain the transcribed notes of your telephone conversations when you leave office. The detailed basis for my opinion is the following:

1. The papers have been expressly designated and filed as personal from the time they were originated. Under Department of State regulations (5 FAM 417.1a), a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt.

2. The papers have not been circulated within any agency, but have been continuously held in your possession and in that of your immediate assistants. They were retained solely at your discretion as work aids to help you recall prior conversations and events. Recent authorities support the view that such papers are personal rather than agency records. In Porter County Chapter v. A.E.C., 380 F. Supp. 630 (N.D. Ind. 1974), certain handwritten notes and materials of A.E.C. staff members were sought under the Freedom of Information Act. The Court concluded that since "such materials were not circulated to nor used by anyone other than the authors, and were discarded or retained at the author's sole discretion for their own individual purposes in their own files," the materials were "personal notes and not agency records." Id. at 633. The OMB guidelines on the Privacy Act are

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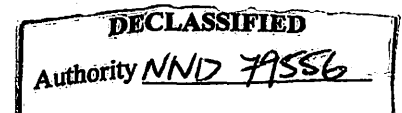
in accord. They state that the Privacy Act extends only to records under the control of an agency and not to "uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion" -- even if such materials are "in the possession of agency employees and used by them in performing official functions." 40 F.R. 28952 (1975).

3. The transcriptions that I reviewed in connection with the Freedom of Information Act requests did not contain any government decisions or policy actions. In the event that other transcriptions should reflect such decisions or actions, it is highly probable that they would have been incorporated in other papers at the time the decisions were implemented -- and those latter papers would certainly have become government records. Nevertheless, as a precaution, you should review the papers. If any discussion of a significant government activity or decision is found, an extract or summary of it should be prepared and submitted to the appropriate records officials. This procedure is contemplated in the Department's regulations (5 FAM 432). Although technically these regulations apply only to "personal correspondence" and not to transcribed secretarial notes, the preparation of a summary or extract will assure that government records are complete.

4. There are expectations of privacy when two people have a telephone conversation. Although either party could well make a record of a conversation, one assumes that what was said will be revealed to others only at the discretion of the other party. Treating what was said as a government or public record would violate these expectations.

5. The fact that the papers were retained for personal use, that they were not required to be prepared, that they have been consistently treated as personal, and that they contain personal and private matter, support the view that they are personal in nature.

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Similar factors were relied on in United States v. First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958), in reaching a conclusion that private notes made on an official government expedition (the Lewis and Clark expedition) were personal papers and not government property of the United States.

6. The fact that these transcriptions were prepared by government-paid secretaries using government paper and typewriters is not, in my opinion, controlling, in view of the factors discussed in paragraphs 1 through 5 above. Moreover, it is accepted practice that senior officials who must devote extraordinary amounts of time to government duties may make use of government office resources to prepare private correspondence and other personal materials.

7. Whether future judicial decisions concerning the Nixon papers might have some effect on the notes of your telephone conversations cannot yet be determined. But I am of the view that the Presidential Recordings and Materials Preservation Act of 1974 does not apply to these transcribed notes because that statute on its fact applies to "the Presidential historical materials of Richard M. Nixon" and not to personal papers of individuals who served under him.

Today's article in the Washington Post suggests that a "U.S. court restraining order" in the Nixon papers litigation may apply to the transcribed notes of your telephone conversations. That court order, however, expressly applies only to "defendants" in that litigation and "their superiors, agents and assigns." Nixon v. Administrator of General Services, 408 F. Supp. 321, 375 (D.D.C. 1976). Since you do not come within any of these categories, this court order does not apply to the transcribed notes of your telephone conversations.

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In summary, it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office.

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