SOURCE	Obama-Biden Transition Project documents
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Obama-Biden Transition Project Memorandum on the Freedom of Information Act

To: Chris Lu, Katy Kale
From: Mike Mongan
Subject: Application of FOIA to Documents Created by the Obama Transition Project

I. ISSUE

Under what circumstances will documents created by the Obama Transition Project (OTP) be covered by the requirements of the Freedom of Information Act (FOIA)?

II. SHORT ANSWER

Any OTP document that ends up in the possession of a federal agency could potentially qualify as an "agency record" that must be disclosed under FOIA. This will include documents that are given to agency personnel by OTP employees during the transition period. It will also include documents brought into an agency by Obama appointees after the inauguration. In each instance, whether a specific document is covered by FOIA will depend on a number of factors unique to that document—including why it is prepared, how it is used by the agency, and how it is stored.

III. ANALYSIS

The Freedom of Information Act authorizes federal courts to order the production of requested materials "upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150 (1980) (quoting 5 U.S.C. § 552(a)(4)(B)). A document created by OTP will therefore fall outside of the scope of FOIA unless it qualifies as an "agency record."

The Supreme Court has held that there are two prerequisites for a document to qualify as an "agency record." First, "an agency must either create or obtain the requested materials." United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989) (internal quotation marks omitted). Second, "the agency must be in control of the requested materials at the time the FOIA request is made." Id. at 145.

If OTP were an "agency," many of the documents created by OTP employees would easily satisfy these two prerequisites and fall within the scope of FOIA. At your request, however, this memo assumes that OTP does not qualify as an "agency." This is a fairly safe assumption in light of the text of the statute and the precedent on point. FOIA defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency[,] . . . includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §§ 551(1), 552(f)(1). As a private, nonprofit organization, OTP probably falls outside this definition. Indeed, the only case to address this issue concluded that a presidential transition team was not an "agency" for purposes of FOIA. See Illinois Institute for Continuing Legal Education v. United States Dep't of Labor, 545 F. Supp. 1229 (N.D. Ill. 1982).[1] The General Services Administration recently indicated that it agrees with this conclusion.[2]

1 The Illinois Institute court reasoned as follows: "The Transition Act manifests a congressional concern with preserving the autonomy of the transition staff from the federal government. Even federal employees serving on the staff are insulated from the government. The transition staff is clearly not in the control of the incumbent President; it answers only to the President-elect. As such, the staff is outside of the executive branch, since 'the Executive Power is vested in a President of the United States of America,' U.S. CONST. art. II, § 1, and the transition staff is outside the control of the President. The autonomy accorded the transition staff compels the conclusion that the staff is not within the executive branch of government and hence not an 'agency' within the meaning of § 552[(f)(1)] of the FOIA." 545 F. Supp. at 1232-33.

2 GSA has taken a similar position in the past. See Illinois Institute, 545 F. Supp. at 1235, n.8 (citing opinion of the Assistant General Counsel to the General Services Administration concluding that President-elect Reagan's transition team was not an "agency").

But even assuming that OTP is not an "agency," some of the documents created by OTP might still fall within the scope of FOIA. Under Tax Analysts and other Supreme Court cases, any document that is "obtained" by a federal agency could potentially become an "agency record." And there are at least two plausible scenarios where OTP documents might be obtained by a federal agency. First, scores of OTP employees and volunteers will be stationed within federal agencies during the transition period. I presume that these individuals will meet with agency officials, and will occasionally provide the agency with memoranda and other materials to help facilitate an orderly transition. Second, OTP will produce reams of documents charting a course for the major federal agencies during the Obama Administration. These documents will be of little use unless they are provided to Sen. Obama's appointees to those agencies. And it strikes me as quite likely that some of the appointees will bring these planning documents with them into the agency when they take office after the inauguration.

Of course, the mere fact that an OTP document ends up within the physical confines of an agency will not necessarily render it an "agency record" for FOIA purposes. Under the second prong of the Tax Analysts test, the agency must also maintain a sufficient level of control over the document. See Tax Analysts, 492 U.S. at 145. There is no precise formula for determining when the "control" requirement is satisfied. The Supreme Court has explained that "control" means "that the materials have come into the agency's possession in the legitimate conduct of its official duties." Ibid. A few lower courts have applied a four-factor test to determine if there is sufficient control. The factors are:

(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

Burka v. United States Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996); see also Missouri v. United States Dep't of the Interior, 297 F.3d 745 (8th Cir. 2002) (applying the Burka test).

In light of these vague tests for "control," the FOIA status of individual OTP documents that are obtained by agencies will vary depending on why the document was created, how it was used by the agency, and other considerations. A few examples are illustrative: If a newly-appointed chief-of-staff to a cabinet secretary brings two copies of an OTP report with him to his government office, but keeps them in a locked bookcase marked "personal" and never uses them, the report will not be treated as an "agency record." See Wolfe v. Dep't of Health & Human Servs., 711 F.2d 1077 (D.C. Cir. 1983) (finding that a report prepared by President-elect Reagan's transition team was not an "agency record" on the same facts).[3] Likewise, if an OTP employee accidentally leaves a document in a cubicle at a federal agency, and it is neither consulted by agency personnel nor integrated into the agency's file system, the document probably will not qualify as an "agency record." But if the incoming Secretary of Transportation takes an OTP planning memorandum with her to her new government offices, and she and her staff frequently review the memorandum and file it away alongside other Department of Transportation materials, a court would probably treat that memorandum as an "agency record" subject to FOIA's disclosure requirements.

OTP should therefore expect that some of its work product might have to be disclosed pursuant to FOIA. To be sure, this is not necessarily a bad thing. A central theme of Sen. Obama's campaign has been improving transparency in government and "restor[ing] meaning to the Freedom of Information Act." See Restoring Trust in Government and Improving Transparency, http://www.barackobama.com/pdf/TakingBackOurGovernmentBackFinal FactSheet.pdf (last visited Oct. 29, 2008). The disclosure of OTP documents that are used by federal agencies would surely help meet that goal.

That being said, the case law suggests several steps that OTP could take if it wishes to minimize the number of OTP-created documents subject to disclosure under FOIA:

- Reduce the number of OTP documents that are "obtained" by agencies. Forbid OTP employees from giving documents or other materials to agency personnel unless absolutely necessary. Ensure that political appointees do not take OTP documents with them into federal agencies after Inauguration Day.
- Signal that OTP documents are for internal purposes only. Where applicable, include a statement on the face of OTP documents explaining that they are intended to be used for internal, OTP purposes only, and that they should not be disclosed to agency personnel either during or after the transition period.

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3 Accord Illinois Institute for Continuing Legal Education v. United States Dep't of Labor, 545 F. Supp. 1229, 1233-35 (N.D. Ill. 1982) (holding that a briefing book prepared by President-elect Reagan's transition team for the Department of Labor was not an agency record where only two copies existed, one in the locked vault of the Secretary of Labor and one on the bookshelf of a Department official, and no one at the Department had made any use of the briefing book); see generally Tax Analysts, 492 U.S. at 145 ("[T]he term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency.").

- Minimize the extent to which agency personnel read and rely on OTP documents. In some cases it may be impossible to avoid having agency personnel review certain OTP documents. OTP could limit the extent to which these documents are read and relied upon by agency personnel by using print instead of electronic copies (which are easier to duplicate and forward), and by asking the agency personnel to return the document after review.
- Do not integrate OTP documents into agency record systems or files. There is not much that can be done about the records-keeping practices of federal agencies before January 20, 2009. But once the Obama Administration has taken office, OTP documents will be less likely to qualify as "agency records" if they are kept out of the standard agency filing and records systems.

One final note: Even if an OTP document does qualify as an "agency record," it is not necessarily the case that FOIA requires its disclosure. FOIA creates nine exemptions under which an agency may deny disclosure of requested records. See generally 5 U.S.C. § 552(b). For example, FOIA exempts documents "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), as well as "personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). If an OTP document satisfied one of these exceptions, it could legally be withheld from a FOIA requester.

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