

: Re:

Subject: : Re:

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

Date: 4/3/01, 11:18 AM

To: Rachel L. Brand (CN=Rachel L. Brand/OU=WHO/O=EOP@EOP [WHO])

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 3-APR-2001 11:18:20.00

SUBJECT:: Re:

TO: Rachel L. Brand (CN=Rachel L. Brand/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

End Original ARMS Header

does not apply to White House, acc to OLC opinions

Rachel L. Brand

04/03/2001 11:14:23 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject:

Who's an expert (or a novice, for that matter) on the privacy act?

Message Sent

To:

H. Christopher Bartolomucci/WHO/EOP@EOP

Bradford A. Berenson/WHO/EOP@EOP

Stuart W. Bowen/WHO/EOP@EOP

Robert W. Cobb/WHO/EOP@EOP

Courtney S. Elwood/WHO/EOP@EOP

Noel J. Francisco/WHO/EOP@EOP

Brett M. Kavanaugh/WHO/EOP@EOP

Helgard C. Walker/WHO/EOP@EOP

Rachel L. Brand/WHO/EOP@EOP

: Re:

Subject: : Re:

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

Date: 4/3/01, 1:14 PM

To: Rachel L. Brand (CN=Rachel L. Brand/OU=WHO/O=EOP@EOP [WHO])

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 3-APR-2001 13:14:16.00

SUBJECT:: Re:

T0: Rachel L. Brand (CN=Rachel L. Brand/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

End Original ARMS Header

Not that I am aware of, although I suppose it can be somewhat delicate.

Rachel L. Brand
04/03/2001 12:37:23 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re:

any other legal restrictions on ppo providing names of job applicants to a senator?

Brett M. Kavanaugh
04/03/2001 11:18:14 AM
Record Type: Record

To: Rachel L. Brand/WHO/EOP@EOP
cc:
bcc:
Subject: Re:

does not apply to White House, acc to OLC opinions

Rachel L. Brand
04/03/2001 11:14:23 AM
Record Type: Record

: Re:

To: See the distribution list at the bottom of this message
cc:
Subject:

Who's an expert (or a novice, for that matter) on the privacy act?

Message Sent

To: _____
H. Christopher Bartolomucci/WHO/EOP@EOP
Bradford A. Berenson/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
Robert W. Cobb/WHO/EOP@EOP
Courtney S. Elwood/WHO/EOP@EOP
Noel J. Francisco/WHO/EOP@EOP
Brett M. Kavanaugh/WHO/EOP@EOP
Helgard C. Walker/WHO/EOP@EOP
Rachel L. Brand/WHO/EOP@EOP

Subject: : FOIA Status of OA

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

Date: 10/16/01, 5:10 PM

To: m.edward.whelan@usdoj.gov (m.edward.whelan@usdoj.gov @ inet [UNKNOWN])

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 16-OCT-2001 17:10:45.00

SUBJECT: : FOIA Status of OA

[TO: m.edward.whelan@usdoj.gov](mailto:m.edward.whelan@usdoj.gov) (m.edward.whelan@usdoj.gov @ inet [UNKNOWN])

READ: UNKNOWN

End Original ARMS Header

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on
10/16/2001 05:10 PM -----

Catherine S. Anderson
10/16/2001 05:09:15 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: FOIA Status of OA

Brett: I am sending you the following materials in response to OLC's request:

A hard copy of the attached chart that I prepared some time ago on FOIA/Privacy Act in the EOP. If you want to print the chart, you need to do so on legal size paper. The first column names the EOP office or council; the second column cites any applicable FOIA/Privacy Act cases in which a court specifically addressed FOIA/PA applicability; the third column cites the authorizing legislation for each of the offices and councils of the EOP; the fourth and fifth columns identify whether the office or council has any politically appointed, Senate confirmed (PAS) positions and/or Title 5 employees; and the sixth column summarizes any independent statutory authority cited in the relevant case law or authorizing legislation. As you will see from the chart, all of the offices and councils that were found to be subject to the FOIA/PA have PAS's, were created by statute, and exercise substantial independent authority. Conversely, no office or council not headed by a PAS and not created by statute (as opposed to Reorganization Plan/Executive Order) has been found to be subject to the FOIA. NSC and CEA fall somewhere in the middle. Although both were created by statute, neither was found to exercise substantial independent authority. In my opinion, OA is more analogous to those EOP offices and councils that were found NOT subject to FOIA: OA has no PAS's, was not created by statute, and exercises no substantial independent authority. Note: My guess is that OA began to operate on the assumption that it was subject to FOIA because most of its employees are Title 5 employees, and because its function is to provide

support to other EOP offices and councils in addition to WHO. As the FOIA case law relevant to the EOP evolved over the years, however, the courts did not place much, if any, emphasis on the existence or non-existence of Title 5 employees (CEA/NSC). More importantly, the courts began to focus less on "sole function" and more on whether an EOP entity exercises substantial authority independent of the President. OA's Mission Statement and Background, which was included as part of the EOP's Fiscal Year 2002 Congressional Budget Submission for the following accounts: Compensation of the President, White House Office, Special Assistance to the President, Official Residence of the Vice President, Office of Administration, Office of Policy Development, National Security Council, Council of Economic Advisers, and Unanticipated Needs. This should provide OLC with more detail regarding OA's mission, which has remained relatively unchanged but for the recent creation of an EOP Chief Financial Officer (CFO) within OA. See 31 U.S.C. 901. For purposes of section 902 of the CFO Act only, the President has designated the Director of OA as 'the head of the agency' with respect to the EOP.

Memorandum to Margaret McKenna from Patrick Apodaca dated June 28, 1978, subject: Applicability of the FOIA to White House Documents, finding that because OA performs functions for other offices within the EOP and there are no identifiable units within the OA which function solely to serve the President, it is reasonable to conclude that OA is an agency subject to the FOIA. This is the only document of which I am aware that concludes that OA is subject to the FOIA. As stated above, however, I think that subsequent case law supports a different conclusion.

Letter, including background material, to Dawn E. Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, from Christopher Cerf, White House Counsel's Office, dated September 16, 1994, requesting OLC's informal advice on whether WHO records in the custody of OA are subject to FOIA. OA has no record of an OLC response.

As you will see from the materials, except for the Apodaca memorandum, most of the documents assume that OA is subject to the FOIA and focus instead on the applicability of FOIA to WHO documents in OA's custody. In any event, to the extent that OLC does not already have copies, the materials may be helpful.

Let me know if you need any additional information. After OLC has an opportunity to review the materials, it may be helpful to meet with them to discuss further. Kate

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_9XN74004_WHO.TXT_1>

— Attachments: _____

P_9XN74004_WHO.TXT_1.doc

34.5 KB

FOIA/Privacy Act in the EOP

EOP Office/Council	FOIA/PA Applicability Cases	Authorizing legislation	PAS	Title 5 Ee's	Independent Authority /Notes
WHO	Alexander v. FBI ¹ (yes) Barr v. EOP ² (no) Jones v. EOP ³ (no) Tripp v. EOP ⁴ (no) Broaddrick v. EOP ⁵ (no) Flowers v. EOP ⁶ (no) Falwell v. EOP ⁷ (no) Sculimbrene v. Reno ⁸ (no) National Security Archive v. Archivist of the US ⁹ (no) Sweetland v. Walters ¹⁰ (no) Kissinger v. Reporter's Comm. For Freedom of the Press ¹¹ (no)	Reorg. Plan No.1 of 1939 and EO 8248	NO	NO	NO
OVP	Meyer v. Bush (Task Force on Regulatory Relief) ¹² (no)		NO	NO	NO
CEA	Rushforth v. CEA ¹³ (no)	Employment Act of 1946 ¹⁴ Reorg. Plan No. 9 of 1953	YES	YES	NO

¹ 971 F. Supp. 603, 607 (D.D.C. 1997) (Lamberth, J.) (holding that the EOP was an agency subject to the Privacy Act).

² No. 99-1695, slip. op. at 6 (D.D.C. Aug. 9, 2000) (holding that the EOP was not an agency subject to the Privacy Act).

³ No. 00-307, slip. op. at 14 (D.D.C. Mar. 12, 2001) (Office of the President/White House Office was not an agency subject to the Privacy Act).

⁴ 200 F.R.D. 140, 146 (D.D.C. Apr. 5, 2001) (holding that the Office of the President/White House Office was not an agency subject to the Privacy Act.)

⁵ 139 F. Supp. 2d 55, 60 (D.D.C. 2001) (holding that the Office of the President was not an agency subject to the FOIA or the Privacy Act).

⁶ 142 F. Supp. 2d 38 (D.D.C. 2001) (holding that inasmuch as the EOP was not an agency under the FOIA, the EOP was not an agency subject to the Privacy Act.)

⁷ 113 F. Supp. 2d 967, 969-70 (W.D. Va. 2000) (holding that the Office of the President was not an agency subject to the Privacy Act).

⁸ No. 99-2010, slip. op. at 15 (D.D.C. Feb. 16, 2001) (holding that the White House Office was not subject to the terms of the Privacy Act).

⁹ 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990) (holding that the White House was not an agency for purposes of FOIA).

¹⁰ 314 U.S. App. D.C. 9, 60 F.3d 852, 855 (D.C. Cir. 1995) (holding that the Executive Residence was not an agency as defined in the FOIA).

¹¹ 445 U.S. 136, 156, 100 S. Ct. 960, 972, 63 L. Ed. 2d 267 (1980) (holding that the Office of the President was not subject to the FOIA).

¹² 299 U.S. App. D.C. 86, 981 F. 2d 1288, 1293 n.3 (D.C. Cir. 1993) (holding that individuals employed in the White House Office were considered part of the President's immediate personal staff and thus are exempt from the FOIA).

¹³ 246 U.S. App. D.C. 59, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (holding that CEA, whose sole function is to advise and assist the President, was not an agency for purposes of FOIA).

¹⁴ 15 U.S.C. § 1023.

OPD¹⁵	None	EO's 12,859 (DPC, 1993) ¹⁶ and 12,835 (NEC, 1993)	NO	NO	NO
NSC	Armstrong v. EOP ¹⁷ (no)	National Security Act of 1947, as amended by the National Security Amendments Act of 1949 ¹⁸ Reorg. Plan No.4 of 1949, EO 12,333 (19--)	NO	YES	NO
PFIAB	None	EO 12,863 (1993), as amended by EO 13,070 (1997) ¹⁹	NO	NO	NO
OMB	<i>Sierra Club v. Andrus</i> (yes) ²⁰	The Budget and Accounting Act of 1921 Reorg. Plan No. 1 of 1939 Reorg. Plan No. 2 of 1970 and EO 11541 ²¹	YES	YES	YES; statutory offices (OFFM, OFPP, OIRA) have numerous independent management, coordina- tion, and administrative functions
ONDCP	None	The Anti-drug Abuse Act of 1988 ²²	YES	YES	YES; independent statutory authority to oversee and coordinate the efforts of federal drug control agencies and programs

¹⁵ OPD currently consists of the Domestic Policy Council (DPC), the Office of National Aids Policy, and the National Economic Council (NEC).

¹⁶ See also Reorg. Plan No. 2 of 1970 related to its predecessor the Domestic Council and Reorg. Plan No. 1 of 1977 abolishing the Domestic Council and transferring its functions to the Domestic Policy Staff.

¹⁷ 319 U.S. App. D.C. 330, 90 F. 3d 553, 567 (D.C. Cir. 1996) (holding NSC was not an agency under the FOIA).

¹⁸ 50 U.S.C. § 401

¹⁹ PFIAB was first established by President Eisenhower in 1956 and has been utilized by all presidents since then except Carter. See, e.g., EO 11460 establishing PFIAB in the EOP(1969), and EO 11984 (1977) abolishing PFIAB in EOP.

²⁰ 189 U.S. App. D.C. 117, 581 F.2d 895, 902 (D.C. Cir. 1978) (finding that OMB is not totally exempt from FOIA by its definition of agency).

²¹ First established in 1921 as the Bureau of the Budget. 31 U.S.C. 16 (1921). OMB includes three statutory offices: the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Information and Regulatory Affairs. OMB carries out numerous, OMB-specific, statutory responsibilities, and exercises various delegated authorities. These include more than 200 statutory provisions, including the Budget and Accounting Act, the Budget Enforcement Act, the Antideficiency Act, the Balanced Budget Act, the Impoundment Control Act, the Government Performance and Results Act (GPRA), the Chief Financial Officers Act (CFOs Act), the Government Management Reform Act, the Federal Acquisition Streamlining Act, the Office of Federal Procurement Policy Act, the Paperwork Reduction Act, the Clinger-Cohen Act, the Federal Credit Reform Act, and the Government Paperwork Elimination Act (GPEA).

²² 21 U.S.C. § 1501 (1988). The ONDCP Reauthorization Act of 1998 reauthorized ONDCP through Sept. 30, 2003. See also 90 Stat. 242 (1976) and Reorg. Plan No. 1 of 1977 related to its predecessor, Office of Drug Abuse Policy.

OSTP	<i>Soucie v. David</i> (yes) ²³	The National Science and Technology Policy, Organizations, and Priorities Act of 1976 ²⁴	YES	YES	YES; independent statutory authority to evaluate federal scientific programs, initiate and support research, and award scholarships
USTR	None	The Trade Expansion Act of 1962 ²⁵ and EO 11075 (1963); The Trade Act of 1974 ²⁶ and EO 11846; Reorg. Plan No. 3 of 1979 and EO 12188; Omnibus Trade and Competitiveness Act of 1988 ²⁷ Uruguay Round Agreements Act ²⁸	YES	YES	YES; statutory authority to negotiate trade agreements, develop and implement U.S. trade policy, both domestic and international, and responsible for bilateral and multilateral direct investment matters
CEQ	<i>Pacific Legal Foundation v. CEQ</i> (yes – Sunshine Act) ²⁹	The National Environmental Policy Act of 1969 ³⁰ The Environmental Quality Improvement Act of 1970 ³¹ and EO 11514	YES	YES	YES; independent authority under NEPA to issue guidelines to other federal agencies, coordinate federal programs, and oversee certain activities of other federal agencies
OA	None	Reorg. Plan No. 1 of 1977 and EO 12028, as amended by EO 12122 (1979)	NO	YES	NO independent policy function or statutory authority; only other function is to provide administrative support “on behalf of” the non-WHO components

²³ 145 U.S. App. D.C. 144, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (holding that OST was subject to FOIA because it had independent authority to evaluate federal scientific programs, initiate and support research, and award scholarships).

²⁴ 42 U.S.C. § 6611 *et seq.* (1976). See also Reorg. Plan No. 2 of 1962 establishing its predecessor OST, which was then abolished by Reorg. Plan No. 1 of 1973.

²⁵ 19 U.S.C. 1801 *et seq.* (1962) (establishing a Special Trade Representative).

²⁶ 19 U.S.C. § 2171 (1974) (establishing the Office of Special Trade Representative in the EOP).

²⁷ 19 U.S.C. § 2902 *et seq.* (1988).

²⁸ 19 U.S.C. § 3501 *et seq.* (1995).

²⁹ 205 U.S. App. D.C. 131, 636 F.2d 1259, 1262-63 (D.C. Cir. 1980) (holding CEQ was an agency because of its independent authority to issue guidelines to federal agencies, coordinate federal programs, and oversee certain activities of other federal agencies).

³⁰ 42 U.S.C. 4321 *et seq.* (1969).

³¹ 42 U.S.C. 4372 (1970).

Subject: : Re: FYI - Development in Linda Tripp Lawsuit
From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Date: 12/6/01, 2:00 PM
To: H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO])

Begin Original ARMS Header #####
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 6-DEC-2001 14:00:53.00
SUBJECT:: Re: FYI - Development in Linda Tripp Lawsuit
TO: H. Christopher Bartolomucci (CN=H. Christopher Bartolomucci/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN
End Original ARMS Header

she's right person

H. Christopher Bartolomucci
12/06/2001 01:22:04 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: FYI - Development in Linda Tripp Lawsuit

Is there anyone in the press shop other than Anne who you think ought to get my attached e-mail?

----- Forwarded by H. Christopher Bartolomucci/WHO/EOP on
12/06/2001 12:20 PM -----

H. Christopher Bartolomucci
12/06/2001 01:21:06 PM
Record Type: Record

To: Anne Womack/WHO/EOP@EOP
cc:
Subject: FYI - Development in Linda Tripp Lawsuit

You may get press inquiries about something that will happen today in the Linda Tripp case. This is the litigation involving the DoD's release of sensitive information from Tripp's personnel file during the Clinton administration.

The DOJ is going to file a document today conceding liability -- i.e., the Department will admit that the release of the information did in fact violate the Privacy Act.

Some talking points:

1) Neither the White House nor any past or present White House officials are parties in this case. The suit is against the DoD only. Furthermore, all of the events at issue are Clinton-era.

2) Although the DOJ is conceding liability, it is not conceding damages. That is, the Department will continue to argue to the court that Tripp has not proved that she has suffered, or is entitled to recover, any money damages as a result of the Privacy Act violation. Thus, the concession with respect to liability will not end the case -- it will simply shift the focus to the issue of damages, where the DOJ believes its position is strong.

Message Sent

To: _____

Bradford A. Berenson/WHO/EOP@EOP

Rachel L. Brand/WHO/EOP@EOP

Robert W. Cobb/WHO/EOP@EOP

Courtney S. Elwood/WHO/EOP@EOP

Noel J. Francisco/WHO/EOP@EOP

Brett M. Kavanaugh/WHO/EOP@EOP

Kyle Sampson/WHO/EOP@EOP

Helgard C. Walker/WHO/EOP@EOP

Subject: : RE: USTR FOIA case
From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Date: 1/23/03, 4:40 PM
To: David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
CC: david g. leitch (CN=david g. leitch/OU=who/O=eop@exchange [WHO])

Begin Original ARMS Header #####
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 23-JAN-2003 16:40:03.00
SUBJECT: : RE: USTR FOIA case
TO: David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
READ: UNKNOWN
CC: david g. leitch (CN=david g. leitch/OU=who/O=eop@exchange [WHO])
READ: UNKNOWN
End Original ARMS Header

Once the appeal decision is rendered, I would hope the process at USTR proceeds more smoothly.

David S. Addington
01/23/2003 04:24:47 PM
Record Type: Record

To: David G. Leitch/WHO/EOP@Exchange
cc: brett m. kavanaugh/who/eop@eop
Subject: RE: USTR FOIA case

David:

USTR needs to get squared away -- if there is a real problem here, I wish USTR would just tell us what it is -- we might have some creative ideas for solving the problem.

They don't need a new Executive Order on classification to get the job done -- E.O. 12958 is clear on the applicable standards and is explicit on the post-FOIA request classifiability of documents. In addition, USTR GC has the authority to get the job done himself (see Fed. Reg. notice below):

* * * * *

NOTICES

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Designation of Senior Agency Official Under Executive Order 12958

Wednesday, June 6, 2001

*30499 AGENCY: Office of the United States Trade Representative.

ACTION: Notice of designation of "Senior Agency Official" for certain purposes under section 5.6 of Executive Order 12958 entitled "Classified National Security Information."

SUMMARY: The General Counsel of the Office of the U.S. Trade Representative has been designated as the senior agency official for purposes of section 1.8(d) of Executive Order 12958 and has the authority, along with the United States Trade Representative (USTR) and the Deputy USTRs, to classify or re-classify information that has not previously been disclosed to the public after a request for it has been received under the Freedom of Information Act (FOIA) or the Privacy Act of 1974.

FOR FURTHER INFORMATION CONTACT: The FOIA Office, Office of the U.S. Trade Representative, 600 17th Street, NW., Washington, DC 20508. The telephone number is (202) 395-3419.

SUPPLEMENTARY INFORMATION: Executive Order 12958 ("the Order") provides that heads of agencies that originate or handle classified information shall designate one or more senior agency officials to carry out certain duties and responsibilities under the Order. On May 10, 2001, U.S. Trade Representative Robert Zoellick designated the position of General Counsel as a "Senior Agency Official" pursuant to the provisions of section 5.6 of the Order. The General Counsel shall have the authority to classify or re-classify information after a request has been received under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a, so long as that information has not previously disclosed to the public. Such classification or re-classification shall be done in a manner that meet the requirements of the Order and on a document-by-document basis.

Sybia Harrison,

Agency FOIA Officer.

[FR Doc. 01-14147 Filed 6-5-01; 8:45 am]

BILLING CODE 3190-01-M

66 FR 30499-01, 2001 WL 606856 (F.R.)
END OF DOCUMENT