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<td>Derick Kravitz</td>
<td>17-00528-F</td>
<td>Pro Publica</td>
<td>All agency briefing materials related to the Presidential transition for Agency Review Teams (also known as Agency Landing Teams). These materials include, but are not limited to, an agency’s mission, vision and strategic goals; organizational chart; budget; human capital overview; current Presidential appointees; and an overview of priority issues facing the organization.</td>
<td>12/6/2016</td>
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<td>Stephen Braun</td>
<td>17-00538-F</td>
<td>AP</td>
<td>All emails sent to or sent from your agency employees in which the Internet domains &quot;trump.com&quot;, &quot;trumporg.com&quot;, &quot;ptt.gov&quot;, &quot;donaldjtrump.com&quot; or &quot;donaldtrump.com&quot; are in email addresses in the To, From, CC, BCC, Subject or Body fields of the message. Email search will occur in early January. FSC will contact requester to either limit the scope to PeTT issues or to exclude PeTT issues. Email search will occur in early January.</td>
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<td>Michael Stratford</td>
<td>17-00543-F</td>
<td>Politico</td>
<td>All documents prepared by the U.S. Department of Education for the President-elect’s transition team. This includes all transition team briefing reports and other presentations or</td>
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<td>MuckRock News</td>
<td>A copy of the primary briefing materials created by XXXX for purposes of the Presidential Transition Process, specifically any presentations created for or delivered to members of the Presidential Transition Team for the new Administration during November/December 2016.</td>
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<td>17-00546-F</td>
<td>Glomar Disclosure, Inc.</td>
<td>any and all materials produced for, received by or relating to President-Elect Donald Trump's Transition Team, including any questionnaires relating to the transition, the incoming administration or produced by any the Transition Team for your agency. Please also include any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: Trump, Transition, President-Elect, New Administration, New Boss Email search will occur in early January.</td>
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<td>Kerr</td>
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<td>AP</td>
<td>...copies the U.S. Department of Education's 2016 Transition Team</td>
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documents prepared by the department for the President-elect’s transition team.

FSC will contact requester to attempt to limit request to briefing material that goes to the Landing Team. Otherwise, in-bound briefs to Denise may have to be reviewed.

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<td>Center for Public Integrity</td>
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<td>17-00557-F</td>
<td>Public Citizen</td>
<td>All records of communications from or on behalf of the Trump-Pence Transition Team to the Department of Education (DOE), for the period from November 8, 2016, through the date of processing this request.</td>
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<td>Jack Stripling</td>
<td>17-00545-F</td>
<td>The Chronicle of Higher Education</td>
<td>Any and all transition briefings provided by the Department of Education to Donald J. Trump's transition team between Nov. 1, 2016 and Dec. 12, 2016.</td>
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<td>Russ Kick</td>
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Use of Agency Resources to Support Presidential Transition

We adhere to the conclusion in our December 14, 1992 Memorandum that, under the Presidential Transition Act of 1963, an executive agency or department may provide office space, secretarial services, and other support services to members of the transition team from agency appropriations without reimbursement from the transition appropriation when the provision of such space and support by the agency, rather than by the transition team itself, would minimize disruption to the agency’s operations caused by the transfer of the leadership of the agency.

Our conclusion in the 1992 Memorandum is not affected by the October 12, 2000 amendment to the Transition Act. Direct support services and office space for those workshops and orientations that the amendment authorizes should be provided by GSA out of the appropriation for the transition, unless their provision by a particular agency would minimize disruption of the agency’s mission or operations.

November 22, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your inquiry whether our 1992 opinion about the provision of office space and support services by executive agencies and departments for activities related to the transition of the President-elect continues to reflect our view of the law. Memorandum for C. Boyden Gray, Counsel for the President, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, Re: Use of Agency Resources to Support the Presidential Transition (Dec. 14, 1992) ("1992 Memorandum"). As discussed below, we adhere to the advice provided in that memorandum.

The 1992 Memorandum addresses the circumstances under which executive agencies and departments may provide office space and support services to members of the presidential transition team without reimbursement from the transition appropriation. The Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964) (codified as amended at 3 U.S.C. § 102 note) ("Transition Act"), authorizes the General Services Administration ("GSA") to provide appropriate office space and support services to the transition team. At the same time, the Transition Act indicates that each individual agency’s mission includes those activities necessary to minimize transition-related disruptions to the agency’s work. Thus, general agency appropriations are available to further that mission.

In reconciling the availability of both general agency and transition appropriations for transition-related office space and support services, we relied upon the principle of appropriations law that when Congress has provided for more than one appropriation in the same area, the appropriations generally are to be interpreted

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"The 1992 Memorandum clarified advice we provided during the 1988 the presidential transition. See Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Executive Agency Assistance to the Presidential Transition (Jan. 3, 1989)"
so as to minimize overlap between the two. Our 1992 Memorandum concluded that agencies could provide office space, secretarial services, and other support services from agency appropriations without reimbursement from the transition appropriation when the provision of such space and support by the agency, rather than by the transition team itself, would minimize disruption to the agency’s operations caused by the transfer of the leadership of the agency.

Our conclusion in the 1992 Memorandum is not affected by the October 12, 2000 amendment to the Transition Act. Presidential Transition Act of 2000, Pub. L. No. 106–293, 114 Stat. 1035 (2000) ("2000 Amendment"). Among other things, this amendment authorizes GSA to pay the expenses for briefings, workshops, and other activities to familiarize key prospective presidential appointees with the issues that typically confront new political appointees. § 2(3). Such activities may include interchanges with individuals in the outgoing administration currently employed by an executive agency or department in order to give new officials the benefit of the experience of the former administration. Id. The legislative history indicates that the Senate Committee on Governmental Affairs believed that the most beneficial format for such orientations would be informal discussions and workshops coordinated by GSA. See S. Rep. No. 106–348 (2000). The amendment also authorizes "orientations" for the same key prospective appointees addressing issues such as records management and human resources and performance-based management. 2000 Amendment § 2(3). The Senate report emphasizes that the amendment "only affects the key political appointments in the executive branch agencies and in the Executive Office of the President." S. Rep. No. 106–348, at 6. Consistent with our 1992 Memorandum, we believe that direct support services and office space for these workshops and orientations should be provided by GSA out of the appropriation for the transition, unless their provision by a particular agency would minimize disruption of the agency’s mission or operations. An example, discussed in our prior opinion, might include circumstances where an agency decides that internal agency information would be best safeguarded if support staff assisting with the transition were responsible to, and therefore funded by, the agency.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[The 2000 Amendment also authorizes the development of a transition directory by the Administrator of GSA in consultation with the Archivist of the United States and consultation by the Administrator with any candidate for President or Vice President before the election to develop a systems architecture for computer and communications systems to coordinate a transition to federal systems if the candidate is elected. 2000 Amendment § 2(3)]
Reimbursing Transition-Related Expenses Incurred
Before the Administrator of General Services Ascertained
Who Were the Apparent Successful Candidates for the
Offices of President and Vice President

The General Services Administration can reimburse the Bush/Cheney transition for legitimate transition-related expenses, as contemplated by the Presidential Transition Act of 1963, that were incurred after the general election on November 7, 2000 but prior to December 14, 2000, when the Administrator of GSA ascertained that George W. Bush and Richard Cheney were the apparent successful candidates for the offices of President and Vice President.

January 17, 2001

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

You have requested our opinion concerning whether, under the Presidential Transition Act of 1963, as amended (“Transition Act,” or “Act”),1 funds appropriated for purposes of that Act can be used to reimburse the Bush/Cheney transition for transition-related obligations they incurred after the general election but before the Administrator of the General Services Administration (“Administrator”) ascertained that they were the “apparent successful candidates for the office of President and Vice President” within the meaning of the Act. As you have acknowledged, before the Administrator could use any Transition Act funds to pay any such obligation of the President-elect or Vice-President-elect, he “would have to confirm that the obligations were bona fide Transition expenses.” Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Stephanie Foster, General Counsel, General Services Administration at 2 n.2 (Dec. 20, 2000).2

The Act authorizes the Administrator to expend the funds appropriated to implement the Act only for those services and facilities that are necessary to assist the transition of the “President-elect” and the “Vice-President-elect.” Id. § 3(a). The terms “President-elect” and “Vice-President-elect” are defined under the Act to mean the individuals, “following the general elections held to determine the electors,” that the Administrator ascertains are “the apparent successful candidates for the office of President and Vice-President, respectively.” Id. § 3(c). We recently concluded that “[s]ince there cannot be more than one ‘President-elect’


2 We also address only your question of whether the Act permits such reimbursements. We do not consider whether there are other legal requirements that might relate more generally to transition-related reimbursements.
following the date of the general elections held to determine the electors of
President and Vice President.” The separate prohibition of section 3(b)(1) thus
would have little function if the phrase “incurred by the President-elect” already
limited reimbursement to those obligations incurred after the designation of the
President-elect. Because interpretations of statutes that render language superfluous
we reject the view that the phrase “incurred by the President-elect” itself bars
reimbursement for legitimate transition obligations incurred by the person
ultimately ascertained to be the President-elect prior to the time that the Adminis-
trator designates an apparent successful candidate. Section 3(b)(1) evidently
recognizes that the person who eventually becomes the President-elect may incur
transition-related obligations prior to the election itself (or even within the very
brief period of time that may exist between the end of the election and the next
day), and the provision operates to bar reimbursement of any such expenses.

Further support for this construction is found in section 3(b)(2) of the Act,
which bars the Administrator from reimbursing transition obligations “incurred by
the President-elect . . . after 30 days after the date of the inauguration of the
President-elect as President.” Plainly, any transition-related obligations incurred
after the date of the inauguration cannot be incurred by “the President-elect”; they
would instead be incurred by the President. Thus, section 3(b)(2), like sec-
tion 3(b)(1), reflects Congress’s understanding that the phrase “incurred by the
President-elect” does not limit reimbursement to obligations incurred only by a
person who, at the time the obligation is incurred, actually is the “President-elect.”

Finally, our construction finds support in section 3(a), which sets out the ser-
dvices and facilities that the Administrator is authorized to provide. This section
specifically states:

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3 It is conceivable that the Administrator could determine that a candidate was the apparently
successful candidate after the polls had closed but prior to the day following the election. In such a
situation, if the term “President-elect” were understood to operate as a temporal limitation, section
3(b)(1) could serve the independent function of prohibiting the Administrator from reimbursing
any transition-related obligations incurred by the President-elect in the few hours after the polls closed
but prior to the day following the election. This possibility appears so remote, the amount of
obligations that could be incurred so slight and the policy supporting such a distinction so unclear that
we consider such a potential independent function to be too insubstantial to support the view that the
term “President-elect” itself incorporates a temporal restriction on reimbursement.

4 This construction of section 3 is consistent with two provisions added to the Act in 2000 that
permit the expenditure of funds prior to the election itself. See Pub. L. No. 106-293, § 2, 114 Stat.
at 1036 (relevant provisions added as paragraphs (9) and (10) of the Presidential Transition Act).
Paragraph (10) expressly provides that the Administrator may consult with “any candidate for President
or Vice President to develop a systems architecture plan for the computer and communications systems
of the candidate to coordinate a transition to Federal systems.” See Presidential Transition Act,
§ 3(a)(10). Paragraph (9) involves the development of a transition directory prior to the election. Id.
§ 3(a)(9). Only in this narrow category of pre-election transition expenses does the Act authorize
disbursements, thus providing support to our view that transition expenses that might be incurred prior
to the day after the election are, generally, not reimbursable due to section 3(b)(1).
and one ‘Vice-President-elect’ under the Act, the Presidential Transition Act does not authorize the Administrator to provide transition assistance to more than one transition team.” See Authority of the General Services Administration to Provide Assistance to Transition Teams of Two Presidential Candidates, 24 Op. O.L.C. 322, 322 (Nov. 28, 2000) (“GSA Authority”). This conclusion, however, does not answer the question whether the Administrator may reimburse the President-elect and/or Vice-President-elect for obligations related to legitimate transition activities that they incurred beginning the day following the general election (November 8, 2000) but prior to the Administrator’s determination that they were in fact “the apparent successful candidates for the office of President and Vice President,” which in this election did not occur until December 14, 2000. Based on the language and purposes of the Act, we conclude that the Administrator can reimburse the President-elect and Vice-President-elect for such expenses.

The argument that funds appropriated to implement the Act cannot be used to reimburse the President-elect and Vice-President-elect for post-election transition obligations incurred prior to December 14, 2000 depends on a reading of the Act that would limit such reimbursement only to those obligations incurred by the President-elect or Vice-President-elect after they held that status as defined in the Act. Under such a reading, because the Act defines both terms as requiring a determination by the Administrator that each candidate is the apparent successful candidate, and because that determination did not take place until December 14, 2000, any obligations incurred prior to that time would not qualify for reimbursement. We conclude, however, that this is not the best reading of the statute.

Section 3(b) of the Act specifies that the Administrator may not expend funds for the provision of services and facilities under the Act

in connection with any obligations incurred by the President-elect or Vice-President-elect—

(1) before the day following the date of the general elections held to determine the electors of President and Vice President under section 1 or 2 of title 3, United States Code; or

(2) after 30 days after the date of the inauguration of the President-elect as President and the inauguration of the Vice-President-elect as Vice President.

If the term “President-elect” in the phrase “incurred by the President-elect” was itself intended to incorporate a temporal limitation on reimbursement—i.e., no reimbursement for any obligations incurred prior to the time the Administrator determines who the President-elect is—then section 3(b)(1) would serve little purpose. As a practical matter, the Administrator cannot determine who the apparent successful candidate[] for the office of President is “before the day
The Administrator of General Services . . . is authorized to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties as President or Vice President necessary services and facilities, including [payment of compensation of members of office staffs, payment of expenses for the procurement of experts or consultants, payment of travel expenses and subsistence allowances, etc.].

Although this provision authorizes assistance only to the “President-elect” and the “Vice-President-elect,” it does not limit that assistance to expenses incurred after the determination of that fact. To the contrary, the Act as a whole only limits the assistance to obligations that are “in connection with his preparations for the assumption of official duties as President or Vice President” and which were incurred after “the day following the date of the general elections held to determine the electors.” This indicates a congressional intent to reimburse the President-elect and Vice-President-elect for any legitimate transition related expenses incurred by them after the general election.

This reading of the statute is also consistent with its purposes, and promotes its goals. Based on a recognition that “the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President” is in the “national interest.” id. § 2. Congress believed that transition efforts are a public function that should be financed by government funds rather than by private interests. See 109 Cong. Rec. 13,346 (1963) (statement of Rep. Rosenthal); id. at 13,347 (1963) (statement of Rep. Monagan). Congress concluded that it was not fair to place the financial burden on the President-elect, private individuals and the national political parties, see, e.g., id. at 13,347 (statement of Rep. Monagan) (“the country cannot reasonably expect that [the costs of transition] will any longer be borne by individuals or even by a party organization. They are an integral part of the presidential administration and should be borne by the public.”), and that it was bad public policy for private individuals possibly to feel that they were entitled to special consideration as a result of helping to fund a cost of government. See, e.g., id. at 13,346 (statement of Rep. Rosenthal) (“If someone is going to come forward and help pay what we now recognize is a cost of government, which is actually what it is, during the transitional period, that person may feel inclined to think that he is entitled to special consideration from the government.”).

Those expenses incurred by the President-elect and Vice-President-elect after the election but prior to December 14, 2000 (and in relation to transition activities as contemplated under the Act) are precisely the sort of expenses that Congress felt it was important to fund publicly because Congress viewed these activities as “expenses that are necessary and pertinent to the job of the Presidency and the
benefit. Neither the language of the statute nor its legislative history supports such a result. As Representative Fascell explained to the House, “this bill formalizes [the process] by authorizing the funding procedures for the orderly transition of executive power so that certain services will be available to the incoming President between the time of his election and inauguration.” 110 Cong. Rec. 3539 (1964) (emphasis added). The Administrator’s determination under section 3(c) of the Act confirms which of the candidates for President is entitled to receive transition funds and when the Administrator may first begin expending those funds; that determination does not also serve to establish the time frame within which legitimate transition-related obligations must be incurred in order to qualify for reimbursement. That time frame is set forth in section 3(b) of the Act.

In sum, we conclude that the General Services Administration can reimburse the transition for legitimate transition-related expenses, as contemplated by the Presidential Transition Act of 1963, that were incurred after November 7, 2000 but prior to December 14, 2000.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

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3 We noted, in the GSA Authority opinion, Representative Fascell’s statement that:

This act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate—apparent successful candidate—for the purposes of this particular act in order to make the services provided by this act available to them. And, if there is any doubt in his mind, and if he cannot or does not designate the apparently successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided and no money expended.

24 Op. O.L.C. at 325 (quoting 109 Cong. Rec. at 13,349). We read this and similar statements in the legislative history to refer to when the Administrator is authorized to make expenditures under the Act rather than to refer to the period in which obligations can be incurred by the transition for which reimbursement expenditures can ultimately be made by the Administrator following his ascertainment of the President-elect.
Vice Presidency,” 109 Cong. Rec. at 19,738 (statement of Sen. Jackson); “a public function,” id. at 13,346 (statement of Rep. Rosenthal); “an integral part of the presidential administration,” id. at 13,347 (statement of Rep. Monagan); and, as President Kennedy expressed in his letter transmitting the proposed legislation that was to become the Presidential Transition Act, “the reasonable and necessary costs of installing a new administration in office.” Letter of Transmittal from the President of the United States to the President of the Senate and the Speaker of the House of Representatives (May 29, 1962), reprinted in H.R. Rep. No. 88-301, at 9, 12 (1963). As long as the transition obligations at issue were incurred within the time frame specified by the Act, the Administrator’s inability, due to the closeness of the election, to determine the President-elect and Vice-President-elect until several weeks after the election itself should not operate to cut off reimbursement of legitimate, post-election transition-related expenses.

To be sure, in our earlier opinion, we concluded that the Act prohibits the Administrator from expending transition funds prior to a determination of “the apparently successful candidates.” That conclusion, however, is consistent with our determination here that, once the President-elect is determined, the Administrator may expend available funds to reimburse the now-designated President-elect for legitimate post-election transition obligations his transition incurred prior to that designation. The prohibition on expenditure prior to the determination of the apparent successful candidate is designed to ensure both that public funds are not disbursed in a manner that might influence the outcome of a disputed election, and that those funds are expended only on obligations that are truly related to the actual transition of the President-elect and Vice-President-elect. As Representative Fascell, a sponsor and manager of the bill, explained:

The pending legislation does not seek to do anything about [the determination of the election of the President and the Vice President] or change it in any way, and we are not directly concerned with the question of election, nomination, or the inauguration, for that matter. But we do provide under this pending legislation, as we have provided in previous congressional actions, the right of the Administrator to determine that funds shall be spent for certain services, supplies, and other things for the benefit of the President-elect and the Vice-President-elect.

109 Cong. Rec. at 13,349 (emphasis added). However, to construe the Act in such a manner that it bars not only expenditures of funds prior to a determination of the apparent successful candidate, but also reimbursement of legitimate transition obligations that the transition incurs after the election but prior to the designation of the President-elect, would have the perverse effect of denying the President-elect and Vice-President-elect the very funds Congress made available for their
Authority of the General Services Administration to Provide Assistance to Transition Teams of Two Presidential Candidates

The Presidential Transition Act of 1963, with certain limited exceptions, authorizes the Administrator of the General Services Administration to provide transition assistance only for those services and facilities necessary to assist the transition of the "President-elect" and the "Vice-President-elect," as those terms are defined in the Act. Since there cannot be more than one "President-elect" and one "Vice-President-elect" under the Act, the Act does not authorize the Administrator to provide transition assistance to the transition teams of more than one presidential candidate.

November 28, 2000

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked our opinion whether, under the Presidential Transition Act of 1963, as amended, the Administrator of the General Services Administration ("Administrator") has the authority to provide transition assistance to more than one presidential candidate in circumstances in which it remains unclear after the election which of two candidates will become the President of the United States. With the limited exceptions set forth below in note 3, the Act authorizes the Administrator to expend the funds appropriated to implement the Act only for those services and facilities that are necessary to assist the transition of the "President-elect" and the "Vice-President-elect." See Presidential Transition Act, § 3(a). The terms "President-elect" and "Vice-President-elect" are defined under the Act to mean the individuals that the Administrator determines are "the apparent successful candidates for the office of President and Vice-President, respectively." Id. § 3(c). Since there cannot be more than one "President-elect" and one "Vice-President-elect" under the Act, the Presidential Transition Act does not authorize the Administrator to provide transition assistance to more than one transition team.

As summarized above, the assistance that the Administrator is authorized to provide under the Presidential Transition Act is expressly tied to the Administrator's determination of a "President-elect" and a "Vice-President-elect." "President-elect" and "Vice-President-elect" are defined terms under section 3(c) of the Act, which provides:

The terms "President-elect" and "Vice-President-elect" as used in this Act shall mean such persons as are the apparent successful candidates for the office of President and Vice President, respec-

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2 This memorandum addresses only the narrow question of the Administrator's authority to provide assistance under the Presidential Transition Act. It does not address whether the Administrator, or any other department or agency, may have separate authority to provide transition assistance to more than one transition team.
of the following: "The President-elect and Vice-President-elect (as a condition for receiving services under section 3 and for funds provided under section 6(a)(1)) shall disclose to the Administrator . . . ." E.g., id. § 5(a)(1) (emphasis added); see also §§ 5(b)(1), 5(c). We thus believe that both the specific terms and the general structure of the Act preclude the Administrator from relying upon this Act to provide assistance to more than one transition team.

The most plausible contrary argument for providing assistance to multiple transition teams, notwithstanding the clear language and structure of the Act, would be that such assistance is necessary under present circumstances because of the shortened time period for the transition. In support of this argument, it is clear, both in the section of the Act stating Congress's purpose and similar expressions of purpose in the legislative history, that the Act was intended "to promote the orderly transfer of executive power." Id. § 2. In this regard, the Act states:

Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption.

Id. See also, e.g., H.R. Rep. No. 88–301, at 4 (1963) ("[T]he size and complexity of our Federal Government today, to say nothing of the difficult domestic and international problems that the President must face, make it a vital necessity that the machinery of transition be as smooth as possible and that sufficient resources are at hand to properly orient the new national leader in whatever manner is required. . . . Under present conditions, a new President, in one sense, begins working for the Government the morning after the election."); 109 Cong. Rec. 13,349 (1963) (statement of Rep. Joelson) ("In that interim time he is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office. For that reason it is up to us to see that he has the tools and the implements.").

We doubt that this expression of intent would, in any event, be sufficient to overcome the evidence from the express terms and structure of the Act that funds appropriated to implement the Act are not available in circumstances in which the Administrator cannot ascertain who the apparent victorious candidate is. The legislative history, moreover, makes clear that Congress did not intend the Presidential Transition Act to be available until an apparent President-elect emerged.

During debate on the bill, concern was raised about the effect that an Administrator's determination of the "President-elect" could potentially have on a close election. See 109 Cong. Rec. 13,348–49 (1963). As part of that debate, Representative Gross expressed the concern that, in connection with the voting of the electoral college, "those designated as President and Vice President by the present
tively, as ascertained by the Administrator following the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.

_Id._ §3(c). As a matter of the statutory definition, as well as common usage, there can be only one “President-elect” and “Vice-President-elect” from any election.

It is only for that “President-elect” and that “Vice-President-elect” that the Administrator is authorized by the Act to provide transition assistance. Section 3(a) of the Act, which sets out the services and facilities that the Administrator is authorized to provide, specifically states:

> The Administrator of General Services . . . is authorized to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties as President or Vice President necessary services and facilities, including [the assistance specifically identified in subparagraphs (a)(1) through (a)(10)].

_Id._ §3(a). Accordingly, by its terms, the Act generally authorizes assistance only to the “President-elect” and the “Vice-President-elect.” Consistent with this general structure, the subparagraphs within subsection 3(a), which list specific services and facilities that the Administrator is authorized to provide, also generally make explicit reference to the President-elect and the Vice-President-elect. For example, subparagraph 3(a)(2) authorizes the payment of compensation to the “members of the office staffs designated by the President-elect or Vice-President-elect.” Without the existence of a President-elect or Vice-President-elect, there can be no staff who have been designated and to whom compensation may therefore be paid. See _id._ §3(a)(2) (emphasis added); see also _id._ §§3(a)(1), (3)–(5), (7), 3(b), 3(d), 3(e).3 Similarly, the provisions in section 5 of the Act for the disclosure of financing and personnel information related to the transition are also expressly premised on, and limited to, the “President-elect” and the “Vice-President-elect.” Each subsection in section 5 begins with language along the lines

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3The only exceptions to the general structure of section 3 limiting assistance to a “President-elect” are two provisions from the 2000 amendments that appear to envision the expenditure of funds prior to the determination of a “President-elect.” See Pub. L. No. 106-293, §3 (relevant provisions added as subparagraphs (9) and (10) of the Presidential Transition Act) These additional provisions, by their distinct language and functions, reinforce the general limitation that assistance may be provided only to a “President-elect.” In particular, subparagraph (10) expressly provides that it applies to the “candidates.” See Presidential Transition Act, §3(a)(10) (“Notwithstanding subsection (b), consultation by the Administrator with any candidate for President or Vice President to develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems, if the candidate is elected.”) (emphasis added)) Subparagraph (9) involves the development by the General Services Administration of a transition directory on the officers, organization, and statutory and administrative authorities, functions, duties, responsibilities, and mission of each department and agency — expenditures that are preparatory to transition for whomever is determined to be the “President-elect” and that are not materially altered by multiple transition teams since the directory would remain the same.
Administrator of General Services would be given psychological and other advantages by designating them as President and Vice President.” *Id.* at 13,348. In response, Representative Fascell, who was the sponsor of the bill and the House manager, stated as follows: “I do not think so, because if they were unable at the time to determine the successful candidates, this act would not be operative. Therefore in a close contest, the Administrator would not make the decision.” *Id.* (emphasis added). Representative Gross, however, remained concerned and continued to press the issue. In response to those further inquiries, Representative Fascell again responded: “There is nothing in the act that requires the Administrator to make a decision which in his own judgment he could not make. If he could not determine the apparent successful candidate, he would not authorize the expenditure of funds to anyone; and he should not.” *Id.* (emphasis added).

Representative Gross was not the only member concerned about the issue, which was raised again later in the debate by Representative Haley:

> I notice that these funds can be used immediately after the general election in November. But how would this situation work, for instance, if the President or, at least, before the determination of the votes in the electoral college, suppose that some person was, say, three or four votes shy? How would this Administrator determine who was in a position to expend these funds?

*Id.* at 13,349. In response, Representative Fascell quoted the section of the bill defining “President-elect” and “Vice-President-elect” and stated:

> This act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate—the apparent successful candidate—for the purposes of this particular act in order to make the services provided by this act available to them. And, if there is any doubt in his mind, and if he cannot and does not designate the apparently successful candidate, then the act is inoperative. He cannot do anything. There will be no services provided and no money expended.

*Id.* (emphasis added). See also *id.* (statement of Rep. Fascell) (“In the whole history of the United States, there have been only three such close situations. It is an unlikely proposition, but if it were to happen, if the administrator had any question in his mind, he simply would not make the designation in order to make the services available as provided by the act. If as an intelligent human being and he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress.”).
It is clear from the legislative history that Congress understood and intended that the Presidential Transition Act would simply be unavailable to fund transition services and facilities in circumstances in which the winner of the election is not apparent. This is consistent with the plain language and structure of the Act, which, with the two exceptions noted above in note 3, authorizes the Administrator to provide transition assistance only to the "President-elect" and the "Vice-President-elect." Accordingly, the Presidential Transition Act would not authorize the Administrator to expend the funds appropriated to implement the Act to provide transition assistance to multiple transition teams.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel
AC 09.2017

November 16, 2016

MEMORANDUM TO FEDERAL AGENCY RECORDS OFFICERS: Guidance Relating to President Elect Transition Team Materials

The President elect’s Transition Team (PETT) represents the President elect during the 2016-2017 Presidential transition. The materials that PETT members create or receive are not Federal or Presidential records, but are considered private materials. However, transition briefing materials created by a Federal agency and agency communications with the PETT are Federal records and must be managed in accordance with an approved agency records schedule.

If a PETT member is appointed to an agency position as part of the new Administration, the status of PETT materials that the individual brings to the agency may change at that time. If PETT materials are incorporated as agency working files, they become records under either the Federal Records Act (FRA) for individuals working at Federal agencies, or the Presidential Records Act (PRA) for individuals working in PRA covered entities of the Executive Office of the President. If the PETT materials are kept separate from Federal agency files or from files of a PRA entity, then they remain private materials.

If you have any questions concerning this guidance, please contact the assigned to work with your agency.

LAURENCE BREWER
Chief Records Officer
for the U.S. Government.

[Link to PDF Memorandum]
Applicability of 18 U.S.C. § 207(c) to President-Elect’s Transition Team

The one-year bar in 18 U.S.C. § 207(c), which prohibits certain former government employees from contacting the agencies where they worked, applies to persons who serve on a presidential transition team while receiving a salary from a private employer.

The bar in 18 U.S.C. § 207(c) does not apply to members of a presidential transition team who support themselves from their own resources or are compensated solely from appropriated funds.

November 18, 1988

LETTER FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This responds to your oral request of November 17, 1988, for our views on whether the one year bar prohibiting certain former government employees from contacting their former agency, contained in 18 U.S.C. § 207(c), applies to former government employees who are working for the President-elect’s transition team. Presidential Transition Act (“Act”), 3 U.S.C. § 102 note, as amended by Pub. L. No. 100–398, 102 Stat. 985 (1988).

As you indicated, this is a novel and difficult question given the sui generis nature of a presidential transition. It is readily apparent that presidential transitions serve an important public function. Congress has endorsed their significance, stating, when it set forth the purposes of the Act:

The national interest requires that such transitions in the office of the President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign.

Id. § 2. We have no doubt that promoting the “orderly transfer of the executive power,” id., is one of the most important public objectives in a democratic society.

It does not follow from this that the restrictions of 18 U.S.C. § 207(c) do not apply at all to the transition. The conflict of interest laws also advance extremely important goals, including promoting public confidence in the integrity of the federal government and ensuring that corruption—and opportunities for corruption—are minimized. Thus, in evaluating the applicability of section 207(c), we believe that it is best to examine the actual status of a transition staff member in conjunction with the evils that the ethics laws were intended to combat.

At one end of the spectrum is the federal employee who is detailed by his agency to assist the transition team. He is clearly a federal employee, covered by all applicable portions of 18 U.S.C. §§ 201–209, and obviously his status raises no question under section 207(c). The Act specifically refers to such employees
ing for some transition staff members. In return for the funding, the President-elect must undertake certain steps to minimize the potential for conflicts of interest with respect to all transition personnel. Act, § 5(b), as amended. As the House Report on the recent bill notes:

Once again, the unique circumstances of a Presidential transition require balancing the ability of a new President to conduct transition activities as completely and effectively as possible, and in a manner he desires, with the necessity of maintaining public confidence . . . .

H.R. Rep. No. 532, 100th Cong., 2d Sess. 6–7 (1988), reprinted in 1988 U.S.C.C.A.N. 1372, 1376. Thus, Congress, notwithstanding the fact that these compensated staff members are not generally treated as federal employees, has made it clear that they occupy a unique position and one that is worthy of federal funding.

Second, with respect to both self-supporting and transition team members compensated solely with public funds, we are influenced by the fact that the Criminal Division has informally advised us that they would not prosecute such individuals under section 207(c) so long as their contacts with their former federal departments or agencies was only for transition purposes. If those who are charged with the direct enforcement of the objectives that section 207(c) was intended to achieve do not believe that those who are self-supporting volunteers or who are compensated solely out of appropriated funds fall outside the scope of section 207(c), we do not feel compelled to disagree.

We would note, in concluding, that former government employees within the scope of section 207(c), regardless of their funding source for the transition, may utilize the exception in 18 U.S.C. § 207(i) which permits former employees otherwise barred by section 207(c) from contacting their former agencies for one year to make or provide a statement to those agencies based on the employees’ prior special knowledge, provided that no compensation is received. Thus, any former employee could assist the transition by supplying to the transition or his former department or agency for the transition an analysis based on his prior experience with and knowledge of his former department or agency, even if the considerations above preclude that individual’s current contact with his former department or agency. Finally, it is of course apparent that section 207(c) does not prevent any covered former employee from contacting departments or agencies other than the one by which he was formerly employed.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

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and emphasizes that their status vis-a-vis the United States does not change while they are working with the transition team. Act, § 3(a)(2). Based upon this statutory recognition, we also agree with you that the prohibitions in section 203 and 205 do not apply to such detailed employees by virtue of the “official duties” exception to those provisions.

At the other end of the spectrum is an individual who recently occupied a high, policy making position in the executive branch and who is now employed by a company or law firm in the private sector. If such an individual, while still receiving his private sector salary, works for the transition team, he typifies the potential for abuse that we believe that section 207(c) was intended to guard against. He is not compensated by the federal government, may not make decisions or participate in matters on behalf of the United States, and his loyalties are not undivided. Because the central purpose of section 207(c) was to preclude for one year a limited class of high-level government employees from contacting their former agencies unless the contact was clearly on behalf of the United States, we believe such individuals who receive compensation from the private sector or, or during, their work for the transition team are not exempt from the fairly absolute “no contact” rule, merely by virtue of their association with the transition. We therefore believe that such individuals are, notwithstanding their employment by the transition team, covered by 18 U.S.C. § 207(c), and barred from contacting their former department or agency for the statutory period.

It is less clear that section 207(c) should apply to those former high-level government officials who have been separated from their agencies less than one year who are either volunteers for the transition team and are supporting themselves from their own resources or who have severed their ties with private sector employment and are being compensated solely from funds appropriated under the Act. It is much more likely that those former officials who are supporting themselves and are acting solely in the interests of the President-elect will not face the divided loyalties at which section 207(c) was aimed.

The same argument is true with respect to those whose salaries are paid out of appropriated funds: Congress has decided that it is in the interest of the United States (even if the actions of the transition team cannot be precisely said to be on behalf of the United States) that these individuals be paid with federal funds because they are advancing a federal interest. Our hesitation to apply section 207(c) to transition team members compensated with appropriated funds is bolstered by the fact that the Act was recently amended to provide significant amounts of fund-

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1 The Act also makes clear that such staff members are not federal employees except for limited provisions not relevant here. Act, § 3(a)(2)

2 We understand that the proposed Standards of Conduct for a transition worker make it clear that he cannot and should not attempt to interfere with the decision making functions of the agencies.

3 A clear example would be a former Department of Defense officer who is now working for a defense contractor or a former Department of Justice official who is now representing companies whose interests would be affected by decisions of the Department.

4 This would seem to apply with special force to a former government official who had no private sector affiliation since leaving government, such as former government employees participating in the political campaign which led to the election of the President-elect.

An Act

To provide for the training or orientation of individuals, during a Presidential transition, who the President intends to appoint to certain key positions, to provide for a study and report on improving the financial disclosure process for certain Presidential nominees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Presidential Transition Act of 2000".

SEC. 2. AMENDMENTS TO PRESIDENTIAL TRANSITION ACT OF 1963.

Section 3(a) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) is amended--
(1) in the matter preceding paragraph (1) by striking "including--" and inserting "including the following;",
(2) in each of paragraphs (1) through (6) by striking the semicolon at the end and inserting a period; and
(3) by adding at the end the following:
"(8)(A)(i) Not withstanding subsection (b), payment of expenses during the transition for briefings, workshops, or other activities to acquaint key prospective Presidential appointees with the types of problems and challenges that most typically confront new political appointees when they make the transition from campaign and other prior activities to assuming the responsibility for governance after inauguration.
"(ii) Activities under this paragraph may include interchange between such appointees and individuals who--
"(I) held similar leadership roles in prior administrations;
"(II) are department or agency experts from the Office of Management and Budget or an Office of Inspector General of a department or agency; or
"(III) are relevant staff from the General Accounting Office.
"(iii) Activities under this paragraph may include training or orientation in records management to comply with section 2203 of title 44, United States Code, including training on the separation of Presidential records and personal records to comply with subsection (b) of that section.
"(iv) Activities under this paragraph may include training or orientation in human resources management and performance-based management.
"(B) Activities under this paragraph shall be conducted primarily for individuals the President-elect intends to nominate as department heads or appoint to key positions in the Executive Office of the President.
"(9)(A) Notwithstanding subsection (b), development of a transition directory by the Administrator of General Services Administration, in consultation with the Archivist of the United States (head of the National Archives and Records Administration) for activities conducted under paragraph (8).
"(B) The transition directory shall be a compilation of Federal publications and materials with supplementary materials developed by the Administrator that provides information on the officers, organization, and statutory and administrative authorities, functions, duties, responsibilities, and mission of each department and agency.

"(10)(A) Notwithstanding subsection (b), consultation by the Administrator with any candidate for President or Vice President to develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems, if the candidate is elected.

"(B) Consultations under this paragraph shall be conducted at the discretion of the Administrator."

SEC. 3. REPORT ON IMPROVING THE FINANCIAL DISCLOSURE PROCESS FOR PRESIDENTIAL NOMINEES.

(a) In General.--Not later than 6 months after the date of the enactment of this Act, the Office of Government Ethics shall conduct a study and submit a report on improvements to the financial disclosure process for Presidential nominees required to file reports under section 101(b) of the Ethics in Government Act of 1978 (5 U.S.C. App.) to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives.

(b) Content of Report.--

(1) In general.--The report under this section shall include recommendations and legislative proposals on--

(A) streamlining, standardizing, and coordinating the financial disclosure process and the requirements of financial disclosure reports under the Ethics in Government Act of 1978 (5 U.S.C. App.) for Presidential nominees;

(B) avoiding duplication of effort and reducing the burden of filing with respect to financial disclosure of information to the White House Office, the Office of Government Ethics, and the Senate; and

(C) any other relevant matter the Office of Government Ethics determines appropriate.

(2) Limitation relating to conflicts of interest.--The recommendations and proposals under this subsection shall not (if implemented) have the effect of lessening substantive compliance with any conflict of interest requirement.

(c) Authorization of Appropriations.--There are authorized to be appropriated such sums as may be necessary to carry out this section.


Legislative History -- H.R. 4931 (S.2705)

Senate Reports: No 106-348 accompanying S.2705 (Comm. On Governmental Affairs)


Sept. 13, considered and passed House.

Sept 28 considered and passed House.


Oct. 12, Presidential Statement
Eighty-eighth Congress of the United States of America

AT THE SECTION SESSION

Begun and held at the City of Washington on Tuesday, the seventh day of January, on one thousand nine hundred and sixty-four

An Act

To promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the Inauguration of a new President.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "President Transition Act of 1963"

PURPOSE OF THIS ACT

Sec. 2. The Congress declares it to be the purpose of the Act to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President. The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption. In addition to the specific provisions contained in this Act directed toward that purpose, it is the intent of the Congress that all officers of the Government so conduct the affairs of the Government for which the exercise responsibility and authority as (1) to be mindful of problems occasioned by transitions in the office of President, (2) to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power, and (3) otherwise to promote orderly transitions in the office of President.

SERVICES AND FACILITIES AUTHORIZED TO BE PROVIDED TO PRESIDENTS-ELECT AND VICE PRESIDENTS-ELECT

Sec. 3 (a) The Administrator of General Services, referred to hereafter in this Act as "the Administrator," is authorized to provide, upon request, to each President-elect and each Vice President-elect, for use in connection with his preparations for the assumption of official duties as President or Vice President necessary services and facilities, including-
President in accordance with title 3, United States Code, sections 1 and 2, or after the inauguration of the President-elect as President and the inauguration of the Vice-President-elect as Vice President.

(c) The terms “President-elect” and “Vice-President-elect” as used in this Act shall mean such persons as are the apparent successful candidates for the office of the President and Vice President, respectively, as ascertained by the Administrator following the general elections held to determine the electors of the President and Vice-President in accordance with title 3, United States Code, sections 1 and 2.

(d) Each President-elect shall be entitled to conveyance within the United States and its territories and possessions of all mail matter, including airmail, sent by him in connection with his preparations for the assumption of official duties as President, and such mail matter shall be transmitted as penalty mail as provided in title 39, United States Code, section 4152. Each Vice-President-elect shall be entitled to conveyance within the United States and its territories and possession of all mail matter, including airmail, sent by him under his written autograph signature in connection with his preparations for the assumption of official duties as Vice President.

(e) Each President-elect and Vice-President-elect may designate to the Administrator an assistant authorized to make on his behalf such designations or findings of necessity as may be required in connection with the services and facilities to be provided under this Act. Not more than 10 per centum of the total expenditures under this Act for any President-elect or Vice-President-elect may be made upon the basis of a certificate by him or the assistant designated by him pursuant to this section that such expenditures are classified and are essential to the national security, and that they accord with the provisions of subsections (a), (b), and (d) of this section.

(f) In the case where the President-elect is the incumbent President or in the case where the Vice-President-elect is the incumbent Vice President, there shall be no expenditures or funds for the provisions of services and facilities to such incumbent under this Act, and any funds appropriated for such purposes shall be returned to the general funds of the Treasury.

SERVICES AND FACILITIES AUTHORIZED TO BE PROVIDED TO FORMER PRESIDENTS AND FORMER VICE PRESIDENTS

Sec. 4. The Administrator is authorized to provide, upon request, to each former President and each former Vice President, for a period not to exceed six months from the date of the expiration of his term of office as President or Vice President, for use in connection with winding up the affairs of his office, necessary services and facilities of the same general character as authorized by this act to be provided to Presidents-elect and Vice Presidents-elect. Any person appointed or detailed to serve a former President or former Vice President under authority of this section shall be appointed or detailed in accordance with, and shall be subject to, all of the provisions of section 3 of this Act applicable to persons appointed or detailed under authority of that section. The provisions of the Act of August 25, 1958 (72 Stat. 838; U.S.C. 102, note), other than
(1) Suitable office space appropriately equipped with furniture, furnishings, office machines and equipment, and office supplies as determined by the Administrator, after consultation with the President-elect, the Vice-President elect, or their designee provided for in subsection (e) of this section, at such place or places within the United States as the President-elect or Vice-President-elect shall designate;

(2) Payment of the compensation of members of office staffs designated by the President-elect or Vice-President-elect at rates determined by them not to exceed the rate provided by the Classification Act of 1949, as amended, for grade GS-18: Provided, That any employee of any agency of any branch of the Government may be detailed to such staffs on a reimbursable or non-reimbursable basis with the consent of the head of the agency; and while so detailed such employee shall be responsible only to the President or Vice-President-elect for the performance of his duties: Provided further, That any employee so detailed shall continue to receive the compensation provided pursuant to law for his regular employment, and shall retain the rights and privileges of such employment without interruption. Notwithstanding any other law, persons receiving compensation as members of office staffs under this subsection, other than those detailed from agencies, shall not be held or considered to be employees of the Federal Government except for purposes of the Civil Service Retirement Act, the Federal Employee's Compensation Act, the Federal Employees Group Life Insurance Act of 1954, and the Federal Employees Health Benefits Act of 1959;

(3) Payment of expenses for the procurement of services of experts or consultants or organizations thereof for the President-elect or Vice-President-elect, as authorized for the head of any department by section 15 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. 55a), at rates not to exceed $100 per diem for individuals;

(4) Payment of travel expenses and subsistence allowances, including rental of Government or hired motor vehicles, found necessary by the President-elect or Vice-President-elect, as authorized for persons employed intermittently or for persons serving without compensation by section 5 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. 73b-2), as may be appropriate;

(5) Communications services found necessary by the President-elect or Vice-President-elect;

(6) Payment of expenses for necessary printing and binding, notwithstanding the Act of January 12th, 1895, and the Act of March 1, 1919, as amended (44 U.S.C. 111);

(7) Reimbursement to the postal revenues in amounts equivalent to the postage that would otherwise be payable on mail matter referred to in subsection (d) of this section.

(b) The Administrator shall expend no funds for the provision of services and facilities under this Act in connection with any obligations incurred by the President-elect or Vice-President-elect before the day following the date of the general elections held to determine the electors of the President and Vice
subsections (a) and (e) shall not become effective with respect to a former President until six months after the expiration of his term of office as President.

AUTHORIZATION OF APPROPRIATIONS

Sec. 5. There are hereby authorized to be appropriated to the Administrator such funds as may be necessary for carrying out the purposes of this Act but not to exceed $900,000 for any one Presidential transition, to remain available during the fiscal year in which the transition occurs and the next succeeding fiscal year. The President shall include in the budget transmitted to the Congress, for each fiscal year in which his regular term of office will expire, a proposed appropriation for carrying out the purposes of this Act.

Approved March 7, 1964
P.L. 100-398
100th Congress

An Act
To amend the Presidential Transition Act of 1963 to provide for a more orderly transfer of executive power in connection with the expiration of the term of office of a President.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act "3 USC 102 note" may be cited as the "Presidential Transitions Effectiveness Act".

SEC. 2. PRESIDENTIAL TRANSITION AUTHORIZATIONS.

(a) AMENDMENT. -- Section 5 of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) is amended --

(1) by redesignating such section as section 6;
(2) by inserting before such section the following heading:

"AUTHORIZATION OF APPROPRIATIONS";

(3) by inserting "(a)" after the section designation;
(4) in paragraph (1), by striking out "$2,000,000" and inserting in lieu thereof "$3,500,000";
(5) in paragraph (2), by striking out "$1,000,000" and inserting in lieu thereof "$1,500,000";
(6) in paragraph (2), by inserting before the period at the end thereof the following: ", except that any amount appropriated pursuant to this paragraph in excess of $1,250,000 shall be returned to the general fund of the Treasury in the case where the former Vice President is the incumbent President"; and
(7) by adding at the end thereof the following new subsection: "(b) The amounts authorized to be appropriated under subsection (a) shall be increased by an inflation adjusted amount, based on increases in the cost of transition services and expenses which have occurred in the years following the most recent Presidential transition, and shall be included in the proposed appropriation transmitted by the President under the last sentence of subsection (a)."

(b) EFFECTIVE DATE. -- The amendments made by subsection (a) "3 USC 102 note" of this section shall be effective upon enactment, except that the amendment made by paragraph (7) of such subsection shall take effect on October 1, 1989.

SEC. 3. PRESIDENTIAL TRANSITION FINANCING AND PERSONNEL.

The Presidential Transition Act of 1963 (3 U.S.C. 102 note) is further amended by inserting after section 4 the following new section:
chartered aircraft shall be deposited to the credit of the appropriations made under section 6 of this Act;".

(b) DURATION OF EXPENDITURES. -- Section 3(b) of the Presidential Transition Act "3 USC 102 note" of 1963 is amended to read as follows:

"(b) The Administrator may not expend funds for the provision of services and facilities under section 3 of this Act in connection with any obligations incurred by the President-elect or Vice-President-elect --

"(1) before the day following the date of the general elections held to determine the electors of President and Vice President under section 1 or 2 of title 3, United States Code; or

"(2) after 30 days after the date of the inauguration of the President-elect as President and the inauguration of the Vice-President-elect as Vice President."

(c) COMMENCEMENT OF EXPENDITURES. -- Section 4 of the Presidential Transition Act of 1963 "3 USC 102 note" is amended by striking out "six months from the date of the expiration" and inserting "seven months from 30 days after the date of expiration."

SEC. 5. 3 USC 102 note" DISCLOSURE OF IN-KIND CONTRIBUTIONS TO 1988-1989 TRANSITION.

(a) DISCLOSURE AS CONDITION OF RECEIPT OF FUNDS. -- The President-elect and Vice-President-elect (as a condition for receiving services under section 3 and for funds provided under section 6(a)(1) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) shall provide an estimate to the Administrator of General Services of the aggregate value of in-kind contributions made during the period beginning on November 9, 1988, through January 20, 1989, received for transition activities for --

(1) transportation;
(2) hotel and other accommodations;
(3) suitable office space; and
(4) furniture, furnishings, office machines and equipment, and office supplies.

(b) FORM AND AVAILABILITY OF ESTIMATES. -- The estimates made under subsection (a) shall be --

(1) in the form of a report to the Administrator of General Services within 90 days after January 20, 1989; and
(2) made available to the public by the Administrator upon receipt by the Administrator.

SEC. 6. TRAVEL AND TRANSPORTATION EXPENSES.

Section 5723 of title 5, United States Code, is amended --

(1) in subsection (a)(1), by striking out "or (B)" and inserting "or (C)";
(2) in subsection (a), by adding at the end thereof: "In the case of an appointee described in paragraph (1) who has performed transition activities under section 3 of the Presidential Transition Act of 1963 (3 U.S.C. 102 note), the provisions of paragraphs (1) and (2) may apply to travel and transportation expenses from the place of residence of such appointee (at the time of relocation following the most recent general elections held to determine the electors of the President) to the assigned duty station of such appointee."; and
"DISCLOSURES OF FINANCING AND PERSONNEL; LIMITATION ON ACCEPTANCE OF DONATIONS"

"SEC. 5. (a)(1) "3 USC 102 note" The President-elect and Vice-President-elect (as a condition for receiving services under section 3 and for funds provided under section 6(a)(1)) shall disclose to the Administrator the date of contribution, source, amount, and expenditure thereof of all money, other than funds from the Federal Government, and including currency of the United States and of any foreign nation, checks, money orders, or any other negotiable instruments payable on demand, received either before or after the date of the general elections for use in the preparation of the President-elect or Vice-President-elect for the assumption of official duties as President or Vice President.

"(2) The President-elect and Vice-President-elect (as a condition for receiving such services and funds) shall make available to the Administrator and the Comptroller General all information concerning such contributions as the Administrator or Comptroller General may require for purposes of auditing both the public and private funding used in the activities authorized by this Act.

"(3) Disclosures made under paragraph (1) shall be –

"(A) in the form of a report to the Administrator within 30 days after the inauguration of the President-elect as President and the Vice-President-elect as Vice President; and

"(B) made available to the public by the Administrator upon receipt by the Administrator.

"(b)(1) The President-elect and Vice-President-elect (as a condition for receiving services provided under section 3 and funds provided under section 6(a)(1)) shall make available to the public –

"(A) the names and most recent employment of all transition personnel (full-time or part-time, public or private, or volunteer) who are members of the President-elect or Vice-President-elect's Federal department or agency transition teams; and

"(B) information regarding the sources of funding which support the transition activities of each transition team member.

"(2) Disclosures under paragraph (1) shall be made public before the initial transition team contact with a Federal department or agency and shall be updated as necessary.

"(c) The President-elect and Vice-President-elect (as a condition for receiving services under section 3 and for funds provided under section 6(a)(1)) shall not accept more than $5,000 from any person, organization, or other entity for purposes of carrying out activities authorized by this Act."

"SEC. 4. LIMITATION ON EXPENDITURES OF CERTAIN FUNDS."

(a) USE OF AIRCRAFT. -- Section 3(a)(4) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) is amended –

(1) by inserting "(A)" after "(4)";
(2) by adding at the end thereof the following new subparagraph:

"(B) When requested by the President-elect or Vice-President-elect or their designee, and approved by the President, Government aircraft may be provided for transition purposes on a reimbursable basis; when requested by the President-elect, the Vice-President-elect, or the designee of the President-elect or Vice-President-elect, aircraft may be chartered for transition purposes; and any collections from the Secret Service, press, or others occupying space on
(3) in subsection (c), by adding at the end thereof the following: "In the case of an appointee described in subsection (a)(1) who has performed transition activities under section 3 of the Presidential Transition Act of 1963 (3 U.S.C. 102 note), the travel or transportation shall take place at any time after the most recent general elections held to determine the electors of the President."

SEC. 7. EXECUTIVE AGENCY VACANCIES.

(a) APPLICATION OF VACANCY PROVISIONS TO EXECUTIVE AGENCIES. —
(1) Section 3345 of title 5, United States Code, is amended by striking out "Executive department" and inserting in lieu thereof "Executive agency (other than the General Accounting Office)."
(2) The heading for section 3345 of title 5, United States Code, is amended to read as follows:

"Section 3345. Details; to office of head of Executive agency or military department."

(3) The table of section headings for chapter 33 of title 5, United States Code, is amended by amending the item relating to section 3345 to read as follows: "3345. Details; to office of head of Executive agency or military department."

(b) EXTENSION OF TIME FOR INTERIM SERVICE. -- Section 3348 of title 5, United States Code, is amended to read as follows:

"Section 3348. Details; limited in time

"(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that --
"(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title --
"(A) until the Senate confirms the nomination; or (B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or
"(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.
"(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn."

Approved August 17, 1988.

LEGISLATIVE HISTORY -- H.R. 3922 (S. 2037);
HOUSE REPORTS: No. 100-532 (Comm. on Government Operations).
SENATE REPORTS: No. 100-317 (accompanying S. 2037) Comm. on Governmental Affairs).
Pre-Election Presidential Transition Act of 2010

Public Law 111-283
111th Congress

An Act

To amend the Presidential Transition Act of 1963 to provide that certain transition services shall be available to eligible candidates before the general election. <<NOTE: Oct. 15, 2010 - [S. 3196]>>

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, <<NOTE: Pre-Election Presidential Transition Act of 2010.>>

SECTION 1. <<NOTE: 3 USC 1 note.>> SHORT TITLE.

This Act may be cited as the "Pre-Election Presidential Transition Act of 2010".

SEC. 2. CERTAIN PRESIDENTIAL TRANSITION SERVICES MAY BE PROVIDED TO ELIGIBLE CANDIDATES BEFORE GENERAL ELECTION.

(a) In General.--Section 3 of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) is amended by adding at the end the following new subsection:

"(h)(1)(A) In the case of an eligible candidate, the Administrator--

"(i) shall <<NOTE: Notification.>> notify the candidate of the candidate’s right to receive the services and facilities described in paragraph (2) and shall provide with such notice a description of the nature and scope of each such service and facility; and

"(ii) upon notification by the candidate of which such services and facilities such candidate will accept, shall,
notwithstanding subsection (b), provide such services and facilities to the candidate during the period beginning on the date of the notification and ending on the date of the general elections described in subsection (b)(1).

The Administrator <<NOTE: Notification.>> shall also notify the candidate that sections 7601(c) and 8403(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 provide additional services.

"(B) The Administrator shall provide the notice under subparagraph (A)(i) to each eligible candidate--

"(i) in the case of a candidate of a major party (as defined in section 9002(6) of the Internal Revenue Code of 1986), on one of the first 3 business days following the last nominating convention for such major parties; and

"(ii) in the case of any other candidate, as soon as practicable after an individual becomes an eligible candidate (or, if later, at the same time as notice is provided under clause (i)).

"(C)(i) The Administrator <<NOTE: Deadline. Reports.>> shall, not later than 12 months before the date of each general election for President and Vice-President (beginning with the election to be held in 2012), prepare a report summarizing modern presidential transition activities, including a bibliography of relevant resources.

"(ii) The Administrator <<NOTE: Public information.>> shall promptly make the report under clause (i) generally available to the public (including through electronic means) and shall include such report with the notice provided to each eligible candidate under subparagraph (A)(i).

"(2)(A) Except as provided in subparagraph (B), the services and facilities described in this paragraph are the services and facilities described in subsection (a) (other than paragraphs (2), (3), (4), (7), and 8(A)(v) thereof), but only to the extent that the use of the services and facilities is for use in connection with the eligible candidate's preparations for the assumption of official duties as President or Vice-President.

"(B) The Administrator--

"(i) shall determine the location of any office space provided to an eligible candidate under this subsection;
"(ii) shall, as appropriate, ensure that any computers or communications services provided to an eligible candidate under this subsection are secure;

"(iii) shall offer information and other assistance to eligible candidates on an equal basis and without regard to political affiliation; and

"(iv) may modify the scope of any services to be provided under this subsection to reflect that the services are provided to eligible candidates rather than the President-elect or Vice-President-elect, except that any such modification must apply to all eligible candidates.

"(C) An eligible candidate, or any person on behalf of the candidate, shall not use any services or facilities provided under this subsection other than for the purposes described in subparagraph (A), and the candidate or the candidate's campaign shall reimburse the Administrator for any unauthorized use of such services or facilities.

"(3)(A) Notwithstanding any other provision of law, an eligible candidate may establish a separate fund for the payment of expenditures in connection with the eligible candidate's preparations for the assumption of official duties as President or Vice-President, including expenditures in connection with any services or facilities provided under this subsection (whether before such services or facilities are available under this section or to supplement such services or facilities when so provided). Such fund shall be established and maintained in such manner as to qualify such fund for purposes of section 501(c)(4) of the Internal Revenue Code of 1986.

"(B)(i) The eligible candidate may--

"(I) transfer to any separate fund established under subparagraph (A) contributions (within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(8))) the candidate received for the general election for President or Vice-President or payments from the Presidential Election Campaign Fund under chapter 95 of the Internal Revenue Code of 1986 the candidate received for the general election; and

"(II) solicit and accept amounts for receipt by such
separate fund.

"(ii) Any expenditures from the separate fund that are made from such contributions or payments described in clause (i)(I) shall be treated as expenditures (within the meaning of section 301(9) of such Act (2 U.S.C. 431(9))) or qualified campaign expenses (within the meaning of section 9002(11) of such Code), whichever is applicable.

"(iii) An eligible candidate establishing a separate fund under subparagraph (A) shall (as a condition for receiving services and facilities described in paragraph (2)) comply with all requirements and limitations of section 5 in soliciting or expending amounts in the same manner as the President-elect or Vice-President-elect, including reporting on the transfer and expenditure of amounts described in subparagraph (B)(i) in the disclosures required by section 5.

"(4)(A) In <<NOTE: Definition.>> this subsection, the term `eligible candidate' means, with respect to any presidential election (as defined in section 9002(10) of the Internal Revenue Code of 1986)---

"(i) a candidate of a major party (as defined in section 9002(6) of such Code) for President or Vice-President of the United States; and

"(ii) any other candidate who has been determined by the Administrator to be among the principal contenders for the general election to such offices.

"(B) In making a determination under subparagraph (A)(ii), the Administrator shall---

"(i) ensure that any candidate determined to be an eligible candidate under such subparagraph---

"(I) meets the requirements described in Article II, Section 1, of the United States Constitution for eligibility to the office of President;

"(II) has qualified to have his or her name appear on the ballots of a sufficient number of States such that the total number of electors appointed in those States is greater than 50 percent of the total number of electors appointed
in all of the States; and

"(III) has demonstrated a significant level of public support in national public opinion polls, so as to be realistically considered among the principal contenders for President or Vice-President of the United States; and

"(ii) consider whether other national organizations have recognized the candidate as being among the principal contenders for the general election to such offices, including whether the Commission on Presidential Debates has determined that the candidate is eligible to participate in the candidate debates for the general election to such offices.".

(b) Administrator Required To Provide Technology Coordination Upon Request.--Section 3(a)(10) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note) is amended to read as follows:

"(10) Notwithstanding subsection (b), consultation by the Administrator with any President-elect, Vice-President-elect, or eligible candidate (as defined in subsection (h)(4)) to develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems if the candidate is elected.".

(c) Coordination With Other Transition Services.--

(1) Security clearances.--Section 7601(c) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b note) is amended--

(A) by striking paragraph (1) and inserting:

"(1) Definition.--In this section, the term `eligible candidate' has the meaning given such term by section 3(h)(4) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note).",

and

(B) by striking "major party candidate" in paragraph (2) and inserting "eligible candidate".

(2) Presidinally appointed positions.--Section 8403(b)(2)(B) of such Act (5 U.S.C. 1101 note) is amended to read as follows:

"(B) Other <<NOTE: Records.>> candidates.--After making transmittals under subparagraph (A), the Office of Personnel Management shall transmit such electronic record to any other candidate for President who is an eligible candidate described in section 3(h)(4)(B) of the Presidential Transition
Act of 1963 (3 U.S.C. 102 note) and may transmit such
electronic record to any other candidate for President.”.
(d) Conforming Amendments.--Section 3 of the Presidential Transition Act
of 1963 (3 U.S.C. 102 note) is amended--

(1) in subsection (a)(8)(B), by striking "President-elect" and
inserting "President-elect or eligible candidate (as defined in
subsection (h)(4)) for President"; and

(2) in subsection (e), by inserting ", or eligible candidate (as
defined in subsection (h)(4)) for President or Vice-President," before "may designate".

SEC. 3. AUTHORIZATION <<NOTE: 3 USC 102 note.>> OF
TRANSITION ACTIVITIES BY THE INCUMBENT ADMINISTRATION.

(a) In General.--The President of the United States, or the President's
delegate, may take such actions as the President determines necessary
and appropriate to plan and coordinate activities by the Executive branch
of the Federal Government to facilitate an efficient transfer of power to a
successor President, including--

(1) the establishment and operation of a transition coordinating
council comprised of--
   (A) high-level officials of the Executive branch selected by the
President, which may include the Chief of Staff to the
President, any Cabinet officer, the Director of the Office of
Management and Budget, the Administrator of the General
Services Administration, the Director of the Office of
Personnel Management, the Director of the Office of
Government Ethics, and the
   Archivist of the United States, and

   (B) any other persons the President determines appropriate;

(2) the establishment and operation of an agency transition
directors council which includes career employees designated to
lead transition efforts within Executive Departments or agencies;

(3) the development of guidance to Executive Departments and
agencies regarding briefing materials for an incoming
administration, and the development of such materials; and

(4) the development of computer software, publications,
contingency plans, issue memoranda, memoranda of understanding, training and exercises (including crisis training and exercises), programs, lessons learned from previous transitions, and other items appropriate for improving the effectiveness and efficiency of a Presidential transition that may be disseminated to eligible candidates (as defined in section 3(h) (4) of the Presidential Transition Act of 1963, as added by section 2(a)) and to the President-elect and Vice-President-elect.

Any information and other assistance to eligible candidates under this subsection shall be offered on an equal basis and without regard to political affiliation.

(b) Reports.--
(1) In general.--The President of the United States, or the President’s delegate, shall provide to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate reports describing the activities undertaken by the President and the Executive Departments and agencies to prepare for the transfer of power to a new President.

(2) Timing.--The reports under paragraph (1) shall be provided six months and three months before the date of the general election for the Office of President of the United States.

SEC. 4. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.


LEGISLATIVE HISTORY--S. 3196:
SENATE REPORTS: No. 111-239 (Comm. on Homeland Security and Governmental Affairs).
CONGRESSIONAL RECORD, Vol. 156 (2010):
Sept. 24, considered and passed Senate.

https://www.gsa.gov/portal/content/178099[12/27/2016 1:35:04 PM]
Sept. 28, 29, considered and passed House.
As noted at the top of the “Archived Guidance” page, guidance articles that have been archived may be superseded by new developments in the law. In the intervening years since this guidance was issued, there have been court decisions that provide additional insight into the issues addressed. Agencies should contact OIP with any questions they have with respect to any issues addressed in this guidance.

January 1, 1988
FOIA Update
Vol. IX, No. 4
1988

FOIA Counselor

TRANSITION TEAM ISSUES

Every four or eight years, when there is a change in presidential administrations, certain Freedom of Information Act questions arise in connection with that process. Immediately upon a new President’s election, he selects a “transition team” to assist him in “promot[ing] the orderly transfer of the executive power,” so as to “assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government.” Presidential Transition Act of 1963, Pub. L. No. 88-277, § 2, 78 Stat. 153 (codified at 3 U.S.C. § 102 note (1976)). While transition team efforts present a President-elect with a wide range of policy issues to be confronted, they can give rise to several unique FOIA issues as well.

The FOIA questions most frequently presented concern whether transition teams are executive agencies; whether transition documents retained by transition team members who become agency officials are “agency records”; whether the deliberative process privilege under Exemption 5, 5 U.S.C. § 552(b)(5), is applicable to agency communications with a transition team; and whether disclosure of FOIA-exempt records to a transition team results in a waiver of their exempt status.

Nonagency Status of Transition Teams

First and foremost, it seems quite clear that transition teams are not federal agencies subject to the FOIA. The Act applies only to “agencies” of “the executive branch of the Government,” including the independent regulatory agencies. 5 U.S.C. § 552(f). To be sure, the expenses of a transition team are federally funded. See 3 U.S.C. § 102 note, amended by Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 6, 102 Stat. 985 (1988) (providing authorization and appropriation of up to $3.5 million for transition team expenses). However, it is executive branch control, not mere funding, that determines whether an entity is an “agency” for purposes of the FOIA. See Forsham v. Harris, 445 U.S. 169, 182 (1980) (autonomy of grantee of federal funds precludes “agency” status under FOIA).

In the only case to focus directly on this point, it was observed that the transition team enabling legislation
Indeed, it is difficult to imagine a more compelling policy justification for protecting the confidentiality of agency-generated advice to a nonagency than facilitation of the relationship between senior agency officials of an outgoing administration and the members of a President-elect’s transition team. Any threat of premature disclosure or other inhibition of the candid policy recommendations between agencies and transition teams would greatly impair the quality of transition efforts.

This is further reinforced by Section 2 of the Transition Act, which sets out the statute’s congressional purpose, where it is specifically provided that “it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption” which might be “occasioned by the transfer of the executive power.” 3 U.S.C. § 102 note. Most certainly, the legislative purpose of promoting a smooth transition of executive power would be frustrated if Exemption 5’s threshold were not given a sufficiently flexible interpretation so as to afford the confidentiality necessary for candid and effective agency/transition team communications.

No Waiver Consequences

The final FOIA issue that can arise from the relationship between an agency and transition team is whether any FOIA exemption that applies to pre-existing agency records can be deemed to be waived when the agency makes disclosures -- either by merely permitting review of the records or by providing actual photocopies -- to transition team personnel. This question, too, presents itself only because a transition team is not part of the executive branch. (With the possible, narrow exception of records protected by the attorney-client privilege, see FOIA Update, Spring 1985, at 4, the dissemination of a record to another federal agency within the executive branch raises no true issue of waiver under the FOIA. See FOIA Update, Spring 1983, at 6.)

With respect to records disseminated to nonagency entities, the FOIA case law has consistently held that a waiver of exemption applicability does not result where the disclosure fosters a legitimate governmental purpose. Id.; see, e.g., Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1320-21 (5th Cir. 1980) (disclosure to Government Accounting Office); Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976) (disclosure to an advisory committee); Aspin v. Department of Defense, 491 F.2d 24, 26 (D.C. Cir. 1973) (disclosure to congressional committee). Because the very purpose of a disclosure to a transition team is to implement the statutory mandate “to promote the orderly transfer of the executive power,” such a disclosure could not reasonably be found to waive any applicable FOIA exemption.

Updated September 1, 2016
"manifests a congressional concern with preserving the autonomy of the transition staff from the federal government." *Illinois Inst. for Continuing Legal Educ. v. Department of Labor*, 545 F. Supp. 1229, 1232 (N.D. Ill. 1982). Because "[t]he transition staff is clearly not in the control of the incumbent President [and] answers only to the President-elect," the Court found that "[a]s 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." *Id.* This autonomy compels the conclusion that a transition team "is not within the executive branch of government and hence not an 'agency' within the meaning of . . . the FOIA." *Id.* at 1232-33.

**Transition Team Documents as "Personal Records"**

A complication can arise, however, when a member of a transition team brings copies of transition team documents with him to a federal agency when appointed as an agency official. In both of the FOIA cases in which requesters have sought such documents, the courts held that they were not "agency records" under the Act but rather were the "personal records" of the former transition employees. *See Wolfe v. HHS*, 711 F.2d 1077, 1080 (D.C. Cir. 1983) (document did not lose "its private character simply upon arrival within the agency building"); *Illinois Inst. for Continuing Legal Educ. v. Department of Labor*, 545 F. Supp. at 1234 ("To be 'agency records,' something more than mere possession of the records by an agency official must be shown.").

An element in each of those cases, though, was that the documents had never been integrated into the agency's files and were not formally used by the official who possessed it or by anyone else in conducting official agency business. *See Wolfe v. HHS*, 711 F.2d at 1081 ("no one [else] in the agency ever read or relied upon these documents"); *Illinois Inst. for Continuing Legal Educ. v. Department of Labor*, 545 F. Supp. at 1235 (document never was "actually used by an agency official"). The dicta statements in these cases suggest that had the documents been used not merely for personal reference, but rather to conduct agency business, they might have been found to be "agency records." *See also FOIA Update*, Fall 1984, at 4.

**Applicability of Exemption 5**

The fact that a transition team is not a part of the executive branch presents an interesting issue with respect to the applicability of Exemption 5 to deliberative materials drafted by agency personnel for a transition team's use. (In this context, it is essential to distinguish between agency employees who continue to work for their federal agency and those who, under Section 3 of the Transition Act, are detailed to a transition team and who therefore are not generally regarded as agency employees. For the purpose of this discussion, detailees are not considered to be agency employees.) The concern here results from Exemption 5's awkward threshold language (covering "inter-agency or intra-agency memorandums or letters"), a requirement which might at first seem to preclude the exemption's applicability to communications between agencies and transition teams.

However, most courts have sought to further the vital consultative purposes of the deliberative process privilege by adopting a "functional," or "common sense," approach to this threshold in order to protect advice received by agencies from outside entities. *See, e.g., Department of Justice v. Julian*, 108 S. Ct. 1606, 1616 n.1 (1988) (Scalia, J. dissenting) (issue not reached by majority); *Durns v. Bureau of Prisons*, 804 F.2d 701, 704 n.5 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1122 (D.C. Cir. 1986), cert. granted, judgment vacated on other grounds & remanded, 108 S. Ct. 2010 (1988); *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); see also *FOIA Update*, June 1982, at 10 (citing additional cases). *But see also FOIA Update*, Summer 1987, at 5 (citing both supporting and contrary cases).

While the case law is not nearly so extensive regarding the applicability of Exemption 5's threshold requirement to recommendations flowing from an agency to outside entities, *see, e.g., FOIA Update*, Spring 1983, at 5 (discussing cases relating to agency advice to Congress); *see also Paisley v. CIA*, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983), *motion to intervene granted, reh'g granted & vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984), the same basic policy concerns strongly suggest that such advice simply would not be given -- or at least not so candidly -- if it were not protectible under the FOIA.
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<td>any and all materials produced for, received by or relating to President-Elect Donald Trump's Transition Team, including any questionnaires relating to the transition, the incoming administration or produced by any the Transition Team for your agency. Please also include any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: Trump, Transition, President-Elect, New Administration, New Boss Email search will occur in early January. 12/13/2016</td>
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<td>Center for Public Integrity</td>
<td>Any records, documents, emails, questionnaires, memoranda or other correspondence or communications between agency officials and the Trump Presidential Transition Team. <strong>FSC will contact requester to attempt to limit request to briefing material that goes to the Landing Team.</strong> Otherwise, in-bound briefs to Denise may have to be reviewed.</td>
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November 17, 2016

U.S. Department of Education
Office of Management
Regulatory Information Management Services
400 Maryland Avenue, SW, LBJ 2W220
Washington, DC 20202-4538
ATTN: FOIA Public Liaison

Dear Ms. or Sir,


I am seeking copies of the U.S. Department of Education's 2018 Transition Team Briefing for the new administration.

Please consider this an expedited request under the FOIA and under the section of the department's own FOIA regulations, 2(f)(B) and (C), as this information is urgently required to inform the public about an actual or alleged federal government activity. The briefing reports were due Election Day, to be ready for meetings with the President-Elect transition team. I certify that I am reporter with The Associated Press, the world’s largest news-gathering organization with more than 1 billion readers, listeners and viewers.

Whether an “urgency to inform” exists depends on several factors: (1) whether the information relates to a currently unfolding story; (2) whether delaying release of the information harms the public interest; and (3) whether the request concerns federal governmental activity (see Al-Fayed v. CIA, 245 F.3d 300 (D.C. Cir. 2001)). In addition, “the credibility of a requester” is also a relevant consideration.

Please release any information pursuant to my requests as it is received and/or reviewed by your office, rather than waiting to send me all the material I have requested. If you have questions or need to contact me, I can be reached at 202-638-2268 and my email address is jckem@ap.org.

As I am making this request on behalf of the AP for use in reporting the news, no fees may be assessed for searching or reviewing documents sought by this request, and no duplication fees should be charged to the AP for the first 100 pages of material (see 5 U.S.C. § 552(a)(4)(A)(ll)(ll)). AP hereby consents to pay duplication charges up to a total not to exceed $100. Please notify me in advance before incurring any duplication charges in excess of this amount.

As you know, the Act permits you to reduce or waive the fees when the release of the information is considered as “primarily benefiting the public.” I believe that this request fits that category and I therefore ask that you waive any fees.

If all or any part of this request is denied, please cite the specific exemption(s) that you think justifies your refusal to release the information and inform me of your agency's administrative appeal procedures available to me under the law.

To the extent that you affirm, in whole or in part, the denial of disclosure, we ask that you provide us with a list describing with specificity the categories of documents that have been withheld and explaining the grounds for the withholding (see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

1100 13th St. NW, Suite 700, Washington, DC 20005-4076
T: 202.641.9000 voice; www.ap.org
Sorry about that. It was on the next page, which you may not have.

It's:

Jennifer Kerr
Associated Press
Washington DC
202-538-2268

Sent from my iPhone

On Nov 21, 2016, at 8:50 AM, ED FOIA Manager <EDFOIAManager@ed.gov> wrote:

Dear Requestor, Please provide your Full name. Thank you.

ED FOIA Manager
FOIA Service Center
400 Maryland Ave SW
Washington, DC 20202
202-401-8365 - Hotline
202-401-0920 – Fax
edfoiomanager@ed.gov

From: 2E339.scanner@ed.gov [mailto:2E339.scanner@ed.gov]
Sent: Monday, November 21, 2016 8:35 AM
To: Jones, Kim (Contractor)
Subject: Scan Data from [LBJ-C3765-2E339]

<img-161121091718-0001.pdf>
This is a Freedom of Information Act request under 5 U.S.C. 552, as amended. I hereby request the Education Department’s planning and coordination documents with the Trump education transition team.

As this is a time-sensitive request, please email me within the next two weeks on the status of my request.

Frank Wolfe
Staff Writer
LRP Publications
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703-862-4291

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