

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. fax	Fax Cover from Jeff Gutman to Steve Neuirth at 5:15 pm. [Re: <u>Health Care Reform Task Force</u>]. [partial] (1 page)	05/11/1993	P6/b(6)	334
001b. fax	Jeff Gutman to Steve Neuirth at 5:15 pm. [Re: Health Care Reform Task Force] (1 page)	05/11/1993	P5	335 336
001c. fax	Bretton G. Sciaroni to Brenda Dolan [Re: Health Care Reform Task Force] (2 pages)	04/26/1993	P5	337
002. form	Freedom of Information Act Request from the American Council for Health Care Reform requesting records relating to the Health Care Reform Task Force. (2 pages)	03/17/1993	P5	338
003a. form	Freedom of Information Act Request from the American Council for Health Care Reform requesting records relating to the Health Care Reform Task Force. (2 pages)	03/17/1993	P5	339 Dup
003b. draft	Stewart M. Gerson to Dr. Jane M. Orient, Association of American Physicians and Surgeons, Inc., Re: Request for Documents and Information. (3 pages)	03/30/1993	P5	340
003c. letter	Stewart M. Gerson to the Honorable Michael J. Astrue. [Re: Federal Advisory Committee Act]. (2 pages)	03/17/1993	P5	341
003d. photocopies	Photocopy of Legal decision in the case of Food Chemical News v. Department of Health and Human Services (DCCA, 91-5318; decided 12/18/1992) (10 pages)	03/17/1993	P5	342
003e. memo	Draft, Memorandum to Vincent Foster and Stephen Neuirth from David J. Anderson. Re: Issues relating to the Document Disclosure Provision of the Federal Advisory Committee Act. (10 pages)	03/24/1993	P5	343

COLLECTION:

Clinton Presidential Records
Counsel's Office
Miriam Nemetz
OA/Box Number: CF453

FOLDER TITLE:

Health Care Task Force Documents Gibson Potentially Privileged Copies [3] [2]

Van Zbinden
2006-0223-F
vz57

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003f. fax	Fax cover sheet. Jeff Gutman to Stephen Neuwirth. (1 page)	03/24/1993	P5 344
004a. fax	No cover sheet. Letter draft to Dr. Jane M. Orient, Association of American Physicians and Surgeons, Inc., Re: Request for Documents and Information. (3 pages)	03/31/1993	P5 345
004b. fax	Letter draft to Dr. William H. Shaker, American Council for Health Reform. Re: Request for Documents and Information. (2 pages)	03/31/1993	P5 346
005a. letter	Bernard W. Nussbaum to Dr. Jane M. Orient, Association of American Physicians and Surgeons, Inc., Re: Request for Documents and Information. (3 pages)	04/01/1993	P5 347
005b. letter	Bernard W. Nussbaum to Dr. William H. Shaker, American Council for Health Reform. Re: Request for Documents and Information. (3 pages)	04/01/1993	P5 348

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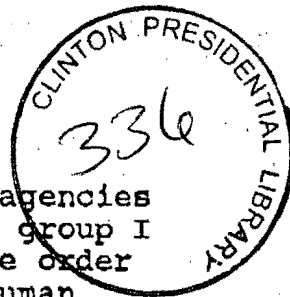
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STEVE -



Just to bring you up to date, many of the relevant agencies have received the attached FOIA request from the USJF, a group I have never heard of, but whose agenda is reflected in the order of their mission: preservation of "property, civil and human rights." The Task Force received one as well and Frank Sobol ran a draft response by me. I assume that it has or shortly will go out. With the agencies, it is, of course, trickier. I have asked them to search for relevant documents and to determine whether the working group documents have been segregated from agency records. If they have been, that segregation along with an implied reservation of control by the White House should serve as sufficient grounds for a global denial. No responsive letters or documents will be released on this FOIA request or the Public Citizen request without letting you know first.

I have read that the President does not intend to make his health care reform proposal until June. I do not know whether he intends the Task Force to continue its efforts past May 30 or not. If so, the Charter should be renewed. Doing so is simple. Retain page 1 of the Charter in its entirety. Revise Section 4, sentence 2 to delete "May 30, 1993" and insert a different date. June 30 may be appropriate unless there is some chance that the Task Force's work will extend beyond it. It would be nice to avoid filing another Charter, but putting a date beyond June 30 may have PR ramifications you'll need to consider. Delete the second sentence of Section VII: "The Task Force has not yet met." Change the filing date and, if appropriate, the estimated cost in Section VI. No other changes are necessary, unless, as I have heard through the grape vine, the President wishes to appoint AG Reno to the Task Force. Her name should then be added to Section 2 -- Membership.

Under the Local Rules, plaintiffs' opposition to our motion to dismiss Count 2 would have been due on Friday. I have not yet been served.

If you have any questions, please call.

Jeff

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MAY 5 '93 0107

PAGE. 002

CRRIF 93-223

BRETTON G. SCIARONI

ATTORNEY AT LAW

GEORGETOWN COURT

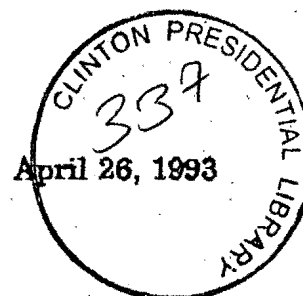
8220 N STREET, N.W. SUITE 297

WASHINGTON, D.C. 20007

RECEIVED

MAY -4 P 2:38

U.S. DEPARTMENT OF COMMERCE
FREEDOM OF INFORMATION ACT
Brenda Dolan
Room 6020
U.S. Department of Commerce
14th and Constitution Avenues, N.W.
Washington, D.C. 20230



Re: Freedom of Information Act Request

Dear Ms. Dolan,

Under the provisions of the Freedom of Information Act, 5 U.S.C. 552, I am requesting copies of any records, memoranda, agendas, transcripts, drafts, notes, working papers, studies, or other documents relevant to the Health Care Reform Task Force. This request pertains to employees of the Department of Commerce serving on the White House task force. According to the list released by the White House, the names of the relevant personnel are included as an attachment.

This request is being made on behalf of the United States Justice Foundation (USJF), a California-based legal foundation. USJF is a non-profit, tax-exempt corporation dedicated to the preservation of property, civil and human rights.

A waiver is requested for all fees. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of health care reform and the role of the federal government. As you may note, this request is initiated by an educational organization, and USJF's mandate is to disseminate information which is considered as "primarily benefiting the public."

If all or any part of this request is denied, please cite the specific exemption(s) which you believe justifies your refusal to release the information, and inform me of the appeals procedure available under the law. I would appreciate your handling this request as quickly as possible, and I look forward to hearing from you within 10 days, as the law stipulates. Thank you for your consideration.

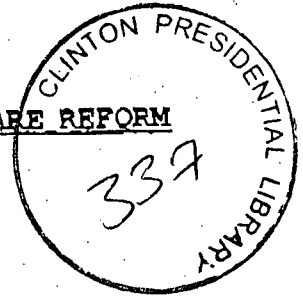
Sincerely yours,

Bretton G. Sciaroni

COPY

DEPARTMENT OF COMMERCE PERSONNEL INVOLVED IN THE HEALTH CARE REFORM
TASK FORCE:

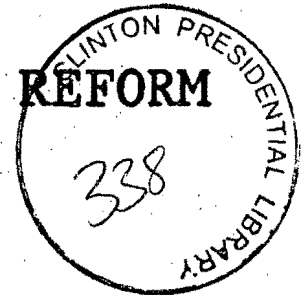
Solomona Aoelua;
Laurence Campbell;
Paul Campbell, Census;
Jonathan Edgell;
Carolyn Gatz;
Patricia Johnson, Census;
David Kass;
Nanpao McKenney;
Jane Molloy;
Chuck Nelson, Census;
Simone Rueschemeyer;
Jonathan Silver;
Dennis Steinauer;
Cynthia Taueber.



AMERICAN COUNCIL FOR HEALTH CARE REFORM

5155 North 37th Street ♦ Arlington, Virginia 22207

(703) 534-6028



**REQUEST FOR DOCUMENTS AND INFORMATION FROM
THE PRESIDENT'S TASK FORCE ON NATIONAL HEALTH CARE
REFORM, ITS INTERDEPARTMENTAL WORKING GROUP AND ALL
CLUSTER GROUPS, PURSUANT TO THE FREEDOM OF INFORMATION
ACT, 5 U.S.C. SECTION 552 AND THE FEDERAL ADVISORY
COMMITTEE ACT, 5 U.S.C APP. 10(b)**

March 17, 1993

To: PRESIDENT'S TASK FORCE ON NATIONAL HEALTH CARE REFORM
C/O HILLARY RODHAM CLINTON, Chair, and
IRA MAGAZINER, Senior Advisor to the President for Policy Development
BERNARD NUSSBAUM, Counsel
Executive Office of the President
The White House
Washington, D.C. 20050

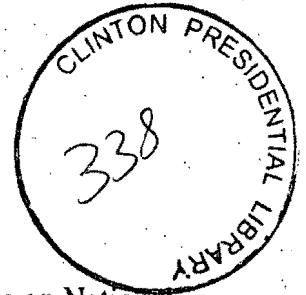
Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, and the Federal Advisory Committee Act, 5 U.S.C. App., Section 10(b), the American Council for Health Care Reform, by and through William Shaker, Executive Director, hereby requests from its inter-departmental working groups and all cluster groups thereof the following documents to be made available for public inspection and copying at the offices of the President's Task Force on National Health Care Reform:

1. The Advisory Committee Charter of the President's Task Force on National Health Care Reform;
2. All records, transcripts, minutes (including minutes containing a record of the persons present and a complete and accurate description of the matters discussed and conclusions reached), appendixes, working papers, drafts, studies, or other documents which have been or will be made available to or have been prepared by the President's Task Force on National Health Care Reform;

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PRESIDENT'S TASK FORCE ON NATIONAL HEALTH CARE REFORM
C/O HILLARY RODHAM CLINTON, Chair, et al.



March 17, 1993

Page 2

3. All schedules of meetings and agenda of the President's Task Force on National Health Care Reform;
4. All records, reports, transcripts, minutes (including minutes containing a record of the persons present and a complete and accurate description of the matters discussed and conclusions reached),
5. The schedules of all meetings and agenda of the interdepartmental working groups and each of its cluster groups; and
6. The names and background histories of all persons who are members of or consult or advise (whether on a full time or part time basis and whether they are paid or not, and the amount paid where applicable), the President's Task Force on National Health Care Reform, the interdepartmental working group and all of the cluster groups, thereof.

As this request will contribute significantly to public understanding of the operations and activities of the President's Task Force on National Health Care Reform and its interdepartmental working groups and all of the cluster groups and activities of the government itself, the aforesaid documents and information should be furnished without any charge or at a charge reduced below the fees established in 5 U.S. C. Section 552(a)(4)(A)(ii).

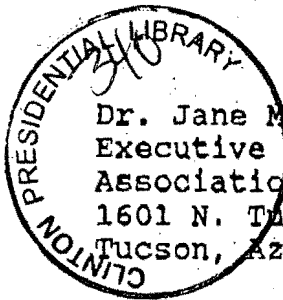
Pursuant to 5 U.S. C. Section 522(a)(6)A9A), a determination of compliance is expected within ten (10) days.

Dated: 3/17/93

Respectfully submitted

WILLIAM H. SHAKER
Executive Director

COPY



Dr. Jane M. Orient
Executive Director
Association of American Physicians and Surgeons, Inc.
1601 N. Tucson Blvd. Suite 9
Tucson, Az. 85716

DRAFT
Z
3/30/93

Re: Request for Documents and Information

Dear Dr. Orient:

This letter will serve as the response of the President's Task Force on National Health Care Reform (the "Task Force") to your March 17, 1993 request for documents and information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b).

The FOIA applies only to records maintained by "agencies" within the Executive Branch. See 5 U.S.C. § 552(a)(3). Neither the Task Force nor the interdepartmental working group or its "cluster" groups are agencies for purposes of FOIA because their functions are, respectively, to advise and to assist the President. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993). The Task Force, working group and "cluster" groups are, therefore, not subject to FOIA.

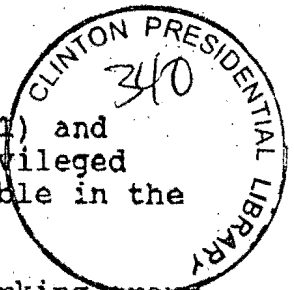
The Court in Association of American Physicians and Surgeons (AAPS), et al. and Surgeons, Inc. v. Clinton, et al., No. 93-0399 (D.D.C. Mar. 10, 1993), however, held that the Task Force is an advisory committee under FACA. Although the defendants believe that ruling to be an error as a statutory and constitutional matter, and have appealed it to the United States Court of Appeals for the District of Columbia Circuit, the Task Force intends to make non-privileged documents which have been and will be "made available to or prepared for or by," FACA, § 10(b), the Task Force available for public inspection and copying (Request 2).

In that regard, the Task Force has established a public reading room located in Room 101G of the Humphrey Building, U.S. Department of Health and Human Services, 200 Independence Ave., S.W. The reading room will be open to the public between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, beginning March 29, 1993. Please contact Steven Pigeon at (202) 690-7000 in order to arrange for access to the reading room.

The Task Force is currently in the process of moving existing documents that have been reviewed into this reading room for public inspection and hopes to complete this process during the week of March 29. The Task Force will send additional non-privileged Task Force documents to the reading room periodically as they are received or created and reviewed until the Task Force ceases to exist or the Court's order is vacated.

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In particular, the Task Force's charter (Request 1) and agendas of any of its meetings (Request 3) and non-privileged Task Force documents (Requests 2 and 4) will be available in the reading room.



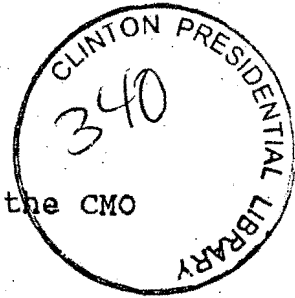
The Court also held that the interdepartmental working group is not an advisory committee under FACA. The Task Force regards Request 4 to seek a subset of the documents sought in Request 2. However, to the extent that you request documents not subsumed under Request 2 that were made available to or prepared for or by the working group or its cluster groups, they are not subject to disclosure under § 10(b). In particular, the documents requested in Requests 5 and 6, if they exist at all, are working group records, not documents made available to the Task Force that are subject to disclosure. As you are probably aware, however, the names of persons on the working group and its consultants have been made public.

Example
In accordance with FACA, § 10(b), 5 U.S.C. § 552(b) and the Court's Opinion and Order, the Task Force has and will withhold documents determined to be protected by privileges protecting deliberative processes and Presidential communications and other applicable privileges.

In particular, the Task Force is withholding categories of documents listed below. The Task Force may withhold additional categories of material determined to be privileged that have not yet been reviewed or created.

1. Personal letters submitted by members of the public to the Task Force that contain, for example, descriptions of health problems and financial information are withheld pursuant to 5 U.S.C. § 552(b)(6);
2. Personal letters, attaching resumes, submitted by members of the public offering to help the Task Force are withheld pursuant to 5 U.S.C. § 552(b)(6);
3. Coding and routing slips for correspondence received by the intake center are withheld pursuant to 5 U.S.C. § 552(b)(2);
4. Background and options papers prepared by working group members and seen by Task Force members or the President related to national health care reform are withheld pursuant to privileges protecting deliberative processes and Presidential communications. See 5 U.S.C. § 552(b)(5) and AAPS, slip op. at 18-26. [Such documents include background and talking point papers prepared for Task Force members for the March 29, 1993 public hearing; options papers prepared for particular Task Force members with expertise or jurisdiction over the subject addressed in the papers; working group "tollgate" background and options books; and briefing materials prepared for the President.]

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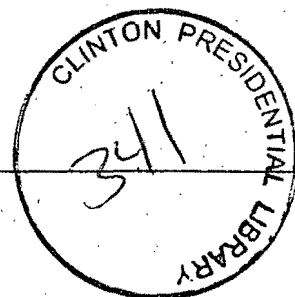


Letter should be signed by the CMO



U.S. Department of Justice

Civil Division



Washington, D.C. 20530

Honorable Michael J. Astrue
General Counsel
Department of Health and
Human Services
Washington, D.C. 20201

Dear Mr. Astrue:

You have asked my opinion on whether the Federal Advisory Committee Act, 5 U.S.C. app. 2 ("FACA"), permits an advisory committee to withhold its documents under the deliberative process privilege of Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). After review of the applicable law and the Department of Justice's position on this issue, it is my conclusion that an advisory committee may not withhold its deliberative documents under Exemption 5.

We are currently representing the Advisory Committee on the Food and Drug Administration (the "Committee") and the Department of Health and Human Services in Food Chemical News v. Advisory Committee on the Food and Drug Administration, et al., D.D.C. No. 91-0516. Plaintiff has sought to obtain certain documents from the Committee under section 10(b) of FACA. That section, which is made subject to FOIA, requires that advisory committees make their documents available to the public. At a hearing on March 28, 1991, Judge Boudin ruled that an individual seeking documents from an advisory committee was required to comply with the procedural requirements of the Freedom of Information Act. Accordingly, Judge Boudin denied plaintiff's motion for a preliminary injunction, but left the case open for thirty days in the event plaintiff wished to bring additional matters to the Court's attention. On March 28, plaintiff made a FOIA request for certain documents of the Committee. The Committee's response is due today.

It is my understanding that the Committee desires to withhold some of these documents under the deliberative process privilege of FOIA Exemption 5. While section 10(b) of FACA is subject to some of the FOIA exemptions, it is the position of the Department of Justice that FACA does not permit advisory committees to withhold their documents under FOIA's deliberative process privilege. This position is established by a 1988 memorandum by the Office of Legal Counsel. This memorandum represents the culmination of a lengthy exploration of this issue by the Department of Justice.

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341

The Justice Department's position is based upon the language of section 10(b) and Exemption 5, the legislative history, and the case law. Section 10(b), specifically requires advisory committees to release their "drafts" and "working papers." These materials are per se deliberative, and therefore Congress could not have intended to permit withholding under Exemption 5. Exemption 5 itself only applies to "inter-agency" or "intra-agency" documents. Since an advisory committee is not an agency, it is doubtful that Exemption 5 applies to documents prepared by an advisory committee. In addition, the entire purpose of FACA, as evidenced by the extensive legislative history, is to open up the deliberations of advisory committees to public scrutiny. Finally, two judges in the District of Columbia have considered this issue. In Wolfe v. Weinberger, 403 F. Supp. 238, 242-3 (D.D.C. 1975), Judge Richey explicitly held that Exemption 5 does not apply to advisory committee documents. More recently, Judge Joyce Green described as "entirely unpersuasive" the argument that the deliberative process exemption may shield advisory committee documents. Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 495 (D.D.C. 1988), aff'd on other grounds, 109 S.Ct. 2558 (1989).

In litigation, the Justice Department has consistently taken the position that advisory committees may not withhold deliberative documents under Exemption 5. This is the position the Department took before the D.C. Circuit Court in National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir 1983). Furthermore, in the Washington Legal Foundation case, the Department argued this position in both the District Court and the Supreme Court. Establishing this point was critical to our argument that the application of FACA to Presidential commissions was an unconstitutional infringement on Executive powers. We argued that because FACA does not permit invocation of the deliberative process privilege, it infringes upon this Executive power when applied to Presidential commissions.

The Department's position on this issue is therefore firmly established as a matter of policy and law. When consulted by other agencies, the Department routinely advises them of this policy. Accordingly, should an agency attempt to withhold deliberative advisory committee documents, we could not defend that action in any subsequent litigation.

Sincerely,

Stuart M. Gerson
Assistant Attorney General

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342

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 15, 1992 Decided December 18, 1992

No. 91-5318

FOOD CHEMICAL NEWS,
APPELLANT

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
APPELLEE

Appeal from the United States District
Court for the District of Columbia
(No. 91-0516)

Theresa A. Amato, with whom *Alan B. Morrison* and *Patti A. Goldman* were on the brief, for appellant.

Richard Alan Olderman, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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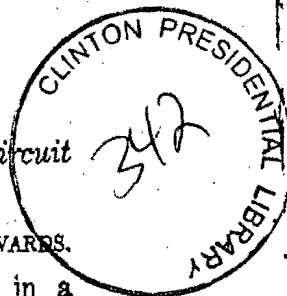
Before: MIKVA, Chief Judge, WALD and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge EDWARDS.

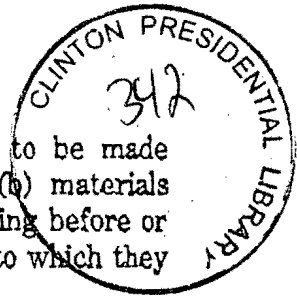
EDWARDS, Circuit Judge: This case comes to us in a somewhat confused posture, because it appears that the relief sought on appeal may not be inconsistent with the final judgment reached by the District Court. This case focuses on the relationship between section 10(b) of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 10(b) (1988), and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988). At issue is whether, under section 10(b) of FACA, an agency is obligated to make available for public inspection and copying all documents that are made available to or prepared for or by an advisory committee.

Before the District Court, the plaintiff, Food Chemical News ("FCN"), claimed that the defendant, the Department of Health and Human Services' Advisory Committee on Food and Drug Administration ("the Committee"), violated FACA by refusing to release documents under section 10(b) unless and until a request for the materials had been filed under FOIA. In particular, FCN argued that section 10(b) imposes an independent, self-executing obligation on advisory committees to make their materials publicly available. The Government, in turn, argued that section 10(b) of FACA incorporates not only FOIA's exemptions, but also its mandatory procedural mechanism of a written request followed by administrative review with respect to any Committee document. During oral argument before this court, the parties' positions appeared to change, with both sides seeming to adopt a view not inconsistent with the judgment of the District Court.

In any event, to the extent that an issue remains, the disposition of this case seems clear. We hold that, under section 10(b) of FACA, an agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request



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disclosure in order for FACA 10(b) materials to be made available. Thus, whenever practicable, all 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.

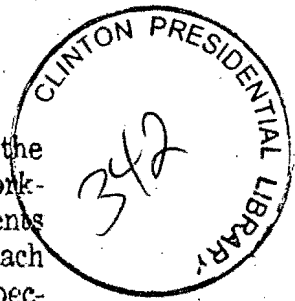
I. BACKGROUND

On November 29, 1989, the Secretary of Health and Human Services ("HHS") formed the Food and Drug Administration Committee as an advisory committee under FACA. The Committee was established to provide HHS with general advice and recommendations on the operation of the Food and Drug Administration ("FDA"), and was required to submit a final report to HHS within one year of its first meeting. At its first meeting, on May 17, 1990, the Committee decided to separate into various subcommittees, including a Drafting Subcommittee responsible for drafting the final report.

FCN, a newsletter that focuses on food safety issues, has closely monitored and reported on the activities of the Committee since its inception. Stephen Clapp, a reporter for FCN, attended many of the meetings of the Committee and its subcommittees and wrote articles pertaining to those meetings. Clapp frequently requested and obtained drafts, working papers and other documents that were prepared for the various meetings. At a Drafting Subcommittee meeting on February 28, 1991, two drafts of the FDA Committee's final report were discussed and considered. Clapp requested copies of the drafts prior to the meeting, but Eric Katz, the Executive Director of the Committee, informed Clapp that the drafts would not be publicly disclosed. Katz announced that all requests for copies of the draft reports should be referred to HHS' Freedom of Information Office.

On March 12, 1991, FCN filed an action in District Court seeking to enjoin all meetings of the FDA Committee and its subcommittees until all drafts, working papers, and other documents prepared for future meetings were released. FCN claimed that withholding these documents was a violation of section 10(b) of FACA, which provides:

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Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. app. § 10(b).

The hub of controversy in the District Court was the first part of section 10(b) of FACA, which refers to FOIA. FCN argued that the reference to FOIA is only meant to incorporate the nine exemptions from disclosure found in 5 U.S.C. § 552(b).¹ The Government responded that, in addition to

¹ Section 552(b) reads as follows:

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

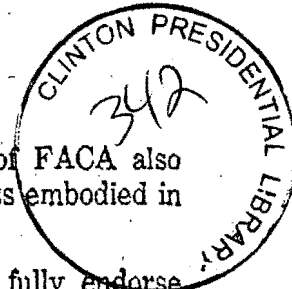
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law

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the section 552(b) exemptions, section 10(b) of FACA also incorporates FOIA's request and review process embodied in section 552(a)(3).²

The District Court ruled that it did "not fully endorse either side's reading of Section 10(b)." *Food Chemical News v. Advisory Comm. on the Food and Drug Admin.*, 760 F. Supp. 220, 222 (D.D.C. 1991). The trial court then held that a

enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

² Section 552(a)(3) reads as follows:

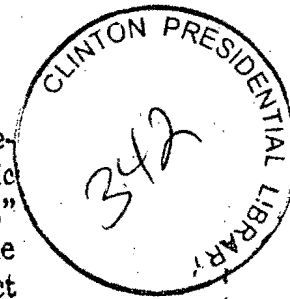
(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

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plaintiff would not be warranted in bypassing FOIA procedures to "resolve an ordinary dispute as to whether specific advisory committee documents were exempt under FOIA." *Id.* The court found that, because HHS believed that the specific documents being sought by plaintiffs "may be subject to FOIA exemptions," *id.* at 222 n.3, FCN was required to file a FOIA request "in this case," *id.* at 223.

What is confusing about the District Court's published decision is the court's holding that "[s]ection 10(b) incorporates FOIA procedures as well as FOIA exemptions." *Id.* at 222. This suggests that a party like FCN is required to file a FOIA request even with respect to section 10(b) materials that an agency does not reasonably claim to be "exempt" under FOIA. In the case at hand, it appears that the disputed documents involved only materials believed by agency officials to be exempt from disclosure, *see id.* at 222 n.3; however, confusion arises because of the trial court's published opinion that "[t]he statutory language does not distinguish between FOIA substance and FOIA procedure, but makes the Section 10(b) disclosure obligation '[s]ubject to' FOIA." *Id.* at 222. The confusion prompted by the published opinion led to this appeal.³

³ The FDA Committee released its final report in 1991 and has since then ceased to exist. However, the District Court found that FCN's complaint included a challenge to HHS' alleged policy governing access to advisory committee materials, *Food Chemical News v. Department of Health and Human Services*, No. 91-0516 (D.D.C. Sept. 9, 1991) (order granting motion to dismiss) at 2, and that FCN had standing to raise this challenge because it had demonstrated that it regularly covered the activities of HHS advisory committees, *id.* at 8. Thus, because the challenge to the alleged unlawful policy remains unresolved, the case is not moot. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1986).



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II. ANALYSIS

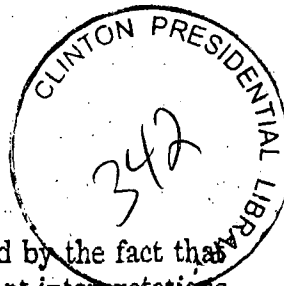
A. The Positions of the Parties

On appeal, this case has been complicated by the fact that FCN and HHS present two critically different interpretations of the District Court's holding. FCN challenges the court's published decision suggesting that individuals must file FOIA requests for the disclosure of *all* section 10(b) materials. By contrast, the Government asks this court to affirm the holding that a FOIA request is required only for those section 10(b) materials withheld due to their potentially exempt status under section 552(b) of FOIA. Although the District Court's reasoning in the published opinion is not entirely clear, it is probably fair to assume that its holding was intended to reach no further than the facts of this case, where the withheld documents were claimed to be "subject to FOIA exemptions." 760 F. Supp. at 222 n.3. Indeed, in an unpublished order dismissing the case, the District Court clarified the scope of its holding:

There is no indication that HHS has ever denied that it has an obligation under Section 10(b) to ensure that *unprotected* documents are made available to the public in due course. Although the agency utilizes the FOIA as a default disclosure mechanism for potentially exempt documents . . . any implication that HHS refuses to make *any* document available unless an [sic] FOIA request is made is inconsistent with FCN's own version of the facts in this case.

Food Chemical News v. Department of Health and Human Services, No. 91-0516 (D.D.C. Sept. 9, 1991) (order granting motion to dismiss) at 2 n.1. With this unpublished order in view, it becomes clear that the District Court's ultimate judgment requires a FOIA request *only* for those documents withheld as potentially exempt; thus, FCN's appeal may involve a complaint about nothing.

At oral argument, with this reality exposed, the two parties essentially conceded to each other's positions. FCN conceded that a FOIA request could be required to obtain



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documents reasonably withheld by the agency under a section 552(b) FOIA exemption. The Government conceded that, except where the agency has asserted application of a specific FOIA exemption, its policy is to disclose all materials that come within section 10(b) of FACA, regardless of whether a FOIA request was filed. Therefore, the Government's position, FCN's position and the District Court's holding appear to be consistent.

B. The Meaning of Section 10(b) of FACA

While the immediate controversy between FCN and HHS appears to be resolved, the parties made assertions at oral argument that demonstrated that some of the confusion remained. We now address some of those assertions to clarify the scope and meaning of section 10(b) of FACA within the context of the dispute before us.

First, the Government asserted that, although HHS does not presently have any regulation, policy or practice that requires a FOIA request for unprotected documents,⁴ it is not

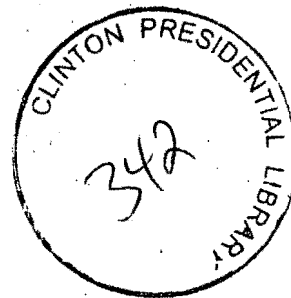
⁴ The HHS regulations governing public access to advisory committee materials provide:

(b) *Access to records.* (1) All records, reports, and other documents of each advisory committee shall be available for public inspection and copying pursuant to the Department's public information regulation. Documents referred to herein include the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee.

(2) Advisory committee records determined to be available for public inspection are to be made available for inspection and copying at a single location in the offices of the advisory committee or the Department organizational component to which the advisory committee reports.

45 C.F.R. §§ 11.5(b)(1), (b)(2) (1991). The regulations continue:

(a) Any person whose request for access to an advisory committee document is denied may seek administrative review in



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process to the public to prevent "subjective influences not in the public interest" from controlling the meetings. S. REP. No. 92-1098, 92nd Cong., 2d Sess. 6 (1972). Congress considered section 10 to be:

one of the key sections in the legislation. It establishes the standard of openness in advisory committee deliberations, and provides an opportunity for interested parties to present their views and be informed with respect to the subject matter taken up by such committees. . . .

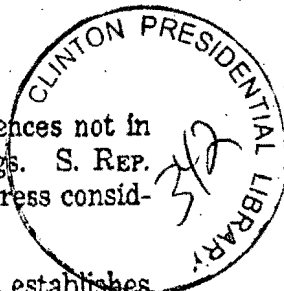
[The intention of this legislation is that the standard of openness and public inspection of advisory committee records is to be liberally construed.]

Id. at 14 (emphasis added). In order for "interested parties to present their views," and for the public to "be informed with respect to the subject matter," it is essential that, whenever practicable, parties have access to the relevant materials before or at the meeting at which the materials are used and discussed. Opening the meetings to the public would be meaningless if the public could not follow the substance of the discussions.

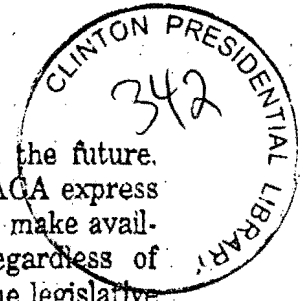
III. CONCLUSION

For the reasons given above, the judgment of the District Court is affirmed as herein clarified.

So ordered.



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precluded from implementing that procedure in the future. We disagree. The language and structure of FACA express unequivocally that the Government is required to make available all nonexempt section 10(b) materials regardless of whether a FOIA request was filed. Moreover, the legislative history of FACA shows that Congress intended for the public to have access to section 10(b) materials before or at the meeting for which they were prepared.

Section 10(b) contains unambiguous language that identifies certain materials, and describes in detail the methods and location by and at which the Government must make those materials available to the public. The applicable materials include "the records, reports ... working papers, drafts ... or other documents which were made available to or prepared for or by each advisory committee." 5 U.S.C. app. § 10(b). The Government must assure that section 10(b) materials "shall be available for public inspection and copying at a single location in the offices of the advisory committee." *Id.* The language of section 10(b) mirrors that of section 552(a)(2) of FOIA, which states: "Each agency ... shall make available for public inspection and copying...." 5 U.S.C. § 552(a)(2). Disclosure of section 552(a)(2) materials clearly does not require a FOIA request, as FOIA requests are needed only for materials not "made available under paragraphs (1) and (2)" of section 552(a). 5 U.S.C. § 552(a)(3). Like section 552(a)(2), section 10(b) affirmatively obligates the Government to provide access to the identified materials, regardless of whether a FOIA request has been filed.

With regard to the timing of the release of section 10(b) materials to be made available to the public, the Government has assured the court that, except in truly unusual circumstances, HHS's practice is to release those materials before or on the date of the advisory committee meeting for which those materials were prepared. FACA requires no less. Congress passed FACA to open the advisory committee

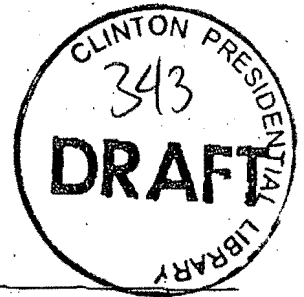
accord with the Department's Freedom of Information Act regulation.

45 C.F.R. § 11.6(a) (1991).

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U.S. Department of Justice



Washington, D.C. 20530

Memorandum ATTORNEY-CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT

To: Vincent Foster
Deputy Counsel to the President

Stephen Neuwirth
Associate Counsel to the President

From: David J. Anderson
Director, Federal Programs Branch
Civil Division

Re: Issues Relating to the Document Disclosure Provision of
the Federal Advisory Committee Act

You have asked that we analyze the obligations of the Task Force on National Health Care Reform to make documents available to the public under the provisions of the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act ("FACA"). The issues are specifically raised by the March 17 request for documents by two of the plaintiffs in American Ass'n of Physicians and Surgeons, but we canvass the area more comprehensively below.

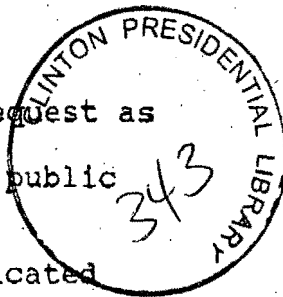
Section 10(b) of FACA requires public disclosure of all records "made available to or prepared for or by" an advisory committee, unless exempted from disclosure. Accordingly, there is a two-part process for determining what documents must be released under § 10(b). First, it must be decided whether a given record is a Task Force document. Second, a decision must be made whether to withhold these records and, if so, under what FOIA exemption. Of particular concern is the question of the extent to which the Task Force may withhold documents under the deliberative process privilege of FOIA exemption 5 or under a constitutionally-based Presidential privilege.

A. Procedure for Responding to FOIA Requests

As discussed in the accompanying memorandum, the D.C. Circuit in Food Chemical News v. Department of Health and Human Services, 980 F.2d 1468 (D.C. Cir. 1992), held that parties are not required to file a FOIA request to obtain non-privileged documents under § 10(b). An advisory committee has an affirmative obligation to make its non-privileged documents publicly available without such a request. If the Task Force presently is not in custody or control of any privileged

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documents, the Task Force need not respond to the FOIA request as a technical matter, other than, perhaps, to report that responsive materials are located at a given location for public review.



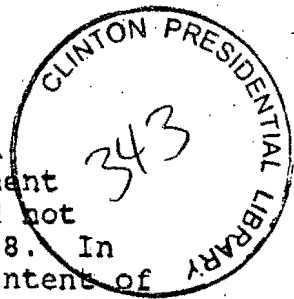
The Food Chemical News court, however, strongly indicated that a FACA committee can require a FOIA request for "those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA." Food Chemical News, 980 F.2d at 1469. Denial of such a FOIA request then may trigger an administrative appeal process that may culminate in federal court litigation.

Depending on the numbers of documents to which plaintiffs are entitled under § 10(b), the Task Force can (although is not required to) simply send plaintiffs the requested documents. Alternatively, the Task Force could decline to produce any documents under FOIA and simply advise the requestors that all Task Force documents are available in a given location. Or, the Task Force could send certain documents to the plaintiffs as a courtesy (for example, the charter of the Task Force) and direct the plaintiffs to the document reading room for all other Task Force materials.

If the Task Force intends to withhold privileged documents, a response should be provided within the requisite ten day period. 5 U.S.C. § 552(a)(6)(A). That response should generally identify the sorts of documents responsive to the request which are withheld and the grounds for doing so. If the Task Force withholds any documents, it should notify plaintiffs of the procedures for an administrative appeal of this decision. The White House component to which the Task Force is "assigned" will not have regulations governing FOIA, because it will not be FOIA agency. In this case, there is no reason why it cannot borrow the appeal procedures of another component that is subject to FOIA. Under 5 U.S.C. § 552(a)(6)(A)(ii), the Task Force would have to decide any such appeal within twenty business days. Normally, plaintiffs would not be able to challenge withholding of documents in court until they had exhausted this administrative appeal process. See Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990). Given the time frame involved, however, plaintiffs might seek judicial review prior to exhausting their remedies by arguing that, otherwise, they would be denied meaningful relief.

B. Applicability of Section 10(b) to the Task Force

An argument can be made that the "subject to section 552 of Title 5" language of § 10(b) exempts non-FOIA agencies, such as certain components of the Executive Office of the President to which the Task Force may be "assigned" and, thus, the Task Force itself from FACA's document access requirements. Such a result



would exempt at least all Presidentially-established FACA committees assigned to non-FOIA offices from FACA's document access provisions. We believe that such a position would not ultimately prevail. Cf. Food Chemical News, 980 F.2d 1468. In the first place, such a result would be contrary to the intent of Congress to open advisory committee deliberations to the public. Nor would it make much sense for Congress to require such FACA committees to conduct open meetings, but allow them to shield their documents from the public. If open committee meetings are to be truly meaningful for the public, interested persons should presumably have access to the documents at issue in these meetings. See Food Chemical News, 980 F.2d at 1472. As a result, we conclude that Task Force documents, except those protected by a privilege, are subject to public inspection "until the Task Force ceases to exist." § 10(b).

C. Scope of Section 10(b)

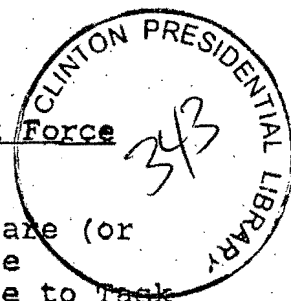
The difficulty in applying § 10(b) to the Task Force arises in construing the requirement that records "made available to or prepared for" the Task Force be subject to disclosure. FACA's legislative history offers no interpretive guidance and no cases have dealt with the question. The issue is further confused by the fact that Task Force members may act in multiple official capacities. In the course of their other duties, Task Force members undoubtedly receive documents that might be relevant to the work of the Task Force. Section 10(b) cannot logically extend to all materials in the possession of individual Task Force members which might relate to health care reform issues. Nonetheless, determining in what capacities Task Force members act when they receive such documents may not be a simple task.

1. Documents in the Possession of the Task Force

As an initial matter, it seems clear that any documents in the possession of the Task Force as a group are "available to" the Task Force. Magaziner Decl. ¶ 22 states that mail sent to the First Lady and Mr. Magaziner on health care issues has been handled by the "intake center." This intake center is apparently part of the Task Force's office. Accordingly, we believe that documents stored within this Task Force repository are "available to" the Task Force and subject to § 10(b), even if the Task Force members have not read them.

Similarly, any records that have actually been distributed to all Task Force members in their Task Force capacities are subject to disclosure, unless privileged. Such records might not be housed in the intake center, but any documents that have been in the possession of each Task Force member, even if temporarily, are Task Force documents, subject to disclosure unless privileged.

2. Documents in the Possession of Individual Task Force Members



A more difficult issue is presented when documents are (or have been) in possession of some, but not all, Task Force Members. As a preliminary matter, records made available to Task Force members in their separate capacities as high-ranking government officials should not be regarded as Task Force documents. We would expect, for example, that most health care related documents made available to the First Lady and Ira Magaziner were furnished to them as either a member of the Task Force, or, in Mr. Magaziner's case, head of the working group. It may well be, however, that many health care related documents made available to other Task Force members, such as Secretary Shalala, were furnished to them in their non-Task Force capacities.

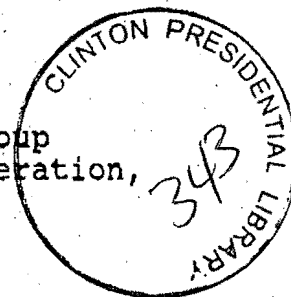
That being said, an argument could be made that § 10(b) applies only to documents provided to the Task Force as a whole - that is, to every Task Force member. Section 10(b) refers to documents made available to the "advisory committee," see FACA, § 3(2), rather than, for example, "advisory committee members." To some extent, this question parallels an issue discussed previously about whether some, but not all, Task Force members could meet without public notice. We expressed concern that dividing the Task Force into informal "subgroups" for meetings might be seen as circumventing FACA and the Court's Order. Similarly, if an advisory committee could shield its documents simply by refraining from distributing them to all members, the statutory goal of openness would arguably be frustrated.

To be sure, one could hypothesize a "typical" FACA committee in which individuals representing private interests ("balanced" out in the committee as a whole) each receive documents from their interest group allies containing facts and evidence for discussion purposes. Although the documents are not generally circulated, it is not difficult to assume that Congress would have intended the public to have access to such documents so that it could determine the extent to which private interests were at work on the committee. The better view, therefore, is that documents made available to one or more Task Force members are Task Force documents as such documents may play a role in the Task Force's deliberations as a whole. As we discuss below, many such documents may be subject to a claim of privilege.

3. Working Group Documents

The working group has been held not to be a FACA committee and is therefore exempt from the document disclosure provision of FACA. Documents created or received by the working group are not covered by § 10(b). Nonetheless, any working group documents which are prepared for or made available to the Task Force are

subject to § 10(b). Thus, to the extent the working group forwards any materials to the Task Force for its consideration, those documents must be released, unless privileged.



4. Documents Available to Mr. Magaziner

Documents received by Mr. Magaziner present a somewhat more difficult issue, because Mr. Magaziner serves a dual role as Task Force member and head of the working group. In order to preserve the confidentiality of working group documents, it will be necessary to draw a bright line between those documents received by Mr. Magaziner in his capacity as head of the working group, and those made available to him as a Task Force member.

We recommend drawing the line sharply in favor of Mr. Magaziner's capacity as head of the working group. Specifically, we believe it should be presumed that Mr. Magaziner receives all documents in his capacity as head of the working group unless he takes affirmative steps to make such materials available to the Task Force. Cf. National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524 (D.D.C. 1983) (FACA committee members chaired task forces found not to be covered by FACA). Such a view is supported by the fact that the work of the Task Force is far more limited than that of the working group. Most of Mr. Magaziner's day-to-day dealings apparently involve the working group and not the Task Force itself.

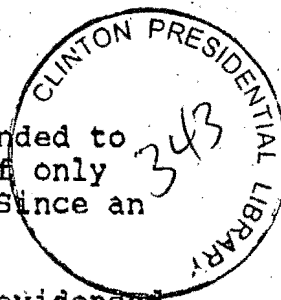
D. Availability of the Deliberative Process Privilege

Once it is determined that a document is a Task Force document within the meaning of § 10(b), it may only be withheld if it falls within a FOIA exemption. The question has arisen whether the Task Force may withhold under § 10(b) materials covered by the deliberative process privilege of FOIA exemption 5. In his order, Judge Lamberth assumed, without analysis, that the deliberative process privilege does apply to advisory committee documents. This assumption provided the basis for his finding that § 10(b) did not violate the separation of powers as applied to the Task Force.

1. Application of the Deliberative Process Privilege to Advisory Committees

Judge Lamberth's holding marks a departure from views expressed in other cases in this District as well as the position taken by the Department of Justice that the deliberative process privilege does not apply to advisory committee documents. The wording of § 10(b) itself suggests that Congress did not intend to permit committees to withhold deliberative materials. Section 10(b) specifically requires advisory committees to release their "drafts" and "working papers." These materials are per se

deliberative, and therefore Congress could not have intended to permit withholding under Exemption 5. Exemption 5 itself only applies to "inter-agency" or "intra-agency" documents. Since an advisory committee is not an agency, it is doubtful that Exemption 5 applies to documents prepared by an advisory committee. In addition, the entire purpose of FACA, as evidenced by the legislative history, is to open up the deliberations of advisory committees to public scrutiny.



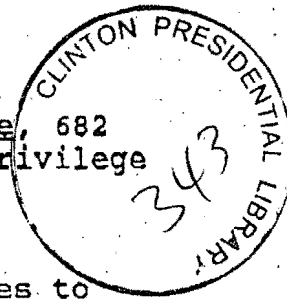
Finally, two judges in the District of Columbia have considered this issue. In Wolfe v. Weinberger, 403 F. Supp. 238, 242-3 (D.D.C. 1975), Judge Richey explicitly held that Exemption 5 does not apply to advisory committee documents. More recently, Judge Joyce Green described as "entirely unpersuasive" the argument that the deliberative process exemption may shield advisory committee documents. Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 495 (D.D.C. 1988), aff'd sub nom. on other grounds Public Citizen v. Department of Justice, 491 U.S. 440 (1989).

In litigation, the Justice Department has consistently taken the position that advisory committees may not withhold deliberative documents under Exemption 5. This is the position the Department took before the D.C. Circuit in National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir 1983). In the Washington Legal Foundation case, the Department argued this position in both the District Court and the Supreme Court. Establishing this point was critical to our argument that the application of FACA to Presidential commissions was an unconstitutional infringement on Executive powers. We argued that, because FACA does not permit invocation of the deliberative process privilege, it infringes upon this Executive power when applied to Presidential commissions.

2. Application of the Deliberative Process Privilege to the Task Force

While we therefore disagree with Judge Lamberth's view of the applicability of that part of exemption 5, we reach the same non-disclosure conclusion by a different route. The other side of Judge Lamberth's exemption 5 coin is that separation of powers requires recognition of a deliberative process privilege in the context of a presidential advisory committee. Cf. United States v. Nixon, 418 U.S. 683 (1974).

There are three purposes for the deliberative process privilege: 1) to encourage open, frank discussions on matters of policy; 2) to protect against premature disclosure of proposed policies before they are adopted and 3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for the



agency's action. Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Application of the privilege to Task Force documents should reflect these policy considerations.

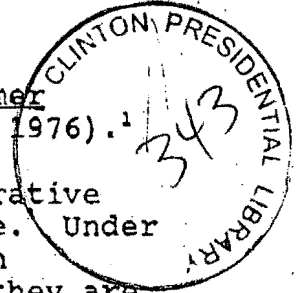
In brief, the deliberative process privilege applies to materials that are both "predecisional" and "deliberative." EPA v. Mink, 410 U.S. 73, 88 (1973); Wolfe v. Department of Health and Human Services, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The former requirement is easily applied in this context, and the D.C. Circuit has held a document to be deliberative if it "reflects the give-and-take of the consultative process." Access Reports v. Department of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Generally, factual material contained in a deliberative document must be disclosed while opinion can be withheld. Mink, 410 U.S. at 88. Yet, the rule cannot be applied mechanically. Wolfe, 839 F.2d at 774. When release of the factual materials "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its function," the factual material may be withheld. Quarles v. Department of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). The same is true if factual information and opinion are so inextricably intertwined that they cannot be segregated.

It is difficult to discern which Task Force documents are subject to deliberative process privilege in the abstract. Plainly, however, Judge Lamberth's motivating concern about confidentiality of the advice formulation process suggests that documents prepared by the Task Force itself for purposes of its deliberations designed to arrive at recommendations for the President would be privileged. It would be anomalous to permit the Task Force to deliberate in private but then require it to release the substance of those deliberations in writing. Indeed, such documents may well be subject to a claim of presidential communications privilege, but Judge Lamberth's implicit recognition of such a privilege in his constitutional analysis of the advice-formulation work of the Task Force does not require the Task Force to make a formal claim of it.

The deliberative process privilege would also apply to certain materials provided to the Task Force by other Executive Branch officials. In the same opinion that concluded that a FACA committee could not generally claim deliberative process protection over its documents, the Office of Legal Counsel concluded that agency documents transmitted to a FACA committee would be subject to deliberative process privilege protection if sought from the Task Force. Moreover, the D.C. Circuit has held that agency materials covered by the deliberative process privilege retain their privileged status even after they have

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been disclosed to an advisory committee. Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107 (D.C. Cir. 1976).¹



The most difficult situation is presented by deliberative materials created by the working group for the Task Force. Under FACA, as soon as the working group makes, for example, an analysis of policy options available to the Task Force, they are subject to disclosure. Because the working group is not an agency, their materials would not normally be considered to be "intra- or inter-agency" for purposes of the deliberative process privilege.

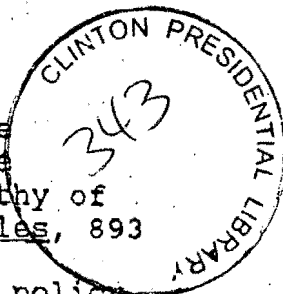
It is not entirely clear whether the court has left an opening for such an argument. In one of the most confusing passages of his opinion, Judge Lamberth stated:

Section 10(b) is also constitutional since the deliberative process exemption of the [FOIA] will allow the advisors the confidentiality they need to enable the President to perform his obligations. This section also addresses the product of the working group as all materials prepared for as well as by the Task Force shall be made available to the public. Thus, the public interest in ensuring that special interests do not overly affect Task Force or working group activities will be preserved.

Slip op. at 25-26 (emphasis in original). Judge Lamberth probably did not specifically consider whether the deliberative process privilege would apply to working group documents that are made available to the Task Force because he accepted Mr. Magaziner's statement that such materials would be factual, and thus not ordinarily subject to the privilege. That admittedly does not explain the third sentence of the paragraph. Withholding working group documents presented to the Task Force would not necessarily impair the public's ability to ensure that special interests do not overly affect the Task Force or the working group. Public disclosure of documents presented by the public to the Task Force or working group would serve that purpose.

If, as Mr. Magaziner has suggested, documents presented to the Task Force from the working group are factual in nature, they are presumptively disclosable. However, depending on the

¹ In 1976, Congress amended FACA expressly to reverse the Washburn Court's ruling that an advisory committee may close its meetings to conduct deliberations. However, these amendments do not disturb the Court's separate holding that an agency's deliberative documents remain privileged in the hands of an advisory committee.



document, it is quite possible that the presumption can be overcome. If these documents are factual, but reflect the exercise of judgment over what facts are relevant and worthy of reporting, deliberative process can be claimed. See Quarles, 893 F.2d at 392-93 (cost estimates prepared by the Navy are deliberative). If other documents go further and contain policy options or even recommendations, the argument in favor of claiming deliberative process is even stronger. Public disclosure could chill the candor by which staff report facts or policy options to those regarded as superiors. See Quarles, 893 F.2d at 393. Moreover, because the fact gathering and option selection process is an integral part of the system that the President has chosen to assist him in exercising his constitutional powers, a claim of privilege has constitutional dimensions. Given Judge Lamberth's constitutional line between fact gathering and advice formulation, we hesitate to rely on this latter point alone to support a claim of privilege, but the constitutional arguments made in our appeal brief might help shape a framework for dealing with documents that may not have been specifically addressed in Judge Lamberth's opinion and order.

E. A Specific Response to Plaintiffs' FOIA Request

We add, in conclusion, our thoughts on an appropriate response to each of the six requests made by the AAPS, which are broader and encompass the six requests made by the American Council for Health Care Reform.

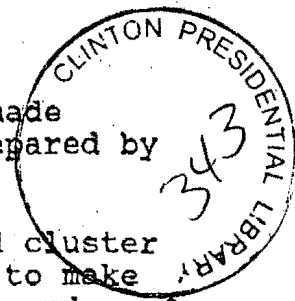
a. The charter is, of course, a Task Force document and should be provided to plaintiffs.

b. The second request, which parallels § 10(b), has been discussed above. We note, however, that plaintiffs ask for documents that "will be" made available to the Task Force. Ordinarily, FOIA requests are not handled in a prospective nature; agencies have no continuing obligation to supply documents in response to a FOIA request after a reasonable search is made. However, the Task Force, under Food Chemical News, has a continuing obligation to make its documents publicly available. We do not believe that the Task Force has an obligation to inform the requestors each time a privileged document comes into its possession.

c. Schedules and agendas of the Task Force would ordinarily be Task Force documents. If, however, the Task Force intends to conduct its meetings without a written agenda, it has no obligation to create one.

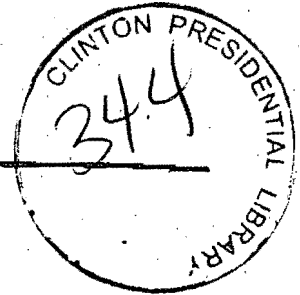
d. This request largely overlaps the second one to the extent that working group or cluster group documents are made available to the Task Force, and is discussed in detail above.

To the extent that the request seeks documents simply made available to the working group or cluster groups or prepared by them, such documents need not be disclosed.



e. Assuming schedules and agendas of working and cluster group meetings exist, the Task Force has no obligation to make them available to plaintiffs unless the schedules and agendas of the working groups are made available to the Task Force.

f. The Task Force has no obligation to provide the requestors with the names and background histories of all consultants or advisors to the Task Force unless such information has been made available to the Task Force in a written form. The Task Force need not create documents to comply with this request.



Washington, DC 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE: 3/24/93

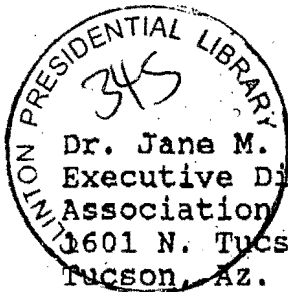
TO: STEVE NEWMAN
UNITED STATES CONGRESS

FAX NUMBER: 456-6279

FROM: JEFF ATMAN
Fax No. (202) 616-8202 (LOCAL) -- 369-8262 (FIS)
9th FLOOR

THERE ARE A TOTAL OF 11 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

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Final
DRAFT

Dr. Jane M. Orient
Executive Director
Association of American Physicians and Surgeons, Inc.
1601 N. Tucson Blvd. Suite 9
Tucson, Az. 85716

Re: Request for Documents and Information

Dear Dr. Orient:

FOIA

On behalf of the President's Task Force on National Health Care Reform (the "Task Force"), I am responding to your March 17, 1993 request for documents and information pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Task Force received your request on March 18. [Steve- you may want to verify this; only the AMHCR FOIA request was date stamped on my copy]

With regard to your request under FACA, the Court in Association of American Physicians and Surgeons (AAPS), et al. v. Clinton, et al., No. 93-0399 (D.D.C. Mar. 10, 1993) held that the Task Force is an advisory committee under FACA. Although the defendants believe that ruling to be an error as a statutory and constitutional matter, and have appealed it to the United States Court of Appeals for the District of Columbia Circuit, the Task Force intends to make non-exempt documents which have been and will be "made available to or prepared for or by" the Task Force, FACA, § 10(b), available for public inspection and copying (Request 2). As explained in greater detail below, the Court's Opinion permits the Task Force to withhold documents covered by privileges protecting deliberative processes and Presidential communications.

The Task Force has established a public reading room located in Room 101G of the Humphrey Building, U.S. Department of Health and Human Services, 200 Independence Ave., S.W. The reading room is open to the public between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday. Please contact Steven Pigeon at (202) 690-7000 in order to arrange for access to the reading room.

The Task Force's intake center has received over 50,000 pieces of correspondence from the public and is now receiving several thousand letters daily. These and other documents that have been received and reviewed are being moved into this reading room for public inspection. The Task Force will send newly received or created non-exempt Task Force documents to the reading room periodically after they are reviewed.

In particular, the Task Force's charter (Request 1), agendas of any of its meetings (Request 3) and non-exempt Task Force documents (Requests 2 and 4) will be available in the reading room.

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The Court also held that the interdepartmental working group is not an advisory committee under FACA. The Task Force regards Request 4 to seek a subset of the documents sought in Request 2. However, to the extent that you request documents not subsumed under Request 2 that were made available to or prepared for or by the working group or its cluster groups, they are not subject to disclosure under § 10(b). In particular, the documents requested in Requests 5 and 6, if they exist at all, would be working group records, not documents made available to the Task Force that are subject to disclosure. As you are probably aware, however, the names of persons on the working group and its consultants have been made public.

In accordance with FACA, § 10(b), 5 U.S.C. § 552(b) and the Court's Opinion and Order, the Task Force has and will withhold documents determined to be covered by privileges protecting deliberative processes and Presidential communications and other applicable privileges.

In particular, the Task Force is withholding the categories of documents listed below. The Task Force may withhold additional categories of material determined to be privileged that have not yet been created or reviewed.

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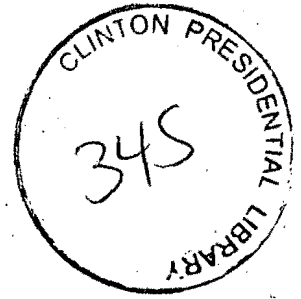
4. Background and options papers prepared by working group members and seen by Task Force members or the President related to national health care reform are withheld pursuant to privileges protecting deliberative processes and Presidential communications. See 5 U.S.C. § 552(b)(5) and AAPS, slip op. at 18-26.

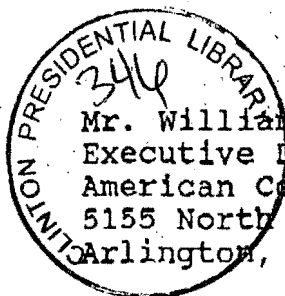
Insofar as your request may be based on the FOIA, that statute applies only to records maintained by "agencies" within the Executive Branch. See 5 U.S.C. § 552(a)(3). Neither the Task Force nor the interdepartmental working group or its "cluster" groups are agencies for purposes of FOIA because their functions are, respectively, to advise and to assist the President. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980); Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993). The Task Force, working group and "cluster" groups

are, therefore, not subject to FOIA.

XXX

cc: Kent Masterson Brown
Frank M. Northam





FINAL
DRAFT

Mr. William H. Shaker
Executive Director
American Council for Health Care Reform
5155 North 37th St.
Arlington, VA 22207

Re: Request for Documents and Information

Dear Mr. Shaker:

On behalf of the President's Task Force on National Health Care Reform (the "Task Force"), I am responding to your March 17, 1993 request for documents and information pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Task Force received your request on March 18.

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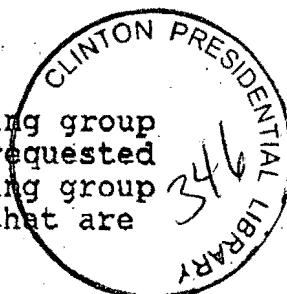
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The Court also held that the interdepartmental working group is not an advisory committee under FACA. The documents requested in Requests 5 and 6, if they exist at all, would be working group records, not documents made available to the Task Force that are subject to disclosure.



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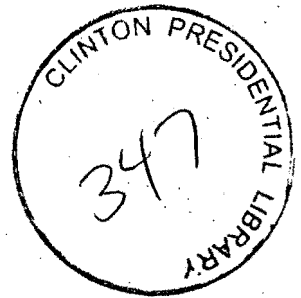
xxx

cc: Kent Masterson Brown
Frank M. Northam

COPY

THE WHITE HOUSE
WASHINGTON

April 1, 1993



File Task Force
FOIA

Dr. Jane M. Orient
Executive Director
Association of American Physicians
and Surgeons, Inc.
1601 N. Tucson Boulevard
Suite 9
Tucson, Arizona 85716

Re: Request for Documents and Information

Dear Dr. Orient:

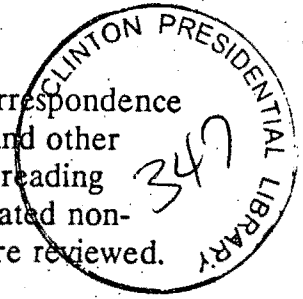
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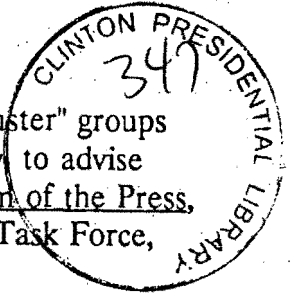
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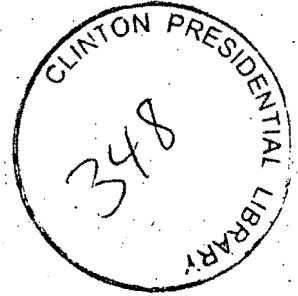
Bernard W. Nussbaum
Counsel to the President

cc: Kent Masterson Brown
Frank M. Northam

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THE WHITE HOUSE
WASHINGTON

April 1, 1993



Mr. William H. Shaker
Executive Director
American Council for Health
Care Reform
5155 North 37th Street
Arlington, Virginia 22207

Re: Request for Documents and Information

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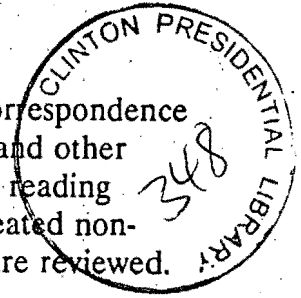
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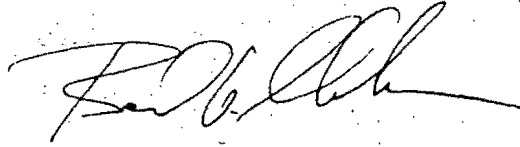
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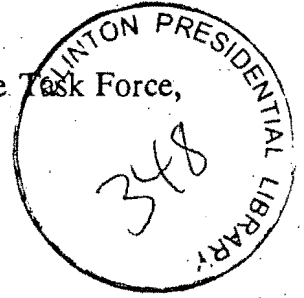
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Sincerely,



Bernard W. Nussbaum
Counsel to the President

cc: Kent Masterson Brown
Frank M. Northam



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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Memorandum for Jennifer O'Connor, Office Administrator from Beth Nolan, Associate Counsel to the President. Subject: HHS Representative on the Health Care Task Force. (1 page)	03/10/1993	P5	349
002. draft	Comments for the last couple of pages of the Brief. (1 page)	n.d.	P5	350
003. fax	Fax cover sheet. Stephen Neuwirth to Web Hubbell at 1:40 pm. [Re: draft of Magaziner declaration]. (1 page)	03/02/1993	P5	351
004. fax	Stephen Neuwirth to Web Hubbell at 1:40 pm. [Re: draft of Magaziner declaration]. (14 pages)	03/02/1993	P5	352
005. note	Talking points on Health Care Task Force. (1 page)	02/03/1993	P5	353
006. memo	Memorandum from Ira Magaziner to unknown. Subject: Health Care Reform Working Groups--Categories of Participants. (1 page)	03/01/1993	P5	354
007. memo	Memorandum for Jennifer O'Connor, Office Administrator from Beth Nolan, Associate Counsel to the President. Subject: HHS Representative on the Health Care Task Force. (1 page)	03/10/1993	P5	355
008. fax	Jeff Gutman to Stephen Neuwirth. [Re: Response to Washington Times Article]. (3 pages)	10/21/1993	P5	356
009. memo	Memorandum for Leon Panetta from Joel Klein and Stephen Neuwirth. Subject: Health Care working group documents / litigation. (1 page)	10/28/1994	P5	357 - Dup
010. memo	Memorandum for Leon Panetta from Joel Klein and Stephen Neuwirth. Subject: Health Care working group documents / litigation. (2 pages)	10/28/1994	P5	358

COLLECTION:

Clinton Presidential Records
Counsel's Office
Nemetz, Miriam
OA/Box Number: CF453

FOLDER TITLE:

Health Care Task Force Documents Gibson Potentially Priv. Copies [4]

Van Zbinden
2006-0223-F
vz58

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
011. order	Photocopy of Judge Royce C. Lamberth's Order in the case of Association of American Physicians and Surgeons, Inc. et al v. Hillary Rodham Clinton, et al. (1 page)	09/28/1994	P5	359
012. fax	Stephen Neuwirth to Jeff Gutman. [Re: Draft responses to Health Care Task Force Freedom of Information Act Requests.] (6 pages)	n.d.	P5	360
013. note	From Steve Neuwirth and Jason Solomon to unknown. Draft for Discussion: Talking Points on Health Care Task Force Court Order. (1 page)	06/15/1993	P5	361
014. note	Photocopy, Vince Foster to Hillary Rodham Clinton. [Re: Health Care Task Force lawsuit]. (1 page)	03/14/1993	P5	362
015. memo	Memorandum for Christopher Cerf from Kumiki Gibson. Subject: Document Request Re: Health Care Task Force. (15 pages)	02/13/1995	P5	363

COLLECTION:

Clinton Presidential Records
Counsel's Office
Nemetz, Miriam
OA/Box Number: CF453

FOLDER TITLE:

Health Care Task Force Documents Gibson Potentially Priv. Copies [4]

Van Zbinden
2006-0223-F
vz58

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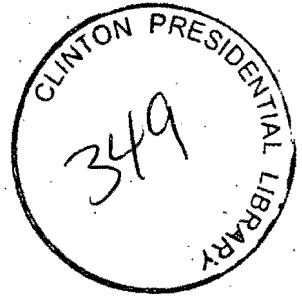
RR. Document will be reviewed upon request.

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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THE WHITE HOUSE

WASHINGTON



March 10, 1993

MEMORANDUM FOR JENNIFER O'CONNOR
OFFICE OF ADMINISTRATION

FROM: BETH NOLAN *Ba NOL*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: HHS Representatives to Health Care Task Force

You have inquired whether employees of the Department of Health & Human Services (HHS) may serve as nondetailees in the Executive Office of the President (EOP) as HHS representatives to the Health Care Task Force. As you know, the General Accounting Office (GAO) concluded in a November 1992 report that agency representatives may properly be classified as nondetailees. Thus, this classification is available for proper agency representatives.

Because these individuals are HHS employees representing HHS to the Task Force, they must be supervised by HHS personnel, not EOP personnel, so that they may properly represent the interests of their agency. So long as this is the case, their assignment to the Task Force as HHS representatives is consistent with personnel requirements and the mission of the Task Force.

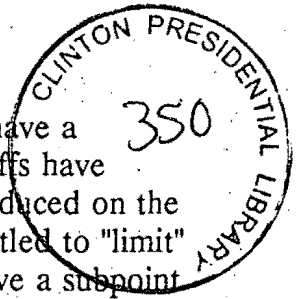
cc: Steve Neuwirth ✓
Associate Counsel to the President

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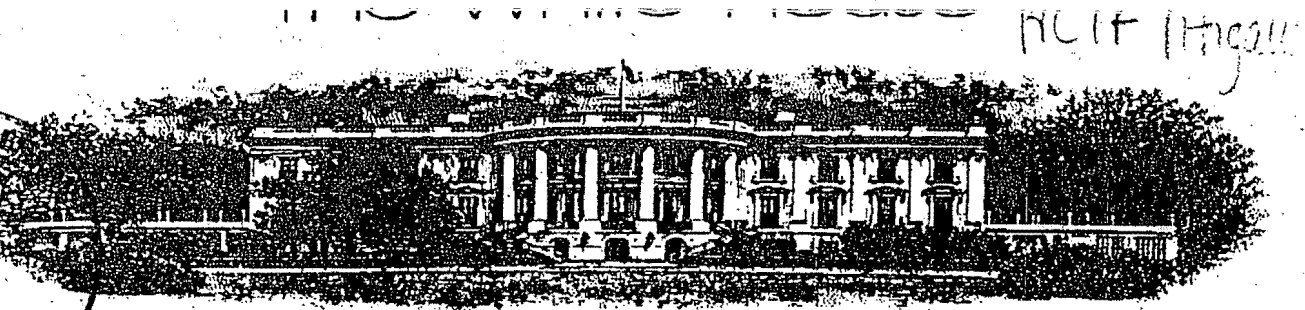
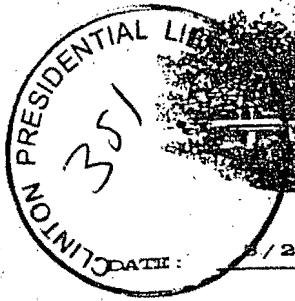
COMMENTS ON LAST COUPLE OF PAGES OF THE BRIEF:

DAVID AND ROB:

It would seem important for the revised point III, which now would have a subpoint "A" on discovery, to have a subpoint "B" which explains that plaintiffs have failed to identify a single piece of evidence that defendants improperly introduced on the summary judgment motion, and why it thus cannot be that plaintiffs are entitled to "limit" -- i.e., exclude -- defendants' evidence. Then it would seem important to have a subpoint "C" that addresses what plaintiffs are really asking the court to do: namely, to rely almost exclusively on plaintiffs' own, after-the-fact "organization" chart and other limited evidence. This subpoint would explain that plaintiffs have made this motion to limit the evidence without ever responding to defendants' lengthy showing in the merits briefs that plaintiffs' "organization chart" and other evidence was inaccurate and/or inadmissible. Again, it would seem that we would want to emphasize what plaintiffs have done: rather than respond to defendants' arguments on the merits -- which go virtually ignored -- plaintiffs have chosen to make this motion, asking the court to gloss over all of the admissible evidence and simply accept plaintiffs' self-created view of the case.



COPY



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

TO: Webb Hubbell
FAX NUMBER: 514-0468
TELEPHONE NUMBER: *
FROM: S. R. Neuwirth
TELEPHONE NUMBER: 456-7900 or 456-2632
PAGES (INCLUDING COVER): 14
COMMENTS: This is a revised draft of the Magaziner
declaration for the Health Care Task Force suit.
We have asked the Civil Division to forward a copy
of the revised brief directly to you as soon as it
is ready.

TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE)
WAS SENT

** COUNT **
14

*** SEND ***

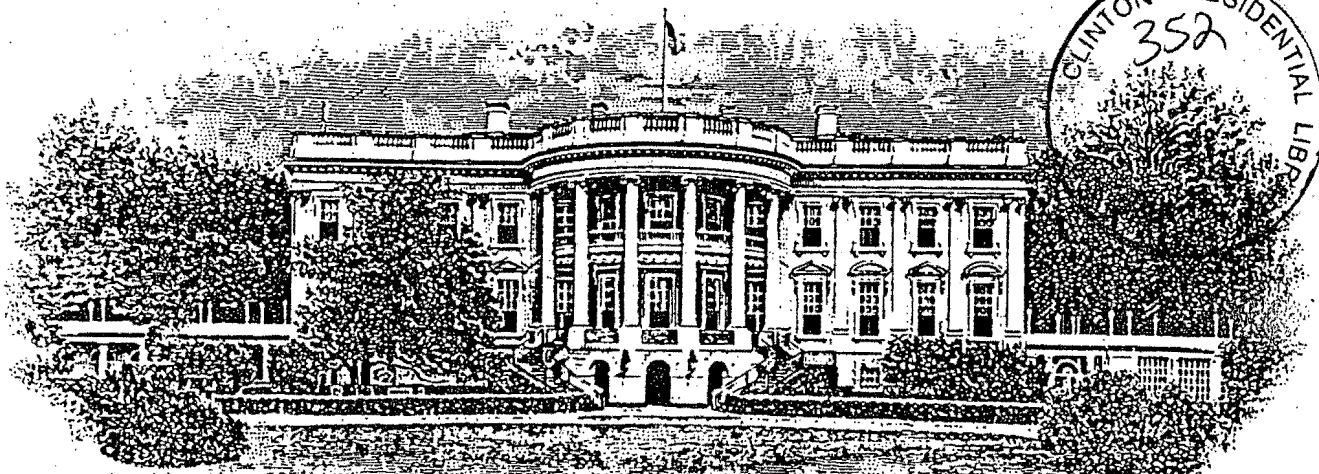
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TOTAL 0:07'12" 14

XEROX TELECOPIER 7020

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The White House



DATE: 3/2

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

TO: Webb Hubbell

FAX NUMBER: 514-0468

TELEPHONE NUMBER: _____

FROM: S. R. Neuwirth

TELEPHONE NUMBER: 456-7900 or 456-2632

PAGES (INCLUDING COVER): 14

COMMENTS: This is a revised draft of the Magaziner

declaration for the Health Care Task Force suit.

We have asked the Civil Division to forward a copy

of the revised brief directly to you as soon as it

is ready.

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS, INC.,
AMERICAN COUNCIL FOR HEALTH
CARE REFORM AND NATIONAL
LEGAL & POLICY CENTER,

Plaintiffs,

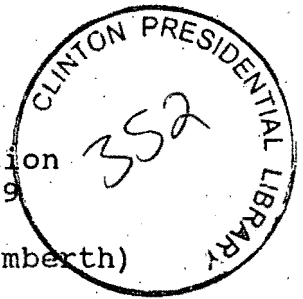
v.

HILLARY RODHAM CLINTON, et al.,

Defendants.

Civil Action
No. 93-399

(Judge Lamberth)



DECLARATION OF IRA MAGAZINER

I, IRA MAGAZINER, declare and state as follows:

INTRODUCTION

1. I am Senior Advisor to the President for Policy Development. I have been advised by my counsel in this action that plaintiffs have sought certain information concerning the President's task force on health care reform (the "Task Force") and the interdepartmental working group created by the President in connection therewith. This declaration is intended to provide information in response to that request, as well as certain information that I have been advised by counsel is relevant to plaintiffs' motion for a temporary restraining order.

2. On January 25, 1993, the President announced the formation of the Task Force to assist him in developing legislation for comprehensive health care reform.

3. The President asked me to serve as a member of the Task Force. The Task Force is chaired by the First Lady. The

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Task Force also includes the following other members: Secretary of the Treasury Lloyd Bentsen; Secretary of Defense Les Aspin; Secretary of Commerce Ron Brown; Secretary of Labor Robert Reich; Secretary of Health and Human Services Donna Shalala; Secretary of Veterans Affairs Jesse Brown; Office of Management and Budget Director Leon Panetta; Assistant to the President for Domestic Policy Carol Rasco; Assistant to the President for Economic Policy Robert Rubin; and Council of Economic Advisors Chair Laura Tyson. These are the only members of the Task Force.

4. The members of the Task Force were present on January 25 when the President announced the Task Force's formation, but no meeting of the Task Force occurred at that time and no business was conducted or discussed by the Task Force members.

5. In addition to serving as a member of the Task Force, I am also leading, at the President's request, an interdepartmental working group that is gathering information concerning the impact of existing health care policies and possible alternatives to those policies. The information that is gathered and analyzed by the working group will be used, in turn, by the Task Force in formulating its recommendations to the President. Only the Task Force will have authority to forward recommendations to the President, and only the Task Force will provide advice to the President. The interdepartmental working group is not charged with responsibility for making, and will not

make, recommendations to the President, and will not otherwise directly advise him.

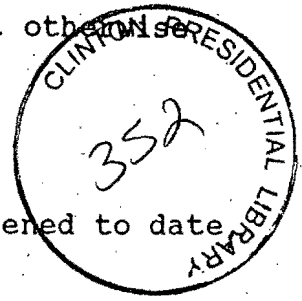
TASK FORCE MEETINGS

6. No Task Force meetings have been convened to date and none have yet been scheduled.

7. The Task Force intends to hold several meetings once the interdepartmental working group has had an opportunity to gather and analyze the information needed by the Task Force to make its recommendations to the President.

8. The Task Force intends to hold some public meetings at which members of the public will have an opportunity to be heard and to learn of the alternatives that the Task Force is considering.

9. No formal sub-groups or committees of the Task Force have been established, and none are presently contemplated. I have met regularly with the First Lady and, less frequently, with Carol Rasco, Assistant to the President for Domestic Policy, to keep them apprised of the working group's efforts and to receive their input on the working group's efforts. Other members of the interdepartmental working group have, from time to time, been present during my discussions with the First Lady and with Ms. Rasco. These meetings do not involve the formulation of advice or recommendations to be provided to the President, but instead are operational and informational in nature.



THE INTERDEPARTMENTAL WORKING GROUP

10. Shortly after January 25, the interdepartmental working group began an intensive effort to gather information concerning the present health care system and alternatives for reform. It was a guiding principle of the working group that a wide breadth of outside parties be consulted, and that members of the public and interested organizations have meaningful opportunities for input.

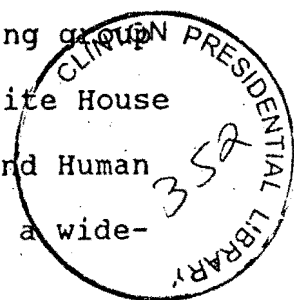
11. Only federal government employees serve as members of the interdepartmental working group. These federal employees fall into two categories. The first category includes full-time, permanent employees, who work for the Executive Office of the President, for federal agencies, for Members of Congress or for Senate or House committees. I have arranged for these federal employees to be informed that they are subject to the conflict of interest provisions set forth in 18 U.S.C. §§ 202-209; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. As of March 1, approximately ____ such permanent employees were serving as members of the working group. These employees have been provided by the White House and several agencies, including the Department of Health and Human Services, and [TO BE ADDED].

12. The second category of federal employees serving as members of the working group includes "special government employees" who have been employed by an agency or the Executive Office of the President for less than 130 days in a 365-day

period, either with or without compensation. I have arranged for these special government employees to be informed that throughout the period of their special employment, they are subject to a limited version of the conflict of interest provisions set forth in 18 U.S.C. §§ 202-209; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. I have also arranged for these special government employees to be informed that they are required to abide by limitations on public speaking and by applicable post-employment restrictions. As of March 1, approximately ___ such special government employees were serving as members of the interdepartmental working group. These special government employees have been retained, and provided to the interdepartmental working group, by the White House and several agencies, including the Department of Health and Human Services and [TO BE ADDED].

13. The working group has also retained a wide range of consultants, who attend working group meetings on an intermittent basis, either with or without compensation. I have arranged for these consultants to be informed that in connection with their services to the working group, they are subject to some provisions of 18 U.S.C. §§ 201-208; the Standards of Ethical Conduct for Employees of the Executive Branch; and all related ethics laws and regulations. These consultants have not had any supervisory role or decision-making authority in connection with the consulting services they have provided to the working group,

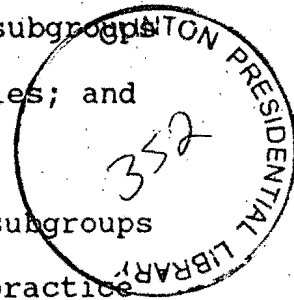
but instead provide information and opinion to the working group members. These consultants have been retained by the White House and other agencies, including the Department of Health and Human Services and [TO BE ADDED]. These consultants come from a wide-range of backgrounds, including [TO BE ADDED].



14. All decisions to hire permanent employees and special government employees, or to retain consultants, have been made by the office or agency that has hired or retained the individual involved.

15. The interdepartmental working group has been organized into fifteen "cluster" groups, each of which addresses a subject area relevant to health care reform. To date, fifteen such cluster groups have been created or planned, and include groups addressing new system organization; new system coverage; infrastructure/integrated health plans; integration of health programs into new system; ethical foundations of a new system; transition to the new system/short-term cost containment; financing; health policy initiatives for underserved populations; mental health; long-term care; economic impact; quantitative analysis; legal audit; numbers audit; and a drafting group.

16. Several of these cluster groups have, in turn, been further divided into subgroups. The new system organization cluster includes subgroups addressing principles and operation of purchasing cooperatives; health plans, providers and patients in the new system; special issues in purchasing cooperatives; governance issues; a global budget; and insurance reform.

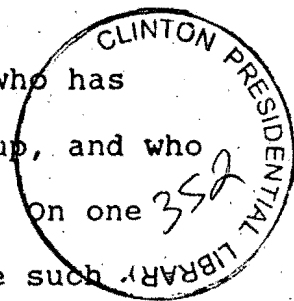


17. The new system coverage cluster includes subgroups addressing benefits packages; coverage for working families; and coverage for low-income and non-working families. The infrastructure/integrated health plans cluster includes subgroups addressing quality measurement; information systems; malpractice and tort reform; and health care workforce development. The integration of health programs cluster includes subgroups addressing Medicare; the Department of Defense; veterans; federal employees' health benefits programs; and other government health programs.

18. The cluster addressing the transition to the new system includes subgroups addressing acceleration of new system development; short-term steps toward administrative simplification; and interim cost containment. The cluster addressing underserved populations includes subgroups addressing high risk populations; urban/rural populations; and women and children. The mental health cluster includes subgroups addressing benefits packages; substance abuse; children's services; and public system impact. And the long-term care cluster includes subgroups addressing background; public care; private care; and cost and revenue.

19. These cluster groups and subgroups have been established since January 25 at my direction. The cluster groups and subgroups have been meeting regularly as part of an intensive effort to document the impact of existing health care policies and to gather information on possible alternatives.

20. I am the only member of the Task Force who has attended meetings of the interdepartmental working group, and who has attended meetings of cluster groups and subgroups. On one occasion, Carol Rasco briefly attended a portion of one such meeting.



OPPORTUNITIES FOR PUBLIC INPUT

21. As noted above, it has been a high priority of the interdepartmental working group to ensure opportunities for input by, and consultation with, private citizens and organizations representing a broad range of interests and concerns. We have sought to open the working group to ideas from literally all corners of the country, and I am aware of no individual or group that has been denied an opportunity to present ideas or suggestions to the working group.

22. Several mechanisms have been established to facilitate public input. First has been the establishment of an "intake center" in the Old Executive Office Building in Washington, D.C.. This intake center accepts letters and phone calls; acknowledges receipt of all correspondence; and forwards all information and recommendations received to appropriate working group members, cluster groups or subgroups. It is my understanding that, to date, this intake center has received between 10,000 and 12,000 pieces of correspondence and several thousand phone calls. The First Lady and I have also received several thousand additional pieces of correspondence, on health care issues, addressed directly to our attention.

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23. The White House Office of Public Liaison has also served an important function in facilitating public input to the interdepartmental working group. The Public Liaison office has set up a series of meetings with outside groups, attended by various members of the interdepartmental working group. I have personally attended many of these meetings. To my knowledge, no other Task Force member has attended any of these meetings. A list of the outside groups that have attended such meetings is attached as Exhibit A hereto.

24. I have also participated in a number of other meetings with representatives of organizations. Through March 1, I met with the Washington Business Group; the National Governors' Association; the American Medical Association; the National Committee to Preserve Social Security and Medicare; the National Federation of Independent Businesses; the American Hospital Association; the National Small Business Legislative Council; the Jackson Hole Group; the National Association of Public Hospitals; the Health Insurance Association of America; the National Association of Counties; and Professional Insurance Agents. No other Task Force members attended any of these meetings.

25. On February 24, 1993, the interdepartmental working group sponsored a meeting on _____ ("HIPC") Prototypes and State-based reform efforts. Participants included representatives of the California Public Employees' Retirement System; the Alpha Center; the Minnesota Department of Employee Relations; Xerox Corporation; Bank of America; the offices of the

governors of Oklahoma, Pennsylvania and Colorado; the health departments of Hawaii, New Mexico, Wisconsin and Arkansas; the Arizona Health Care Cost Containment Program; the West Virginia Public Employee Insurance Agency; the New York State Department of Social Services; the City of Milwaukee; the Agency for Health Care Administration; Medimetrix; the California Major Risk Medical Insurance Board; the Health Care Purchaser's Association; and the California Department of Insurance. I was the only Task Force member to attend this meeting.

26. Moreover, the First Lady has also participated, and plans further participation, in public forums and conferences addressing issues relevant to health care reform. On February 11, 1993, the First Lady attended and participated in a health care conference in Harrisburg, Pennsylvania, sponsored by Senator Harris Wofford and the Pew Charitable Trust. On February 22, 1993, the First Lady attended a forum at Bunker Hill Community College with representatives of health delivery services. The First Lady also plans to attend four regional health care forums in March 1993 being sponsored by the Robert Wood Johnson Foundation. These forums are now tentatively scheduled to take place in Tampa, Florida on March 12; in Iowa on March 15; in Michigan on March 22; and in Washington, D.C. on March 26-27.

CORRESPONDENCE WITH PLAINTIFFS

27. On February 9, 1993, Jane M. Orient, M.D., executive director of plaintiff Association of American Physicians and Surgeons, Inc., wrote to the First Lady to

"advise" that she and the Association's members "desire to attend the next and all subsequent meetings of the President's Task Force on National Health Care Reform." See Complaint, Exhibit B. 352
Ms. Orient stated that her request was made pursuant to the Federal Advisory Committee Act. Ms. Orient also stated that "[a]dvance notice of the next meeting and any and all subsequent meetings would be appreciated so that I and other members may make plans to travel to Washington to be in attendance." Similar requests, dated February 9 and February 12, 1993, respectively, were delivered to the First Lady by the Executive Director of plaintiff American Council for Health Care Reform and the President of plaintiff National Legal & Policy Center. See Complaint, Exhibits C and D.

28. Bernard Nussbaum, Counsel to the President, responded to plaintiffs' requests in writing. See Complaint, Exhibit E (February 12, 1993, letter to Association of American Physicians and Surgeons, Inc.); Exhibit F (February 12, 1993, letter to American Council for Health Care Reform); Exhibit G (February 16, 1993, letter to National Legal & Policy Center).

29. In his letters to plaintiffs, Mr. Nussbaum advised plaintiffs of his office's opinion that the Federal Advisory Committee Act does not apply to the Task Force. He also advised plaintiffs that the Task Force had not yet met, that no Task Force meetings were presently scheduled, but that "the task force will be holding some public meetings at which citizens, organizations and institutions will have an opportunity to

present their views." Mr. Nussbaum explained that such public meetings would be announced in advance. Finally, Mr. Nussbaum informed each of the plaintiffs that if they are interested in attending such public meetings, they should contact a member of the White House staff, Mike Lux, whose name and phone number were set forth in the letters.

30. I have been informed that none of the plaintiffs has contacted Mr. Lux, or any other person affiliated with the Task Force or the interdepartmental working group, to express an interest in attending, or to make arrangements for attending, public meetings of the Task Force.

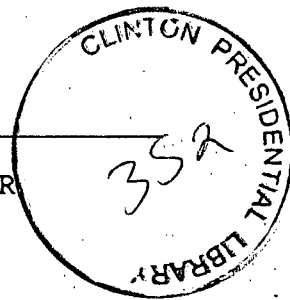
CONCLUSION

31. Although the Task Force contemplates holding some, if not all, of its meetings in public, I believe it is critical -- in light of the magnitude of the Task Force's charge and the short time frame in which it is operating -- that the Task Force and the interdepartmental working group be able to retain flexibility in their operations and be free from formalistic reporting or mandatory public meeting requirements. I believe that such requirements, if imposed on either the Task Force or the working group, would impede the Task Force's ability to address, within the time frame set out by the President, the literally hundreds of complex issues that must be considered in formulating proposals for comprehensive health care reform.

Under penalty of perjury, I swear that the foregoing is true and accurate to the best of my belief.

IRA MAGAZINER

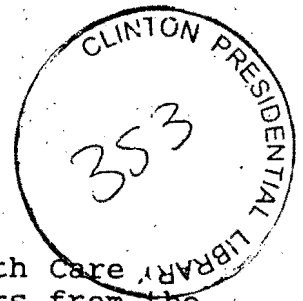
DATED: March 3, 1993



2-3-93

Talking Points on Health Care Task Force

(Prepared by Lisa, Maggie, Vince and Steve)
WITH HRC REVISIONS



- Hillary Clinton is the chair of the President's Health Care Task Force. The task force consists of Cabinet members from the Departments of Defense, Commerce, Labor, HHS, and Veterans Affairs as well as the OMB Director, the President's Domestic and Economic Policy advisors, the Chair of the Council of Economic Advisors and the President's Senior Advisor for Policy Development, White House Staff and other government officials.

-Ira Magaziner is leading a working group which will provide information to the Health Care Task Force. The task force will review information from the working group and make recommendations to the President.

-The working group will be consists of government employees.

-The working group will consult with a wide range of citizens, representing the public and private sectors.

-On January 25, the President announced the formation of the Health Care Task Force and defined its mission. It has not yet held a meeting.

-The task force is planning to hold some public meetings. Those meetings have not been scheduled.

Note: In response to the question: Does FACA apply to the Task Force? In the opinion of the Counsel to the President, it does not.

In response to the question: Did the Task Force violate FACA?

1. In the opinion of the Counsel to the President FACA does not apply.

2. The Task Force has not met, nor taken any action to date.

Note: ONLY USE POINT THREE IF PRESSED.

3. The participation of the first Lady, does not create "a presidential advisory committee" subject to the Act.

In response to the question: Does FACA apply to the working group? No.

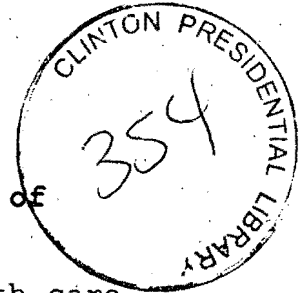
Note: TRY TO AVOID QUESTIONS ON FOIA.

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MEMORANDUM FROM IRA MAGAZINER

DATE: March 1, 1993

SUBJECT: Health Care Reform Working Groups--Categories of Participants



There are three categories of participants in the health care reform working groups:

1. Full-Time Government Employees--

Individuals who work for the Executive Office of the President, for federal agencies, for Members of Congress or Senate and House committees. Federal employees are subject to the conflict of interest provisions in 18 U.S.C. Section 202-209 and Standards of Ethical Conduct for Employees of the Executive Branch and all related ethics laws and regulations.

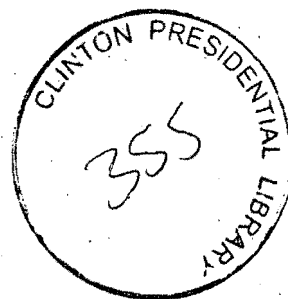
2. Special Government Employees--

a. Individuals who are employed by any agency or the Executive Office of the President for less than 130 days in a 365 day period either with or without compensation. Such individuals are subject to a limited version of the conflict of interest provisions in 18 U.S.C. Section 202-209 and Standards of Ethical Conduct for Employees of the Executive Branch and all related ethics laws and regulations for the period of time they serve on the working group. Furthermore, they are required to abide by limitations on public speaking and by post-employment restrictions. Such individuals may serve as working group leaders.

b. **Consultants**--Individuals who attend working group meetings on an intermittent basis with or without compensation are subject to some provisions of 18 U.S.C. Section 201-208 and Standards of Ethical Conduct for Employees of the Executive Branch and all related ethics laws and regulations. Such individuals may not serve as working group leaders and have other limitations on their participation.

COPY

THE WHITE HOUSE
WASHINGTON



March 10, 1993

MEMORANDUM FOR JENNIFER O'CONNOR
OFFICE OF ADMINISTRATION

FROM: BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: HHS Representatives to Health Care Task Force

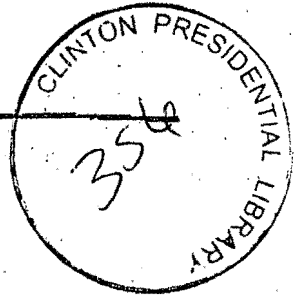
You have inquired whether employees of the Department of Health & Human Services (HHS) may serve as nondetailees in the Executive Office of the President (EOP) as HHS representatives to the Health Care Task Force. As you know, the General Accounting Office (GAO) concluded in a November 1992 report that agency representatives may properly be classified as nondetailees. Thus, this classification is available for proper agency representatives.

Because these individuals are HHS employees representing HHS to the Task Force, they must be supervised by HHS personnel, not EOP personnel, so that they may properly represent the interests of their agency. So long as this is the case, their assignment to the Task Force as HHS representatives is consistent with personnel requirements and the mission of the Task Force.

cc: Steve Neuwirth
Associate Counsel to the President

CC

COPY



Washington, DC 20530

CIVIL DIVISION

FEDERAL PROGRAMS BRANCH

FAX TRANSMITTAL COVER SHEET

DATE:

10/20/93

TO:

Steve Newman

FAX NUMBER:

496-1647

FROM:

Jeff Gorman

Fax No. (202) 616-8202 (LOCAL) -- 369-8202 (FIS)
9th FLOOR

THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

DELIVER IMMEDIATELY

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RESPONSE TO WASHINGTON TIMES ARTICLE

* The article states that defendants revealed that the membership of the working group cannot be determined.

Response -- Defendants provided plaintiffs with a list of the participants in the working group. Defendants explained how the list was developed and stated that, because of the nature of working group operations, others may have attended working group meetings. It would have been disingenuous for defendants to provide a list without this explanation and falsely leave the impression that there was no possibility that others participants did not exist.

* The article states that defendants revealed that the working group failed to keep accurate payroll records and expense vouchers, but later states that they were not kept at all.

Response -- Absolutely incorrect. Defendants disclosed to the plaintiffs which special government employees and consultants were paid and whether their expenses were paid. Defendants disclosed which White House Office SGEs travelled to Washington and when. Defendants have never stated that these records did not exist. Rather, defendants argued that the amount of payment or reimbursement was absolutely irrelevant to the issues before the court.

* The article states that defendants failed to keep accurate minutes and agendas.

Response -- Out of context. Very few minutes and agendas were created of working group meetings, but there was no legal requirement for these documents to be maintained. Moreover, the defendants explained that imposing administrative burdens on the working group members would have diverted needed time and energy from the substantive issues at hand.

* The article states that defendants revealed that defendants did not know whether consultants complied with financial disclosure requirements.

Response -- Absolutely untrue. Defendants have explained which SGEs and consultants completed financial disclosure forms and which did not. As to those who did not, our briefs explain why an exemption from doing so was fully applicable. Moreover, our response shows that each of these individuals was required to attend ethics briefings in which they were provided materials and explanations relating to their ethics obligations. The suggestion that the failure to complete a form means fines could be levied ignores defendants' contentions that many were legally exempt from this requirement.

COPY

* The articles states that Judge Lamberth called "gobbledygook" the Task Force's excuses for the lack of required documentation.

Response -- Absolutely untrue. Judge Lamberth did use the term "gobbledygook" to refer to the statements of evidentiary objections in defendants' discovery response, but he did not characterize in any way defendants' counsel's statements regarding what documents the working group maintained and what they did not. Again, no documentation was "required" to be maintained; in March, Judge Lamberth ruled that the working group was not subject to the FACA.

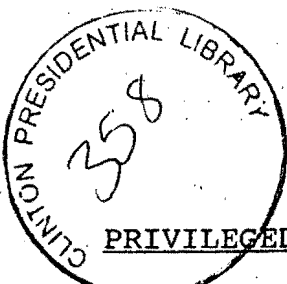
* The articles states that defendants revealed that few working groups produced proposals although many had been leaked.

Response -- Absolutely untrue. The working group produced thousands of pages of policy options and defendants have never said otherwise. Plaintiffs' argument that they were entitled to review these substantive materials was rebuffed by the Court.

* The article describes the special government employees and consultants as "special interest representatives."

Response -- Untrue. To the contrary, a point was made not to have special interest participation on the working group. Rather, most were university professors, independent consultants and non-partisan health care experts.

COPY



THE WHITE HOUSE
WASHINGTON

October 28, 1994

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM FOR LEON PANETTA
CHIEF OF STAFF

FROM:

JOEL KLEIN *JK*
DEPUTY COUNSEL TO THE PRESIDENT

STEPHEN NEUWIRTH *SN*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Health care working group documents/litigation

Today's Washington Times story, titled "Health panel removed records," misrepresents the facts concerning the Administration's recent production of documents of the interdepartmental working group that support the Health Care Task Force in 1993.

As we believe you are aware, in September the Administration placed approximately 260 boxes of health care working group documents in a public reading room at the National Archives. Following that production, the Justice Department argued to a federal district court that a pending litigation concerning the working group is now moot because release of these documents is the only relief to which the plaintiffs could be entitled. The plaintiffs claim that the working group was subject to the Federal Advisory Committee Act, which requires open meetings and public disclosure of documents.

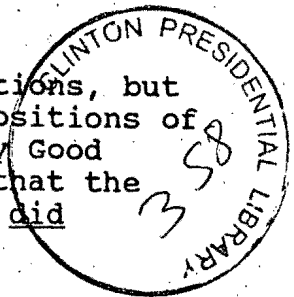
The Justice Department advised the court in briefs, witness declarations and at oral argument of the procedures that were used to produce the working group documents at the Archives. Among other things, the Department explained that, as a general matter, we had not produced documents that post-dated May 31, 1993, the date when the working group terminated. (The record in the litigation is replete with uncontradicted evidence that the working group terminated in May 1993.) The Justice Department explained that if working group members had included post-May 1993 documents in the boxes they submitted to the White House records management office, those post-May 1993 documents were removed before those boxes were produced at the Archives. At the same time, we did produce the post-May 1993 documents of several health care "audit groups" that did continue their work after May 1993.

The court has never stated that the White House "deceived" anyone about which documents were produced. Two weeks ago, the

Handwritten notes:
OK, keep me informed
(with a circle around the word 'informed')

COPY

court ordered some limited discovery, including depositions, but only to confirm whether the case is now moot. The depositions of Ira Magaziner, Marge Tarmey (Ira's assistant) and Terry Good (White House records management) support our position that the White House made a good faith effort to produce -- and did produce -- all working group documents.



Today the court ordered that there is no need for further discovery and set a short briefing schedule for a final decision on whether the case is now moot. Oral argument on this issue will be held on November 10, 1994. The Justice Department feels strongly that the case is moot and that there is no legal basis for a trial. Moreover, we are aware of no legal or factual basis for the plaintiffs' sensational suggestion that the First Lady could be a trial witness. The First Lady did not participate in the interdepartmental working group. She chaired the separate, 12-member Health Care Task Force, composed of Cabinet members and senior White House officials. Last year, the Court of Appeals held that the Task Force was not subject to the Federal Advisory Committee Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS, INC.,
et al.,

Plaintiffs,

v.

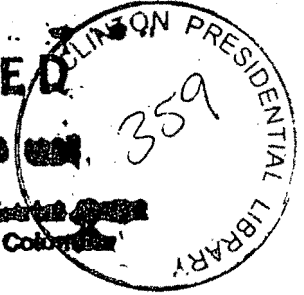
HILLARY RODHAM CLINTON,
et al.,

Defendants.

FILED

SEP 28 1994

Clerk, U.S. District Court
District of Columbia



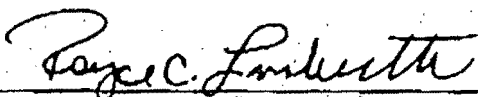
Civil Action No. 93-0399
(RCL)

ORDER

Defendants' motion for expedited ruling on the contempt allegation against Ira Magaziner, in which defendants requested this court to reconsider its July 25, 1994 decision to defer a ruling until a determination on the merits, is hereby DENIED.

In light of the extension of the briefing schedule on the defendants' motion to dismiss this case as moot, sought by defendants and granted by the court, oral argument on defendants' motion is hereby re-scheduled to 9:30 a.m. on October 13, 1994.

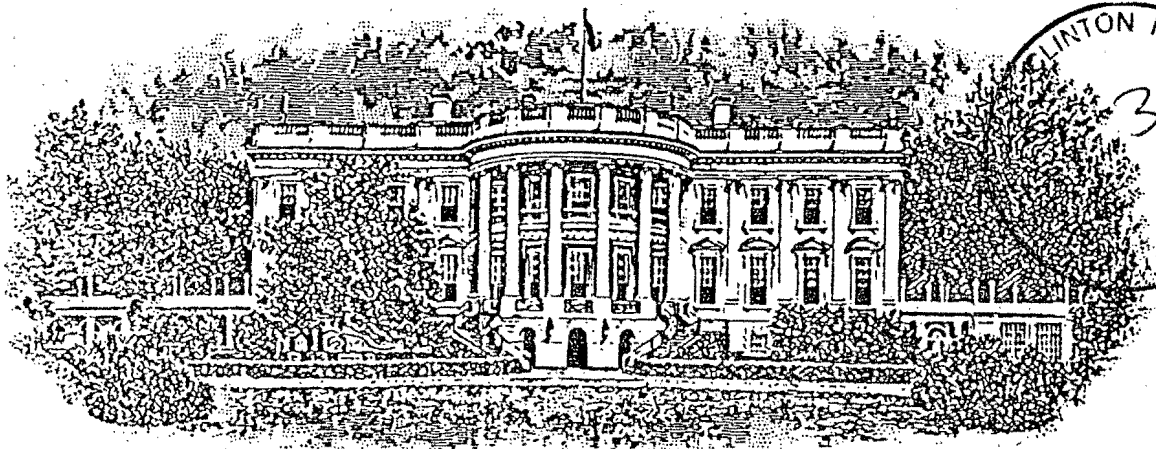
SO ORDERED.


Royce C. Lamberth
United States District Judge

DATE: 9-28-94

COPY

THE WHITE HOUSE



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: _____

TO: JEFF GUTMAN

FACSIMILE NUMBER: 616 8202

TELEPHONE NUMBER: ~~456~~ 514 4775

FROM: S NEUWIRTH

TELEPHONE NUMBER: 456 7903

PAGES (WITH COVER): 6

COMMENTS: _____

PLEASE DELIVER AS SOON AS POSSIBLE

The document(s) accompanying this facsimile transmittal sheet is intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this information in error, please immediately notify the sender at their telephone number stated above.

COPY



David A. Norcross, Esq.
General Counsel
Republican National Committee
Dwight D. Eisenhower Republican Center
310 First Street, S.E.
Washington, D.C. 20003

Dear Mr. Norcross:

This is in response to your Freedom of Information Act (FOIA) (5 U.S.C. § 552) request for expense payment documents pertaining to the attendance or participation in Health Care Task Force meetings, working group sessions, town hall gatherings or conferences of persons associated with the Department of Commerce whose name appears on the list which you submitted as Attachment A to your request.

Eight of the listed individuals are Department of Commerce employees who participated in the ~~Task Forces~~ ^{interdepartmental working group}. I am enclosing a statement of the salary of each of the eight individuals, set forth on standard forms 50-B. We have no way of breaking down salaries according to specific work projects, and are unable to identify which portions of the salaries may be attributed to time spent on ~~Task Force~~ ^{working group} matters.

and gathered information for that provided information to the Task Force.

Four of the eight individuals incurred expenses in connection with their attendance or participation in ~~Task Force~~ meetings or other events. I am enclosing copies of their expense documents, with the redaction of information unresponsive to your request and of personal information (such as social security numbers and home addresses), which is exempt from disclosure pursuant to FOIA exemption (b)(6), which protects personal privacy interests.

Three of the listed individuals ^{here} (Simone Rueschemeyer, Carolyn Gatz and Suzanne Wellford) are independent contractors who received no payment pertaining to attendance or participation in Health Care Task Force meetings or other meetings covered by your request.

You have the right to appeal this partial denial of your FOIA request. An appeal must be submitted within 30 calendar days of this letter to the Assistant General Counsel for Administration, Room 5883, U.S. Department of Commerce, 14th and Constitution Avenue, N.W. Washington, D.C. 20230. The appeal should include a

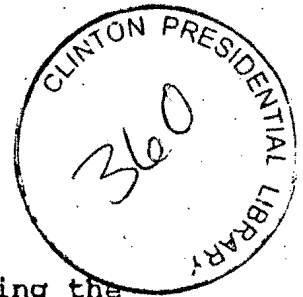
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Office of the General Counsel
Washington, D.C. 20230

Ms. Marcy G. Gordon
Associated Press
2021 K Street, N.W.
Washington, D.C. 20006

DRAFT



Dear Ms. Gordon:

This is in response to your December 8, 1993 Freedom of Information Act (FOIA) request for all documents concerning the White House National Health Care Reform Task Force that were written by or sent to Robert J. Stein since January 20, 1993, including any correspondence between Mr. Stein and Ira Magaziner, Elizabeth Stroud or Barbara S. Fredericks.

There are no documents written by Mr. Stein which are responsive to your request, and no correspondence on Task Force issues between Mr. Stein and Mr. Magaziner, Ms. Stroud or Ms. Fredericks. There are, however, two documents concerning the Task Force which were sent to Mr. Stein. One of the documents, health care talking points, is being released to you. The second document, an internal Department of Commerce memorandum addressing health care deliberations, is protected from disclosure by FOIA exemption (b)(5), which encompasses inter- or intra-agency documents which would not be available by law to a party in litigation with the agency. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1974). One of the purposes of the exemption is to avoid any chilling or distorting of the agency's deliberative process in order to insure that the decisionmakers receive complete information and frank advice on which to base their opinions. Id. at 151. The information at issue constitutes predecisional opinions pertaining to the Task Force.

date?
Who drafted?

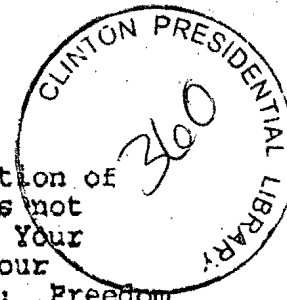
You have the right to appeal this partial denial of your FOIA request. An appeal must be submitted within 30 calendar days of this letter to the Assistant General Counsel for Administration, Room 5883, U.S. Department of Commerce, 14th and Constitution Avenue, N.W. Washington, D.C. 20230. The appeal should include a copy of the original request, this response and a statement of the reason why this response is in error. Both the appeal letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Anthony A. Das
Executive Secretary

Enclosure

COPY



You may request, within thirty days, a reconsideration of the determination that the Federal Trade Commission does not possess any agency records responsive to your request. Your request for reconsideration, accompanied by a copy of your original request and this response, should be addressed: Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

If you have any questions about the way your request was handled or about the Federal Trade Commission's regulations related to the FOIA, please contact Mr. Keith Golden on (202) 326-2410. He is the staff member most familiar with your request.

Sincerely,

Alan Proctor
Deputy Executive Director
for Planning and Information

COPY

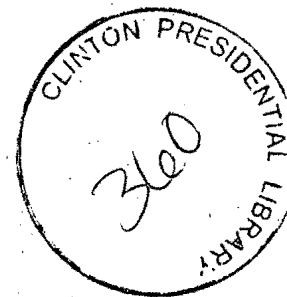
FEB-24-94 THU 14:47

P. 02

003



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



James V. Lacy, Esquire
Lacy and Lacy
30100 Town Center Dr.
Suite 0-269
Laguna Niguel, California 92677

Re: Freedom of Information Act Request
Health Care Reform Task Force
FOIA Control No. 94-0117

Dear Mr. Lacy:

This is in response to your letter dated February 7, 1994, in which you requested access to records in the possession of the Federal Trade Commission relevant to the Health Care Reform Task Force.

It is our policy, when responding to an access request, to search for documents that were records of the Federal Trade Commission as of the date on which the access request was received for processing in our FOIA/PA unit. Your request was received in that office on February 15, 1994.

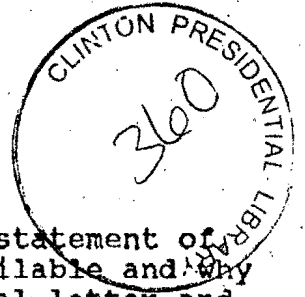
We have searched the indexes of the Commission's records and have contacted two of the individuals listed on the attachment to your letter. The third individual, Ms. Kenyon, (whose correct first name is Kathleen) is no longer employed by the Federal Trade Commission. We have determined that ~~all~~ records ~~of the~~ federal government related to the Task Force have been returned to the Task Force. Documents that those individuals created or obtained in their capacities as ~~members of the working group~~ were not agency records of the Commission. The Commission did not have control of these records, which instead remained in the control of the Task Force. They were, therefore, not "agency records" subject to the FOIA. These working group records are, moreover, subject to the Presidential Records Act, 44 U.S.C. §§ 2201, et seq., and thus not accessible under the FOIA.

For purposes of determining fees incurred to process your request, you have been considered to be a "commercial use" requester, but, based upon document search, duplication, and review provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii)(I) and the Commission's Rules of Practice, 16 CFR 4.8 et seq., as amended, there is not charge to you for processing your request.

that was gathered information for and provided information to the Task Force

working group and/or Task Force
that all such documents

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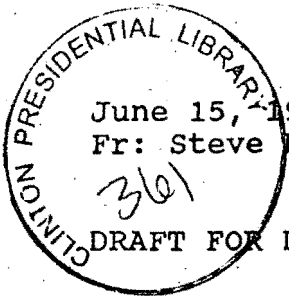
copy of the original request, this response and a statement of the reason why withheld records should be made available and why denial of the records was in error. Both the appeal letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Anthony A. Das
Executive Secretary

Enclosures

COPY



June 15, 1993

Fr: Steve Neuwirth/Jason Solomon

DRAFT FOR DISCUSSION

file-
HETF

DRAFT FOR DISCUSSION

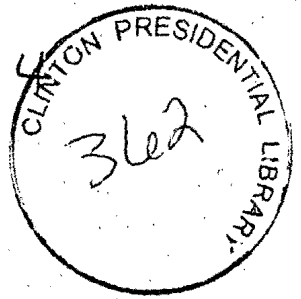
TALKING POINTS ON HEALTH CARE TASK FORCE COURT ORDER

- The court today ordered that all documents from the Task Force be preserved. But the Task Force has been preserving all documents from the beginning. The court acknowledged this in its order and essentially affirmed the status quo.
- Q: What about the documents that have allegedly been shredded as reported in the Washington Times?
- A: There was an unsubstantiated story in the Washington Times which is being investigated. The court made no findings regarding the shredding of documents.
- Q: Has the Task Force really ended? The plaintiff's lawyer showed a letter dated June 5 that talked about the Task Force.
- A: The Task Force completed its work at the end of May. The letter contained an erroneous reference to the Task Force.

COPY

THE WHITE HOUSE
WASHINGTON

3/14



Hillary -

1) After a long meeting Sunday afternoon with the Justice Dept lawyers we have worked out guidelines for meeting with the President. They are attached and I will assume they are workable until someone points out a practical problem. I have conveyed this to Ira.

2) The Justice Dept urges an appeal because of the numerous issues concerning compliance and the long-term intrusion on the ~~the~~ President's ability to obtain advice from a group subject to FACA.

a) Their analysis of the compliance issues is attached.

b) Our position on these concerns follows. This is a quick summary of the issues.

c) A talking points memo for Communications should an appeal be lodged is the next item.

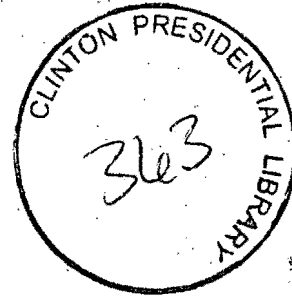
3) Assuming the plaintiffs do not appeal by the end of the day Monday we would like to resolve whether to appeal by Tuesday noon.

Vivian

COPY



OFFICE OF THE VICE PRESIDENT
WASHINGTON



February 13, 1995

MEMORANDUM FOR CHRISTOPHER CERF
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: KUMIKI GIBSON *KG*
COUNSEL TO THE PRESIDENT

SUBJECT: DOCUMENT REQUEST RE: HEALTH CARE TASK FORCE

I write in response to your February 8, 1995 memorandum regarding the U.S. Attorney's "inquiry" into the Health Care Task Force and the Interdepartmental Working Group.

Please be advised that Jack and I have conducted a thorough search of my files and have discovered two documents that may fall within the types of materials being sought by the U.S. Attorney's Office. These documents include (1) a memo to the Vice President from Jack Quinn and me which addresses issues related to the President's Council on Sustainable Development in the context of the Health Care Task Force litigation and (2) notes that I prepared for a meeting (on that issue) with either the Vice President himself or on behalf of the Vice President. (These documents are attached.)

Both of these documents were prepared by the Vice President's Counsel's Office for the sole purpose of providing legal advice to the Vice President. I therefore strongly object to their release to the U.S. Attorney's Office -- either informally or in response to a formal discovery request or subpoena.

Please contact me (ext. 6-7020) if you have any questions regarding this matter.

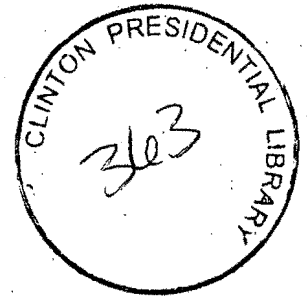
Thank you.

Attachments

cc: Joel Klein (w/ attachments)

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June 21, 1993



MEMORANDUM FOR THE VICE PRESIDENT

FROM: JACK QUINN AND KUMIKI GIBSON

RE: PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT

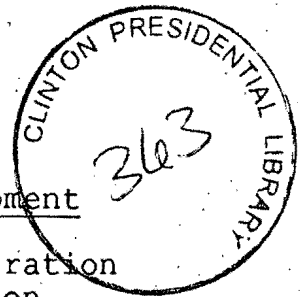
This memorandum responds to your request that we consider and comment on the argument of the White House Counsel's Office that the establishment of the President's Council on Sustainable Development ("President's Council") as an entity reporting to the President may undermine the United States' constitutional argument in Association of American Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. 82 (D.D.C. 1993), appeal docketed, Nos. 93-5086 and 93-5082 (D.C. Cir. Mar. 10, 1993). That case, as you know, addresses the issue whether the President's Task Force on National Health Care Reform is subject to the Federal Advisory Committee Act, 5 U.S.C. §§ 1-15 ("FACA").

In light of the pending appeal, Steve Neuwirth, Associate Counsel to the President, has urged the Office on Environmental Policy ("OEP") to establish the President's Council so that it does not report to the President and is not called the "President's Council." For its part, the OEP believes that it will be unable to ensure high-level participation if the President's Council does not report directly to the President and the Vice President and is not recognized as a presidential advisory group.

In our view, unless the Administration seeks to exempt from FACA all advisory committees that report to the President (which it does not, in the pending litigation, and should not), no sound legal argument exists to support the conclusion that the creation and existence of the President's Council will adversely affect the Health Care Task Force case.¹ Simply put, the constitutional arguments advanced in the Health Care Task Force case hinge on the specific function and composition of the Task Force, which are quite different from those of the President's Council on Sustainable Development.

¹ When we shared this conclusion with Mr. Neuwirth after drafting this memorandum, he informed us that the Department of Justice attorneys who represent the Administration in the Health Care Task Force case have also reached this conclusion.

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I. Background

A. The President's Council on Sustainable Development

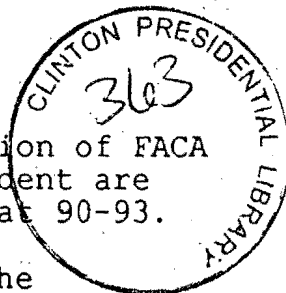
As you will recall, on June 14, 1993, the Administration announced the establishment of the President's Council on Sustainable Development. Under the terms of the Executive Order that has been proposed to establish this Council, the Council will be comprised of twenty-five members: five Cabinet members and twenty citizens from private industry and environmental and not-for-profit organizations. According to the OEP, the Council will develop plans to integrate environmental and economic development related goals, including, possibly, legislation; identify and sponsor projects; and establish a Presidential Award for exemplary service to national sustainable development. The OEP has acknowledged that the Council will be subject to FACA because it will be a committee established and utilized by the President and will be comprised of both officers of the federal government and private citizens.² (By contrast, the Health Care Task Force, the government contends, does not include "outside" private citizens because the First Lady, who chairs the Task Force, is a federal officer or employee within the meaning of FACA.)

B. The Health Care Task Force Case

In Association of American Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. 82 (D.D.C. 1993), the federal district court for the District of Columbia held that the Health Care Task Force is subject to FACA because FACA applies only to Presidential committees that are not comprised solely of federal officers and employees, and the First Lady is not a federal officer or employee. *Id.* at 90. The court also held (under the separation of powers doctrine) that the Task Force must comply with FACA with respect to its information-gathering and

² Without question, FACA would apply to the President's Council, as it has been proposed. As the Act makes clear,

[t]he term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof [which is] established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such terms excludes . . . any committee which is composed wholly of full-time officers or employees of the Federal Government.



information-reporting meetings, but that the application of FACA to the meetings in which recommendations to the President are actually formed would violate the Constitution. Id. at 90-93.

The Administration appealed this decision, and the plaintiffs cross-appealed. See Association of American Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. 82 (D.D.C. 1993), appeal docketed, Nos. 93-5086 and 93-5082 (D.C. Cir. Mar. 10, 1993). On appeal, the government argues (first and foremost) that the First Lady's role on the Task Force is one of a public servant, the functional equivalent of an officer or employee for purposes of FACA. The government also argues (in the alternative) that FACA is unconstitutional as applied in this case because congressional "interference with the President's reasonable efforts to obtain the advice needed to assist him in discharging his constitutional duties [to propose legislation of health care reform] violates fundamental notions of separation of powers." Brief for Defendants-Appellants ("Government's Brief") at 36, Association of American Physicians and Surgeons, Inc. v. Clinton.

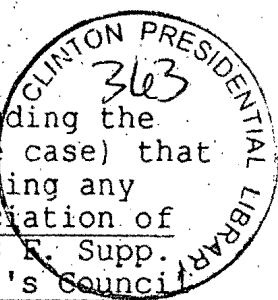
II. Discussion

As noted above, Mr. Neuwirth contends that the mere creation and existence of any advisory group that reports to the President and acknowledges the applicability of FACA to it undermines the Administration's constitutional argument in the Health Care Task Force case.³ This argument lacks legal merit.

In the Health Care Task Force case, the government claims that the application of FACA to the Task Force is unconstitutional because, through the Task Force, the President seeks to exercise his explicit power to recommend legislation to Congress. Government's Brief at 32. ("The sole purpose of the Task Force is to advise the President in preparing legislation of the highest priority in an extremely expedited time frame." Government's Brief at 33.) It contends that the Constitution confers to the President, "sole discretion . . . to determine what measures he shall propose, and [under separation of powers principles] leaves no room for intrusion, direct or indirect, by Congress." Government's Brief at 33. In doing so, the

³ As we understand it, Mr. Neuwirth concedes that the creation of the Presidential Council (which is comprised primarily of private citizens) will in no way affect the government's primary argument in the Health Care Task Force case -- i.e., that FACA, which explicitly exempts advisory groups comprised solely of federal officers and employees, does not apply to the Task Force because the Task Force is comprised of Cabinet Secretaries, senior advisors, and the First Lady, all of whom, the government argues, are federal officers and employees.

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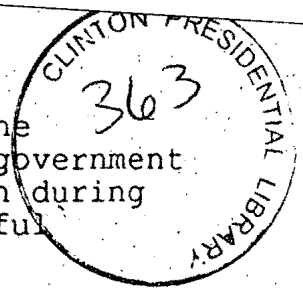
government relies on well-established authority (including the district court's opinion in the Health Care Task Force case) that has held that Congress is barred completely from imposing any limits on "an explicit power of the President." Association of American Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. at 91. No such bar exists, however, for the President's Council on Sustainable Development because it will be engaged in quite different activities, and these differences in function, as well as in composition, have constitutional significance.

Unlike the Task Force, the President's Council is charged with numerous responsibilities that are not (currently) derived from any explicit constitutional provision, but rather derive from "the general grant to the President of 'executive Power.' U.S. Const., Art. II, § 1, cl. 1." Public Citizens v. Department of Justice, 491 U.S. 440, 484 (1989).⁴ Under these circumstances, courts have consistently held that Congress may limit presidential power. Association of American Physicians and Surgeons, Inc. v. Clinton, 813 F. Supp. at 91 ("where Congress does not directly limit an explicit power of the President, but rather indirectly affects a presidential power that is not specifically enumerated in the Constitution, the statute is not unconstitutional per se; instead, the court must balance the interests of the two branches.") Thus, the application of FACA to this Council would not be unconstitutional per se, as the government argues in the Health Care Task Force case.

But, more than just the functions of the two entities are different. The government also notes in the Health Care Task Force case that the Task Force is composed solely of federal officials -- "the President's closest advisors," his inner circle." Government's Brief at 32, 36. The government's interest in protecting the deliberative process of these high-ranking officials outweighs the public's interest in obtaining the information, especially where the Task Force decisions and

⁴ As noted above, the President's Council may at some later date render recommendations regarding legislation. This mere possibility is not, we think, sufficient to support an argument that the President is exercising, through the President's Council, his explicit Article II power to recommend legislation (as is being argued in the Health Care Task Force case). Of course, the President's Council would be viewed as akin to the Health Care Task Force if the Council decides that legislative action will be the most effective means of accomplishing their objectives. Nevertheless, as discussed in the following text, the composition of the Council is so dramatically different as to leave it squarely within the reach of FACA. In short, this difference provides all the reason one needs to concede the applicability of FACA to the President's Council, but not to the Task Force.

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recommendations will be publicly scrutinized during the legislative process. Government's Brief at 32. The government thus contends that protecting the candor of discussion during this process is critical to ensure a full and thoughtful decision-making process. Government's Brief at 31.⁵

The interest of protecting the deliberative process of high-ranking officials simply does not exist with respects to the President's Council, which is comprised primarily of private citizens. While five Cabinet members will serve on the Council, the Council's deliberations cannot be viewed as reflecting the deliberative process of government decision-makers. Moreover, the harm that would result from revealing that process to the public (as feared by the government in the Health Care Task Force case) is not present here, where during every meeting, five Cabinet members will deliberate on various environmental issues before numerous private citizens.

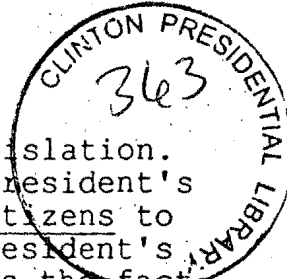
In addition, unlike the Task Force's deliberative process, the deliberations of the President's Council may never result in legislation that is open to public scrutiny. The application of FACA to the President's Council, therefore, may provide the public with the only opportunity to scrutinize the "deliberative activities" of "non-governmental actors given quasi-official status [who] might thereby wield inappropriate influence" -- which is, according to the government, the intent of FACA. Government's Brief at 30 (emphasis original).

In short, the President's Council does not have a constitutionally cognizable interest in protecting its deliberations comparable to those of the Task Force. Moreover, here (unlike in the Health Care Task Force case), the application of FACA to the deliberations of the President's Council may be the only mechanism to provide the public with access to its decision-making process.

These differences are most compelling, in our view. Indeed, not only is the applicability of FACA to the President's Council wholly consistent with the government's constitutional position in the Health Care Task Force case, it actually buttresses the government's argument in that case. In the Health Care Task Force case, the government acknowledges that the narrow constitutional issue before the Court of Appeals is "whether FACA can be constitutionally applied to task forces comprised wholly of federal officers and employees and the First Lady" for the

⁵ Advisory committees subject to FACA must, among other things, hold their meetings in public and make all of their documentation and records available to the public, in accordance with the Freedom of Information Act. See generally 5 U.S.C. App. 2 §§ 1-15.

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sole purpose of advising the President in preparing legislation. Government's Brief at 33-35. To acknowledge that the President's Council (a task force comprised primarily of private citizens to address a host of issues, all of which implicate the President's general executive powers) is subject to FACA underscores the fact that distinctions exist among the various advisory groups that advise the President and that, accordingly, FACA cannot be presumed to apply to all of these groups.⁶

III. Conclusion

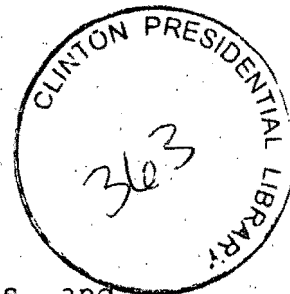
In sum, the argument that the creation and existence of the President's Council will adversely affect the government's (constitutional) position in the Health Care Task Force case will not withstand scrutiny. The constitutional claims advanced in that case are based on the particular function and composition of the Health Care Task Force, each of which differs from those of the President's Council. Making clear that FACA applies to the President's Council, but not the Task Force, precisely because of these differences will, in our view, strengthen, not undermine, the government's position in the pending appeal.

cc: Roy Neel
Katie McGinty

⁶ During a June 18, 1993 conversation with Associate Counsel Neuwirth, he suggested that he and John Podesta believe that the President cannot select which advisory committees are subject to FACA and which ones are not, leading us to conclude that the Administration may indeed want to argue that all Presidential advisory committees are exempt from FACA, regardless of their function and composition. This position, however, is not consistent with the legal arguments advanced in the Health Care Task Force case.

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HEALTH CARE TASK FORCE COURT OF APPEALS DECISION



I. TASK FORCE

Composed of Cabinet Secretaries, White House advisors, and the First Lady

A. First Lady = Employee/Officer For Purposes of FACA

The court held that the First Lady is a full-time officer or employee of the federal government within the meaning of FACA and, thus, FACA does not apply to the Task Force.

It found the language, in FACA, pertaining to employees/officers to be ambiguous: Definition similar to Section 2104 and 2105 was deleted from the Senate version.

Court relies on 1 U.S.C. § 1: Federal officer includes "any person authorized by law to perform the duties of the office."

3 U.S.C. § 105(e): Spouse can provide assistance
Common sense = Spouse assists the President

B. Construe Statute to Avoid Serious Constitutional Issues

Court applies the rule of statutory construction set forth in Public Citizen: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"

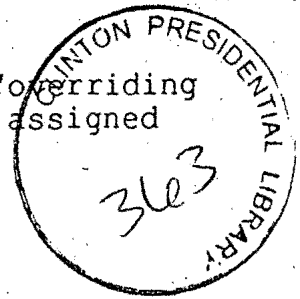
C. Serious Constitutional Issues Here

Court finds that the government's argument that FACA does not apply because it would encroach on the President's explicit power is flawed. Morrison, the case upon which the government relied, actually applied a balancing test to determine the constitutionality of legislation that, arguably, interfered with the President's Article II, section 3 explicit responsibility to "take Care that the Laws be faithfully executed." Slip op. at 17.

Court, however, did find the government's argument re: confidential communications to be compelling and held that "Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between senior advisors." Slip op. at 21. A statute that seeks to limit the President's ability to seek advice "directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns" Slip op. at 22. (Operational proximity to the President.)

COPY

Court holds that this should be balanced against "overriding need to promote objectives within the constitutionally assigned functions." Slip op. at 22.



Court concludes:

We readily confess that this balancing test is not one that, as judges, we can apply with confidence. This is all the more reason to view the constitutional issue soberly. We are satisfied that the application of FACA to the Task Force seriously burdens executive power.

Slip op. at 22.

* * *

S. Ct. Appeal:

It's barred because through Task Force he's exercising an explicit authority

Balancing = As Applied (Buckley)

All advisory committees exempt = Government "suggested" that FACA could not apply to any advisory group established and utilized by the President, but refused to say that FACA was unconstitutional on its face. Slip op. at 26, n.12.

II. WORKING GROUP

Composed of (1) approximately 300 permanent federal government employees from the Executive Office, the federal agencies, and Congress, (2) approximately 40 "special government employees," and (3) an unknown number of consultants who attend meetings on an intermittent basis

A. Utilized By the President?

The government argues that the working group is not in contact with the President and, thus, is not "utilized by the President"

Court finds this to be a "strange" argument:

1. Statute cannot be properly interpreted to apply only to those committees that have direct contact with the president

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2. Statute makes clear that FACA can apply to committees that are established by President, regardless of the closeness of the working relationship

3. Public Citizen: Court did not suggest that FACA did not apply because it communicated with Justice, not the President

* This would not be very persuasive at the district court (President's Council would be utilized by Pres)

B. Staff of the Task Force?

The government also argues that the working group is just staff to the Task Force, as it was in Anti-Hunger.

Court rejects this argument: In Anti-Hunger, the sub-groups reported to a big group that was (concededly) subject to FACA

Here, the working group is the only point of contact with the public (because the Task Force is a governmental entity): "Our disagreement with the district court on this latter issue therefore compels a different analysis of the working group's status." Slip op. at 28.

* Any argument left for the district court? Probably not (President's Council is not a sub-group)

C. Act As A Group?

Strange argument: Can a group that is supposed to be diverse offer consensus advice?

Better question = Do the people involved act like a group? Look at "formality and structure"?

Court concludes: "In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." Slip op. at 30.

If not, it may be a "horde" rather than a committee, as in Nader

* Good argument for district court: Working Group = Horde (President's Council is in form & structure a group)

COPY

D. All Federal Employees?

Government argued that all members are full-time officers/employee

Court finds:

1. 300 federal employee = "concededly within than category"
2. 40 "special government employees" = Full-time if work for government for less than 130 days

Need discovery

3. Consultants = Episodic participation or regular enough to be a member... Need discovery

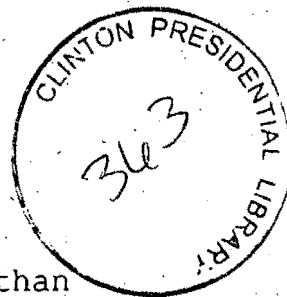
* Good argument for district court (President's Council is primarily private citizens)

III. DISSENT

Buckley concurred in judgement, but dissented from the opinion:

- A. First Lady is not an federal employee/officer
- B. Majority strains the language to avoid constitutional issue
- C. Would apply balancing test:

FACA unconstitutional as applied to the Task Force because Congress's "purposes in enacting FACA are of a gravity that would justify overriding the Presidential privilege in this case". Slip op. at 18 of dissent



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March 25, 1993

Office of the General Counsel
Washington, D.C. 20201

Note to Charlotte Hays

Re: Health Care Working Group Members

As you know, under 18 U.S.C. § 208(a), an employee of the executive branch, including a special Government employee, is prohibited from participating personally and substantially as a Government employee in any particular matter which will have a direct and predictable effect on a financial interest of the employee or any person whose interests are imputed to him. The Office of Government Ethics (OGE) has defined "particular matter" as encompassing those matters involving "deliberation, decision, or action that is focused upon the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3). A "particular matter" includes governmental action such as legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable class of persons, but does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.¹ Id.

The Department of Justice has interpreted section 208 to apply to "rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a direct and predictable effect on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner." OGE Informal Opinion 87 x 6, citing 2 Op. Off. of Legal Counsel 151, 155 (1978). As an example, the regulations restricting the use of silicon breast implants would be a "particular matter" even though the impact of the regulations would be on all manufacturers of breast implants.

As we discussed this afternoon, I have been struggling with how to apply the term "particular matter" to what the Working Groups are doing. How broadly or narrowly the "matter" in which the members are participating is construed will determine, to a certain extent, whether members are actually participating in a

¹ Compare 5 C.F.R. § 2635.402(b)(3) Examples 1 and 2. (Amendment by the Internal Revenue Service of its regulations to change the manner in which depreciation is calculated is not a particular matter; consideration by Interstate Commerce Commission of regulations establishing safety standards for trucks on interstate highways is a particular matter.) See also 57 Fed. Reg. 35,006, 35,024 (1992) (matters affecting a "particular industry" usually are particular matters, whereas matters "of broader applicability" usually are not particular matters).

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363

"particular matter" within the meaning of section 208, and if so, whether those members will require a waiver of the provisions of that section. It could be argued that the members are involved in preliminary fact-finding and formulation of general policy in preparation for national health care reform legislation. Such sweeping legislation would affect such a large and diverse range of interests -- including medical consultants, physicians, trial attorneys, small businesses, hospitals, HMOs, insurance providers, pharmaceutical companies, states, and patients of various income groups -- that the legislation would not be considered a "particular matter" under section 208. Accordingly, even if a Working Group member's employer or a group with whom the member has a professional affiliation will be affected financially by the rules and policies which the member had a role in developing, section 208 would not apply.²

An alternative approach is to focus on the specific portion of the legislative proposal in which the Working Group member is participating. Under this approach, each of the cluster groups (or subgroups) would constitute separate and distinct "particular matters." To avoid the restrictions of section 208, no Working Group member should serve on a cluster group or subgroup which focuses on issues which may directly and predictably affect that member's financial affiliations. To the extent that most Working Group members would not be participating in a particular matter which will have a direct and predictable effect on their financial interest or the financial interest of any person whose interests are imputed to the member, most Working Group members would not be subject to section 208.³

However, those Working Group members who are participating in a cluster group or subgroup whose subject matter is directly and predictably related to their financial interests -- such as Linda Bergthold who is serving on the new system cluster group and has an arrangement to return to William Mercer, a company which, in part, designs health benefits coverage packages for

² While this interpretation of "particular matter" has certain advantages, OGE usually has taken the position that section 208 is to be construed very broadly and may not agree that the Working Groups are not participating in any "particular matter." If we decide to adopt this view, we should get confirmation from the White House Counsel and/or OGE. In addition, it is important that the interpretation of "particular matter" be used consistently for all working group members -- from HHS as well as from other Agencies.

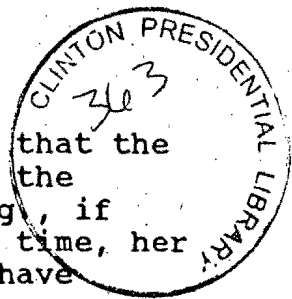
³ I would add that, even if section 208 is determined not to apply to the Working Group members, the members still would be subject to the appearance of impartiality requirements in the Standards of Ethical Conduct, 5 C.F.R. § 2635.502.

employers -- would be determined to have a disqualifying financial interest under section 208. Such members would require a waiver under section 208(b)(1). In accordance with this interpretation of section 208, Working Group members who will be required to seek waivers under section 208(b)(1) are: Linda Bergthold and Carol Miller (consulting interests); Lois Quam (HMOs); David Satcher and Farrah Walters (hospitals and medical services interests); and Sally Richardson (state interests). In my opinion, waivers for some of these members -- particularly Bergthold, Miller and Walters -- may be difficult to obtain.

A waiver under section 208(b)(1) is granted by the appointing official (Secretary Shalala) after a determination that the employee's financial interest in the particular matter is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee." 5 C.F.R. § 2635.402(d)(2)(B)(ii). The standard for a waiver focuses on two lines of inquiry: (1) the financial interest involved, and (2) the services expected of the employee. See OGE Opinion Letter 85 x 10. OGE has suggested that a personal interest in maintaining continued employment may create stronger and more personal ties than purely investment interests. Therefore, the tenure, salary and nature of the employment relationship should be considered as significant factors in making a waiver determination. Id. The services expected of the employee include a consideration of the likelihood that the integrity of the employee's services may be compromised and the nature and significance of the services themselves. Reliance on the employee's personal integrity is discouraged and is not to be taken into account as it involves a subjective determination and detracts from the public acceptance of the waiver process. Id.

As an example of the type of analysis which must be done under section 208(b)(1), Lois Quam is serving on the new system cluster group; was a Vice-President of (with stock options in) United Healthcare -- an HMO holding company which will be greatly affected financially by a new health care system; has an arrangement to return to her employer at the conclusion of the Working Group; and has received from her employer a generous salary and compensation package. For Quam, it may not be easy to argue that her financial interest is "not so substantial." However, her financial interest must be weighed against the likelihood that her services may be compromised, and the nature and significance of those services. This may be done by showing that: (1) steps have been taken to ensure that there is no participation on behalf of or communication between the (former) employer and the Working Group member during the member's tenure on the Working Group (e.g., Prior to coming to Washington, Quam had a memo drafted to United Healthcare explaining that, while serving on the Working Group, she would be severing her professional relationship with her former employer); (2) the services the member is expected to perform for the Government are

limited in nature and do not present a significant risk that the integrity of the member's services and the integrity of the overall decision-making process will be compromised (e.g., if Quam will be serving on the Working Group for a limited time, her role will be limited to fact-finding, and she will not have significant authority to shape the ultimate proposal). Obviously, in order to draft such waivers, I will need full cooperation from the Working Group members who may be affected.



I understand that, as the deadline for completion of the Working Group's task nears, the nature of the members' activities will evolve. Therefore, it is important that we discuss not only how section 208 should be interpreted in relation to the members' current assignments, but also how that interpretation may change given the members' future assignments. Thank you for your help in facilitating a discussion of these issues.

Anne Hall
Assistant Special Counsel for
Ethics

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Photocopy. Note from Vincent Foster to Hillary Rodham Clinton. [Re: Health Care Task Force lawsuit]. (1 page)	n.d.	P5 364 Dup 362
002. photocopy	photocopy of post-it note and handwritten notes. [Re: VFW notes 1993]. (1 page)	n.d.	P5 365
003. note	Photocopy. Vince Foster, handwritten notes regarding Health Care Task Force. (1 page)	n.d.	P5, P6/b(6)
004. note	Photocopy. Vince Foster, handwritten notes regarding Health Care Task Force. (1 page)	n.d.	P5, P6/b(6)
005. note	Photocopy. Vince Foster, handwritten notes regarding Health Care Task Force. (1 page)	n.d.	P5 366
006. note	Photocopy. Vince Foster, handwritten notes regarding Health Care Task Force. (1 page)	n.d.	P5, P6/b(6)
007. note	Photocopy. Vince Foster, handwritten notes regarding Health Care Task Force lawsuit. (26 pages)	n.d.	P5 367

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

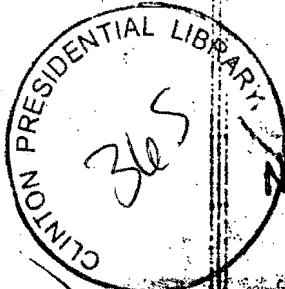
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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- 1) clarification by him
- 2)

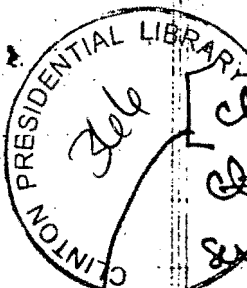
Not a ^{FAC} subgroup

- 1. no authority from TF
- 2. not designated by TF
- 3. ~~SC~~ ~~sub~~ subpara (k)
- 4. charter not filed, subgroup of TF not authorized since TF can't act

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SUSC 4/2/51-14

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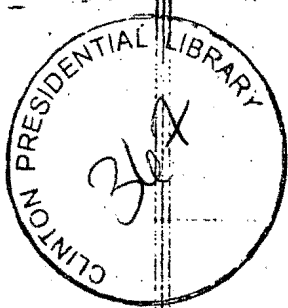
2/12 letters declining request

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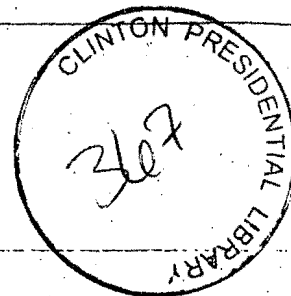
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[Brown]

Brown
Northam
Shanley

directed to mtg of Task Force
& members of Task Force from
mtg of sub-groups

Judge: [Treat as Prelim reg.]

Judge
reading per

Facts:

Announcement:

like a war room

depts. will be represented in the room

15 cluster groups

100 day time limit

No other analysis must be made than it meets ^{statutory} determinants

Exceptions

does not meet 1st 2 exceptions

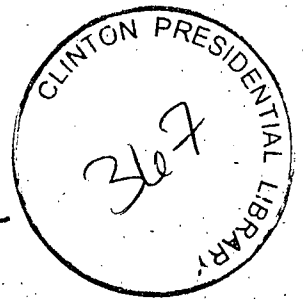
CFR 100.3 & 100.4

definition

anti-repotion ["Kearney Act"]

reflects Cong. intent on FACT

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*

not here to have her removed
price Pres. should pay in to have mtgs open

"managed competition"

result in increased taxes of \$90M → \$150M

Pres. hide behind construction to conduct mtgs in secret

"insider" argument

requires to

substitute the term for "officer and employee"

judicial activism

*

does not inform public of

1) membership of cluster group

2) cost

no E.O. establishing ~~the~~ Committee

SEt is telling us to read statute by clear & unambiguous language

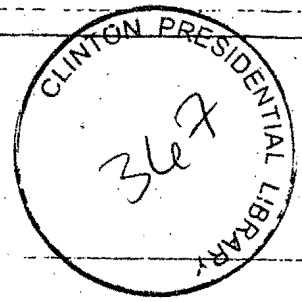
Judge

[This that is the way ^{through the} law was developing
the Ct didn't do that in Public Citizen]

Brown

limit to committees not established by
or funded by govt.

COPY



* "full-time" officers or employees

[How do you deal w/ my need to
address Constitutional question]

No impairment of Pres by ~~of~~ injunction

DOT says because EASA not apply

① Don't have to tell us when they are
going to meet

[Don't be too sure I won't require that]

* ② Have right to close mfgs

→ Not 3 airtight compartments

Judge on brief in a case

§552 b

Irrep. harm

"wrapped in secrecy"

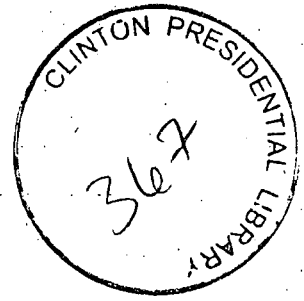
won

not get in situation
Center for Auto Safety

want to allow working groups
operate by themselves

Not like working groups in Nat'l Hunger

COPY



Clinton Gops were formulated by him
He participates in every one
Rancus "

HRC has interviewed
He reports to HRC

Eg, Drafting Subcommittee

vs only
assembling info

Gusell - If subcommittee makes recommendations

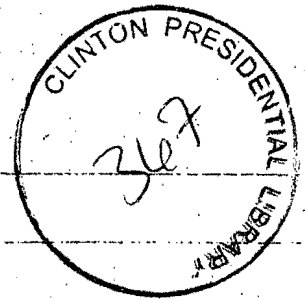
→ Fact that they are "one & the same"
reflects unrep. harm

too overw Remedy is on the Hill

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11:30

Gutman



Public Citizen

ok my work

FACA is unusually close to stat.

so where more important to control than re the ability to
get advice

~~what about results.~~

4 flaws

1) ignores intent

2) 1st body unique position

3) avoid court problem

~~1. Discretionary power~~

Rely?

2 sources of legal intent

1) purpose

2) [authorization for 1576]

§105e

Intent

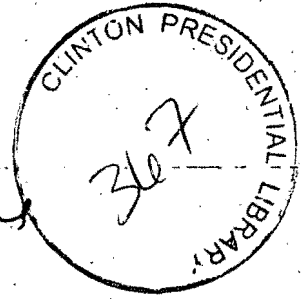
also an exception for public ^{corporate} groups

§105e - public funds
members of govt.

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Public Citizen:

Interpret statute to avoid constitutional problems, not create them



1) Advice to Pres.

Art 2 § 3 - duty to Pres to progress begin
on matters he deems --

Constitutionally, FACA cannot be only
way Pres gets advice from closest advisors

* Judge - "serious constitutional Q is presented"
but how is his ability impaired [by requiring
open mtgs] [reference to Gov't Sunshine Act]

more to FACA than open mtgs
eg balanced membership

anti-nepotism

statutes are unrelated

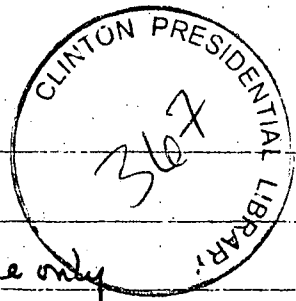
3110 applies to "agency"

- (limited) rich mtg in FOIA

not apply to EOP

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working gaps



advice will be supplied by Task Force only
Magazine is mtg only w/ fed ltr

Judge

[Assume if I find it is covered by FACA
what analysis do I do re working gaps]

*

Analyze what working gap does
- They do not give advice to Pres

Interp. Inquiry

no mtgs scheduled

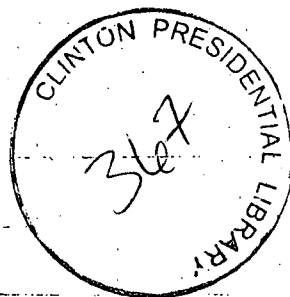
[Judge - knows must complete work
w/in 100 days]

[Assuming I've not decided
Can you tell me how much time I have
to rule?]

* No problem in advising Ct of when
mtg will occur

orum

COPY



Public interest

- A) FACT not apply to all fed emp comm
- B) Constitution

[If found FACT applied & thus unconst
what is procedure]

Brown

12: noon

leg. history irrelevant

Appropriation to 1st lady not make her an employee

Anti-separatism

Not talking about a 1st lady planting
flowers along the highway

but so...

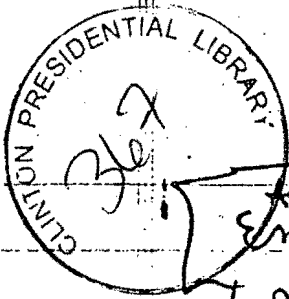
*
*
*
Judge

[Peace is not just open mtg
but balanced membership]

Openness is not enough to ~~im~~ impair Pres. authority

[Court votes 3 + Souter & Thomas & Scalia?]

COPY



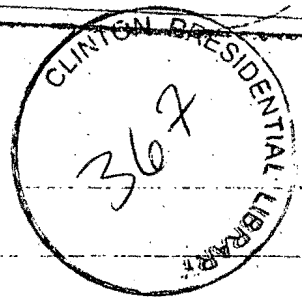
Steve - 55526
is extremely limited
section *

Free
Escape valve was not
available in Public Citizen

Mtg is imminent or working groups
are serving as task force

In Auto Care case this Judge said
if ~~Task~~ there were more, ~~the~~ eg
Task Force

COPY



1st
Ira 3/11
SI

① Working Grp

A. Ira meet w/ Pres [ok, as TF member]

B. Ira & WG members along

C. Other WG response to request for advice

② What is a "subgroup"

A) S/B same as WG status

B) Unrelevant since when giving advice
(this would have to comply w/ notice)

C) What if 3d party is

③ Document

A) individual TF to Pres.

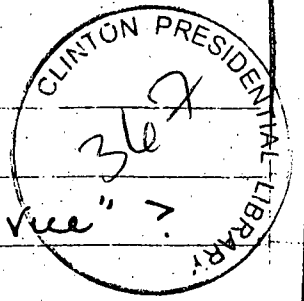
- documents rec'd as indiv. member

4) Fact-finding by TF - what is?

5) Mtg. by WG to TF as a whole?

is this formulating advice

COPY



7) narrowing phase -
is this "consensus advice" ?

8) Policy book - post-acceptance

Product ought to offer various options

9) Drafting Group [a - F vs fulltime
Sara Kosenbloom wants to
play more active roll
get es

Anti-Trust

Drug Cos

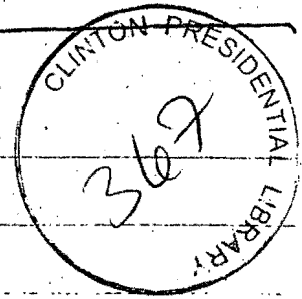
want anti-trust exemption - gave copy
of letter to WH

* match charter to argument

eg - assist the President
serving as his personal representative

COPY

Cyf @ DAS
Work



FACA is in appendix
FACA not in Title 5 by amendment
- just in there by codified
not explicitly

Title 1 def. - ^{officer} authorized
"officer" is flexible concept

Chill on ^{WB} conduct (between employees)

Serious implications for Pres. power

- cloud over TF

- a) balanced membership
- b) not inappropriately influenced by appointing
- independent J [authority]
- c) report to Congress

**

Severability - since openness

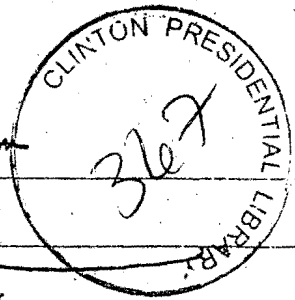
Documents:

FOIA privileges available

is deliberative process exemption available? - probably no.

COPY

fluid / ^{not} workable to distinguish between
fact-finding vs. formulating



Q - If FACA only applies when advising
Pres., how can it apply to what judge
says is not advice-giving

Pres. has interest in receiving fact

Not to expedite
not on practical impairment
but importance of issues

If a FACA request for document to TF

→ argue

includes a) deliberative process generally

b) "

" constitutionality

If to WGrp

FOIA

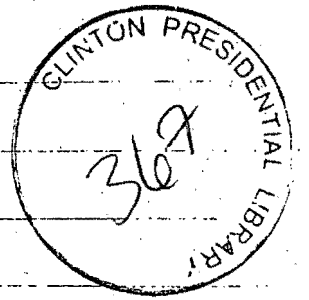
A) claim not an agency" since purpose
is to assist TF to advise pres

~~B) claim for~~

B) FACA not apply

COPY

"made available to"



* Can "work" proceed w/o a charter

9(c)

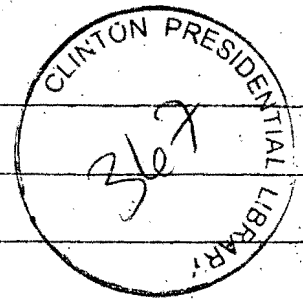
Q - Is ~~the~~ ruling on WG appealable -

Q - FOIA applicable to
Agency EE on WGp.

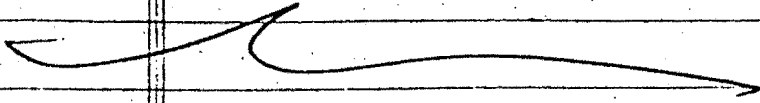
"Subgrp"

§ 101-6.1004 (k)

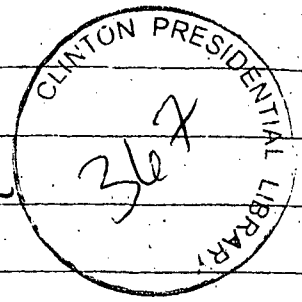
COPY



steps of subgrp to formulate advice
- need for notice



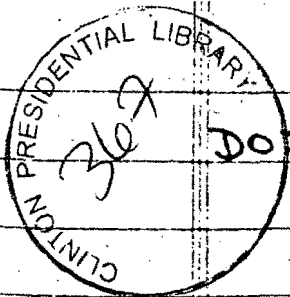
COPY



If H & I meet w/ Pres to give advice
A) give notice?

If need Feder to help
is giving her individual advice

COPY



DOT strongly urges appeal - believe excellent chance of success

- 1) Compliance issues
- 2) underlying principle
of separating methods in which PPS
obtains advice

We prefer to cross-appeal only, for public appearances

Interim

- A) show cause or Compliance
- B) discovery, The ^{judge} considers case over & is assessing an appeal
- C) Ps try to obtain facts informally to support show cause

Signal has benefit of ~~probably~~ possibly freezing show came in
discovery efforts

Turning:

- 1) reactive
- 2) risk -

Subgroup -

Lauch ^{Sp.} Penetta
 Lauch ["] Long
 Lauch
 Brown

Appet Ct may not expedite it wait more than a wk

Charter requires designation of costs / termination date

Q - GAO inquiry

COPY

C. Try to correct w/ spirit of opinion

Why WGroup not advise since all federal Eas

likelihood of discovery?

Headline on subgroup

HRC + IRA meet w/ WG

Complan for 1st public mtg.

★ Fact Reporting/Subgroup vs C.1004(k)

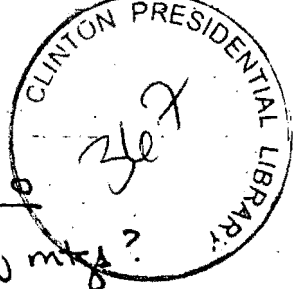
#1

Fact Reporting diff 1 vs. info-gathering
in opinion

Ok for working group to find facts —

Vol. of documents

COPY



Options

CHARTER

1. Use of E.O.
- advantages

2. Delete 1st Lady

3. Allow 1st Lady to chair
w/o veto

4. Open some
documents voluntarily
while disputing

A) discovery

B) FOIA

To Do

1. Schedule of mts?
of attendees

2. Comm. strategy if agreed

3. guidelines to working grp.

Who is dec. perm - Charlotte Hayes

4. Document publication

A. Received by W Group

B. Rec'd by TF

C. " " " IRA

D

NRC

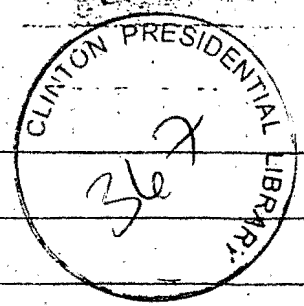
Pres

* E. Generated by W Grp -

4A. Volume consideration

5. Drop dead date

COPY



Compliance issues

1. Charter as prerequisite for action, including mtg

- A. Approval of proposed charter by Secretariat
- + filing of notice of approval
- ~~B. Secretariat~~

B. Sec. ^{filing of charter in} Approval of ~~establishment~~ notice < 15 days

2. Prereq for mtg

- A. 15 days notice except for exceptional circumstances

3. Subgroup meetings

- A. with each other
- B. with President

4. Fact-reporting meetings

- A. notice
- B. public

5. Advice formulation & Fact-Finding

6. Documents:

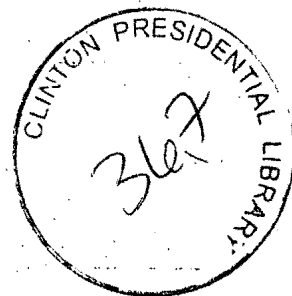
- A. Document ~~proceeds~~ produced by TF
- giving advice

B. "available to" TF

C. public comment

COPY

Appeal



1) time restraints

2) advisory documents by TF

COPY

Charter

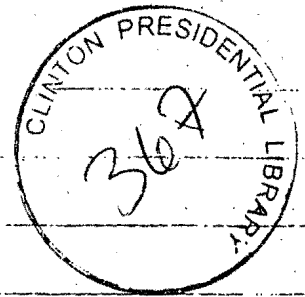
letter & proposed charter to GSA

GSA approves

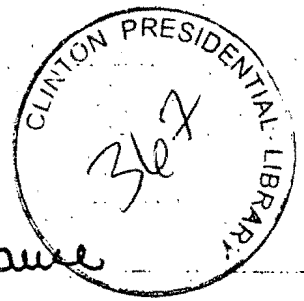
Notice of establishment

15 days

charter filed



COPY



FF ORDER

- A) No mtgs until in full compliance
- B) fact-finding and fact-reporting mtgs must comply
↳ (mean
- C) mtgs for purpose of formulating advice and
recommendations - ^{claims} are dismissed

Opinion

A) gathering or reporting info.

vs

B) formulating recommendations

19-20

gather info in open mtg
Report info in open mtg

formulation advice in closed mtg
recommend advice

Q - when find facts?
Q - when deliberate?

COPY

(A)

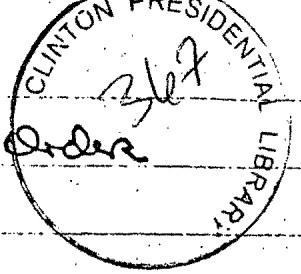
(b)

H + I

or

H + I + WG

inconsistent w/ order



(3) was in affidavit + no mention

(c)

But

(1) H + I are chair + head -

(2) narrowing roles

vs learning how

nothing works to be

more effective TF member

(D) But in m mty

cluster grp.]

COPY

Other considerations

TF to

A) If Presidential
Fact-reporting / Constitutional
pre-notice requirement

B) Who & where Pres meets should be confidential

C) Timing of where Pres can get advice

D) § 5 (b)(3)

§ 11

balanced mem

~~Other considerations~~

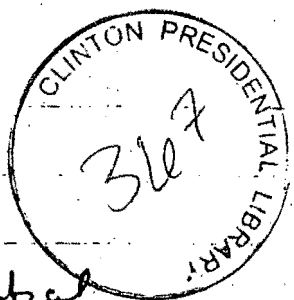
Why Appeal

1. Very important

2. Immediate constitutional

framework for Adv Comm to

3. Slowdown



COPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	William T. Fitzsimmons to Bernard S. Arons. Subject: Financial Interests. (1 page)	03/29/1996	P5, P6/b(6)
002. report	Executive Branch Confidential Financial Disclosure Report. (11 pages)	01/29/1993	P5, P6/b(6)
003. note	Photocopy of handwritten notes by Beth Nolan. [Re: Health Care Task Force]. (4 pages)	n.d.	P5 368
004. fax	To: Beth Nolan. From: Jane. [Re: Financial Disclosures for White House Staff]. (4 pages)	10/05/1993	P5 369
005. memo	Photocopy. Memorandum for Jennifer O'Connor from Bruce R. Overton. Subject: Funding Options regarding the Health Care Task Force. (3 pages)	03/12/1993	P5 370
006. note	Photocopy. Note to Beth Nolan. [Re: plan for public input into Health Care Reform.] (1 page)	05/13/1993	P5 371
007. memo	Photocopy. Memorandum for Dr. Thomas Pyle, Health Care Task Force Board Member from Bernard Nussbaum and Beth Nolan. Subject: Employment Status. (2 pages)	03/22/1993	P5 372
008. letter	Photocopy. Charles Samuels to Ira Magaziner. [Re: Thomas Pyle]. (2 pages)	03/19/1993	P5 373
009. resume	Photocopy. Resume for Thomas O. Pyle. (2 pages)	n.d.	P5, P6/b(6)
010. resume	Photocopy. Curriculum Vitae for Thomas O. Pyle. (2 pages)	n.d.	P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Miriam Nemetz
OA/Box Number: CF453

FOLDER TITLE:

Health Care Task Force Nolan Potentially Priv. Copies

2006-0223-F

vz74

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
--------------------------	---------------	------	-------------

011. memo	Photocopy. Memorandum to Ira Magaziner from Beth Nolan. Subject: Outside auditors on Health Care Task Options. (4 pages)	03/24/1993	P5 374
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COLLECTION:

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Miriam Nemetz
OA/Box Number: CF453

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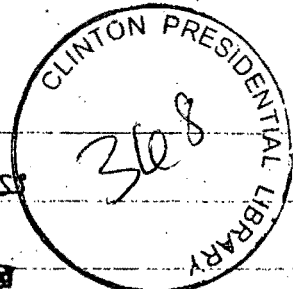
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



Guidelines

- FTE
- 130 days / less
- Consultants

1. FTEs

2. King

3. Volunteers →

4. Scenarios

Paid K
Volunteer

} want raise people working for
interest Grp that affect Health care

→ Law firms

§ 208(b) ① § 208 →

price controls → DRB

Benefits
Consulting
Firm S

Jane Levy: 523-5371

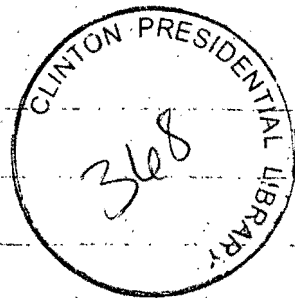
1st statement

② Boards → membership?

→ 1 year deal

Dump away stock

COPY



Jays

WAES → Steve Pidgeon

- ▶ Consultants / exports → ① 3-4 days every few wks / resource to gps.
② Specifically w/ Benefits Gr. -- attending a mtg.

phy

▶ Export

▶ State es → \$20B → S

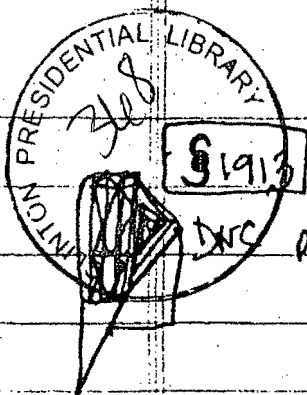
✗ DRS. } - Physicians / Cost Controls → categorical waiver?
Nurses
Tied to coming through same way?
OK → \$20B → OGE

Drug Test

① John Har
② 2896
Charlotte Hayer
2816

> Gen'l waiver

COPY



HHS
↓

~~Wants~~?

people - Advisors - Reps.

→ HMOs
→ Health Care practices

"Appendix C."

Consultants

→ Regulatory waiver? → OGE

[Judy
Charlotte]

COPY

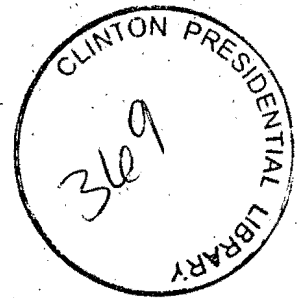


Particular matter → most swath of

Legislative proposal

COPY

United States
OFFICE OF GOVERNMENT ETHICS
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917
FAX: (202) 523-6325



**FACSIMILE TRANSMISSION
COVER SHEET**

DATE: 10/5/93

TO: Beth

FAX NO. _____ Phone No. _____

FROM: Jane Ext. _____

COMMENTS: _____

NUMBER OF PAGES
(INCLUDING COVER SHEET) 4

If you did not receive the total number of pages, please call (202) 523-5757

FOR OGE USE ONLY

PLEASE DATE STAMP THE BACK, WHEN LEAVING A FAX ONLY

DISCARD ☐ RETURN ORIGINALS ☐ RETURN BY INTERNAL ☐ MAIL ORIGINAL TO: ☐
ASAP MAIL THE SAME DAY

COMPLETED BY _____ EXT. _____

COPY

Beth--

First, so you won't feel blindsided, this Office sent Bernie a Memo on financial disclosure for the White House staff on January 22, 1993 which notes that all SGEs have to file. You probably never saw it because it was before you got there. Anyway, since I found it, I thought I'd send it along.

Second, under 2634.905 there are three possible bases for exclusions from the confidential filing requirements for regular filers as well as SGEs. If you determined early on that members of the Health Care Task Force were not working on a particular matter, (wasn't that the discussion you, Richard and I had in your office one evening), it seems to me that the exception in (a) might be what you used even though you weren't thinking of its terms specifically. If the members couldn't be involved in a real conflict and you counseled them extensively about apparent conflicts, this exception may fit what you did. It seems to me that you were the agency designee for this purpose.

The trick is that when the work of the task force became work on a particular matter, did you get confidential financial disclosures from those who were left?

I have a staff meeting at 10:00, that's why the note. I'll call when I get out and see if you want to discuss in more depth. Let Lauren know if you don't so if you're not available when I call, you won't have to waste time calling me back.

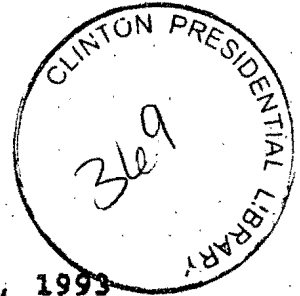
COPY



United States

Office of Government Ethics

1201 New York Avenue, NW Suite 500
Washington, DC 20005-5917



January 22, 1993

MEMORANDUM FOR BERNARD NUSBAUM
COUNSEL TO THE PRESIDENT

FROM: STEPHEN D. POTTS
DIRECTOR

Stephen D. Potts

SUBJECT: Financial disclosures for White House staff

In addition to the statutory requirement that Presidential appointees requiring Senate confirmation must file public financial disclosure reports, a number of White House staff members must also file some type of financial disclosure. There are two financial disclosure programs in the executive branch: a statutory public system for certain senior officials, as described in 5 U.S.C. appendix, and a confidential system established by Executive Order 12674 for certain mid-level employees. Both systems have been implemented by regulation at 5 CFR part 2634, recently revised at 57 Federal Register 11800 on April 7, 1992. A copy of that regulation is enclosed.

I. PUBLIC FINANCIAL DISCLOSURE

The statute requires public financial disclosure reports to be filed by:

- those who serve in positions classified above GS-15 or in positions at or above an equivalent minimum rate of basic pay (including special Government employees who are expected to serve more than 60 days in a calendar year);
- those serving in positions excepted from the competitive service by reason of a confidential or policy-making character (Schedule C employees), unless exempted under the regulation;
- primary designated agency ethics officials; and
- any other civilian employees in the Executive Office of the President (except special Government employees) who hold a commission of appointment from the President.

Public financial disclosure reports must be filed with the designated agency ethics official initially within 30 days of appointment, annually on or before May 15, and again within 30 days of terminating employment in the position. Agencies may extend due dates up to 45 days, for good cause, and this Office may grant an additional 45 day extension. Public reports should be filed on a standard form, the SF 278, which is available through the General Services Administration's Customer Supply Centers, using National Stock Number 7540-01-070-8444.

SSmith/SSmith (lbr)

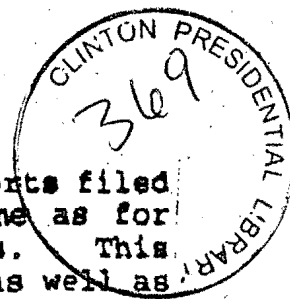
ETH 3-2-4

ETH 3-2-5

COPY

OK
1

Mr. Bernard Nussbaum
Page 2



The statute also requires that copies of public reports filed by some employees be forwarded to this Office, the same as for reports of advice-and-consent Presidential appointees. This includes reports of designated agency ethics officials, as well as reports of employees in the Executive Office of the President who are appointed under 3 U.S.C. 105(a)(2)(A) or (B) or 3 U.S.C. 107(a)(1)(A) or (b)(1)(A)(i), and reports of employees in the Office of Vice President who are appointed under 3 U.S.C. 106(a)(1)(A) or (B). All such reports must be reviewed by the agency prior to forwarding a copy to this Office.

II. CONFIDENTIAL FINANCIAL DISCLOSURE

The regulatory implementation of Executive Order 12674 requires confidential (nonpublic) financial disclosure reports to be filed by:

- those in positions designated by their agency because of certain specified duties (described below) whose positions are classified at GS-15 or below or an equivalent minimum rate of basic pay; and

- all special Government employees, regardless of pay grade, who do not meet the requirements for filing a public financial disclosure report.

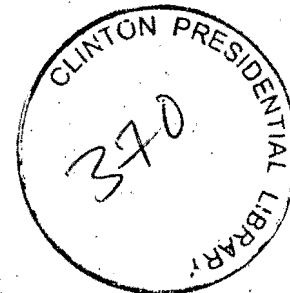
The specified responsibilities defined by regulation as requiring designation within the pay grade parameters are those which involve personal and substantial participation or the exercise of significant judgment in contracting or procurement, grants and subsidies, regulating or auditing of non-Federal entities, activities which the agency determines could have a direct and substantial economic effect on non-Federal entities, and other duties where filing is determined by the agency to be necessary in order to avoid conflicts of interest. Each agency must evaluate its employee position descriptions to determine whether an incumbent's responsibilities fit within one of the above categories. The regulation also provides for exclusions from filing, even though a position otherwise falls within one of these categories, where the agency determines that the possibility of conflict is remote.

Confidential financial disclosure reports must be filed with the designated agency ethics official initially within 30 days of entry into the position and annually on or before October 31. Agencies may extend due dates up to 90 days, for good cause. There is no requirement that copies of any of these reports be forwarded to this Office, and they are strictly protected by the Privacy Act from disclosure to anyone, except in the limited circumstances provided in the regulation. Confidential reports should be filed on a standard form, the SF 450, which is available through the General Services Administration's Customer Supply Centers, using National Stock Number 7540-01-351-9173.

COPY



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503



March 12, 1993

MEMORANDUM FOR JENNIFER O'CONNOR
SPECIAL ASSISTANT
WHITE HOUSE OFFICE

FROM: BRUCE L. OVERTON *BL*
GENERAL COUNSEL

SUBJECT: Funding Options Regarding the Health Task Force

This memorandum responds to your request for funding options available to the Health Task Force¹.

BACKGROUND

As a result of the decision by Federal District Court Judge Lamberth on March 10, 1993, the provisions of the Federal Advisory Committee Act (FACA)² have been made applicable to the Health Task Force.³ This includes a provision covering the administrative support of advisory committees:

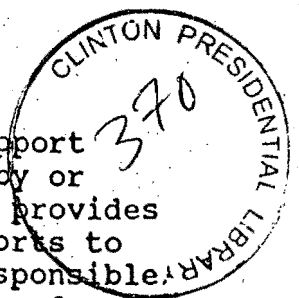
¹Health Task Force is a shorten reference to the President's Task Force on National Health Care Reform, created January 25, 1993, and comprising an advisory body of the following officials and individuals:

Hillary Rodham Clinton, Chairperson
Senior White House Policy Advisors
Secretary of Health and Human Services
Secretary of the Treasury
Secretary of Defense
Secretary of Veterans' Affairs
Secretary of Commerce
Secretary of Labor
Director, Office of Management and Budget

²5 U.S.C. App. 2 Sections 1-15

³Association of American Physicians and Surgeons v. Hillary Rodham Clinton, Civil Action No. 93-0399, D.C. D.C. March 10, 1993. The District Court ruled that only certain provisions of the FACA, (i.e., Sections 10(a)(1), 10(a)(3) and 10(c)), primarily covering the requirement for open meetings were found unconstitutional as applied to the President.

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Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration. Section 12(b), FACA.

In addition to the above provision limiting support services, Congress has placed a further limitation on the funding of advisory committees in the appropriations for fiscal year 1993:

No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards, commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality. Section 612, Pub. L. 102-393 (1992).

This funding restriction actually predates the FACA and first appeared as a limitation on appropriations expenditures in 1968. The Comptroller General has expressly interpreted it to countermand a statutory provision that had allowed interagency funding, 31 U.S.C. 1346(b).

FUNDING OPTIONS

1. The Health Task Force may be assigned to the General Services Administration (GSA) because it is a Presidential advisory committee. Pursuant to FACA Section 12(b), cited above, the GSA would provide support services.

2. The Health Task Force could be assigned to any of the agencies listed in footnote one (herein). Such agency would provide the entire administrative support for the Health Task Force. The fact that the working groups primarily meet in the Old Executive Office Building is not significant in determining which agency provides support. Supplies, travel expenses, and costs for such matters as report production, consultants and experts, and conference facilities for regional hearings would all be covered by the agency providing support services. Members of the working groups who are federal employees may continue to receive their salaries from their employing agencies.

⁴65 Comp. Gen. 689, 691 (1986), citing 49 Comp. Gen. 305 (1969).

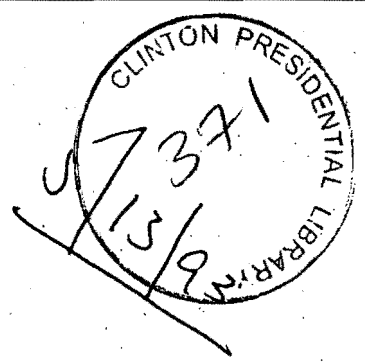
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3. There is precedent for assigning the support services to the Office of Administration within the Executive Office of the President. This was done in 1986 with the "Tower Commission" which was formally designated as the President's Special Review Board on the National Security Council. In this case, however, the appropriation tapped for funding was the "unanticipated needs" account. 3 U.S.C. 108.

cc: Patsy Thomasson
Special Assistant to the President and
Director of the Office of Administration

COPY

VOX POP



Both

Ira Magaziner is planning to invite some 50 members of the public (who have written in about the Reform) to come to Washington (at their own expense) to talk to him about the Plan.

The 'phone call (and a follow-up letter) will make it clear that the WH has no funds for their trip, but will suggest that if they don't have their own money, that they contact some local organization to see if that organization would be willing to do so.

(legally)

I saw nothing wrong with the idea and asked them to clear the language with us.

They will be testing the idea "politically" with other WH offices.

Richard —

- ① Is it to be a public meeting? ^{one on one over the phone -} Not clear
- ② Has Steve Newman okayed? ^{group here - not 'public' but still working it out with Bonatin.} Yes

B.

COPY

THE WHITE HOUSE

WASHINGTON

March 22, 1993



MEMORANDUM FOR DR. THOMAS PYLE
HEALTH CARE TASK FORCE MEMBER

FROM: BERNARD NUSSBAUM
COUNSEL TO THE PRESIDENT

BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Employment Status

This memorandum responds to Mr. Charles A. Samuels' letter of March 19, 1993 regarding your employment status with the Health Care Task Force. In this letter, Mr. Samuels' requested, on your behalf, clarification of your employment status.

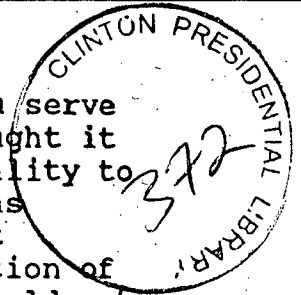
It is our understanding that you serve as a Special Government Employee with the federal government. A Special Government Employee, see 18 U.S.C. § 202, may serve no more than 130 days. This category covers individuals who also may be categorized as experts or consultants. You have not been designated as an expert or consultant, which requires certain criteria to be met.

As a Special Government Employee, you are covered by the federal ethics laws as well as the Standards of Conduct for Executive Branch Employees. See 18 U.S.C. § 209; 5 C.F.R. § 2635. Like all employees (including full-time volunteers, experts and consultants), you are prohibited by federal law from participating in particular matters in which you have a financial interest. See 18 U.S.C. § 208. The financial interests of your spouse, minor child, general partner and those of any organization in which you serve as an officer, director, trustee, or employee are imputed to you as well. Id.

In addition, the Standards of Ethical Conduct require that where a reasonable person would question an employee's impartiality in a matter, he or she may not participate in a particular matter involving specific parties with whom they have a covered relationship. 5 C.F.R. § 2635.502. Individuals and organizations with whom you have a covered relationship (outside of your family or an organization with which a family member is affiliated) include your employer and any organization with which you have served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. Thus, you should not participate in particular matters in which an organization with which you are associated is a party.

COPY

Because of the number of Boards and Commissions that you serve upon, it is our understanding that [decision-maker] thought it was more conducive to providing you with maximum flexibility to serve free of potential conflicts if you did not serve as [previous position]. While we were not involved in that determination, we understand it was made with the intention of ensuring that your ability to serve with impartiality could not be challenged.



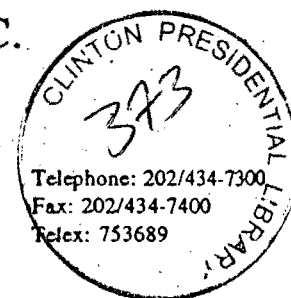
It is our understanding that employee status of Task Force members was addressed at a mandatory ethics briefing. It appears from Mr. Samuels' letter that you may not have attended this meeting. If you need further clarification of your status, please call either of us directly. We gladly will take the time to address your concerns to your satisfaction.

COPY

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241



Charles A. Samuels

Direct Dial Number
202/434-7311

March 19, 1993

VIA HAND DELIVERY

Mr. Ira Magaziner
Senior Advisor for Policy Development
The White House
Room 216-Old Executive Office Building
Washington, D.C.

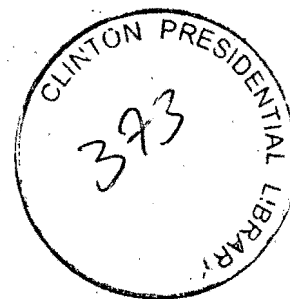
Dear Mr. Magaziner:

I represent Thomas Pyle. As you know, Mr. Pyle has been the subject of inaccurate media stories today regarding his status, which have embarrassed him and possibly damaged his reputation. Despite this extremely unfortunate situation, Mr. Pyle would be willing to continue to provide assistance to your critical effort if his status can be resolved within the next three working days. However, Mr. Pyle needs you to focus carefully on his situation and to obtain definite clarifications of his arrangements with your office. The White House should then take appropriate action to clarify the public record when occasions arise.

As you know, since you asked Mr. Pyle to move to Washington to assist you, he has repeatedly requested clarification of his employment status and resolution of any ethical issues. You advised him that he would be a federal employee or a special employee and that you did not foresee that there would be substantial conflict of interest issues. Mr. Pyle has repeatedly asked you and others since he joined you on February 2 to resolve these issues, and only after a month of such urgings and efforts by Mr. Pyle was it determined that it was infeasible for him to become a federal employee. During this period of time, he has retained counsel, has expended significant expense and effort, and has been totally uncompensated by the federal government.

Most recently, Mr. Pyle was advised that a consultant status would be appropriate, but despite his numerous requests that appropriate documentation be prepared for his review and execution, no information or documentation, such as a consulting contract, has been provided. Mr. Pyle was then advised by staff to your Task Force that no ethical restrictions would apply to him in his capacity as a consultant, which advice did not make

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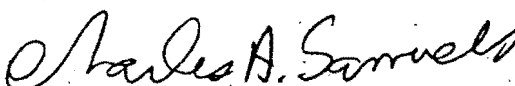
Mr. Ira Magaziner
March 19, 1993
Page 2

sense to him or us and, of course, he has continued to carry out his duties with utmost circumspection regarding potential ethical or conflict issues. In contradiction, I understand that staff has now requested Mr. Pyle sign a document in which he would acknowledge that he attended an ethics briefing and that he had reviewed and would abide with certain ethical restrictions. Since Mr. Pyle did not attend the briefing and since the ethical restrictions which are being proposed are apparently applicable to federal employees and not consultants, we have advised him not to execute this document.

If you wish Mr. Pyle to continue in a consulting arrangement, he is agreeable if it can be shown that he will be able to contribute substantially to your effort and if an appropriate contract or other documentation is provided for his review immediately. Our advice to Mr. Pyle is that if such assurances and documentation are not provided by Tuesday, March 23, he should terminate his involvement in your activities because of the untenable lack of clarification about his duties and requirements.

I would be happy to speak with you or anyone on the White House Staff, including White House Counsel who have refused to return my calls. It is extremely regrettable that a person of such high integrity, ability and willingness to serve should be treated in a manner that embarrasses both him and the President.

Sincerely,

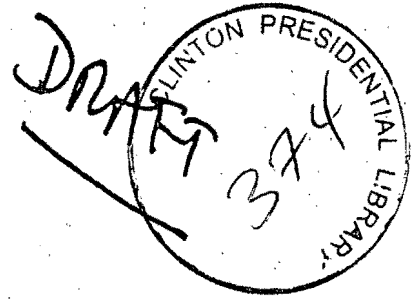

Charles A. Samuels

cc: Bernard Nussbaum, Esq.

D14966.1

COPY

h 24, 1993



Beth



I gave this to Charlotte
in draft this A.M.

I am working on a memo
to Magaziner about
safeguards against disclosure
of T. F. material via axis
the working group.

United States Information Agency

RS ON HEALTH CARE OPTIONS

request for advice on the most
people from outside the existing
compensation with particular
not thinking of the Healthcare Task

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All the work would not necessarily be done at OEGB.

A primary concern is that the Task Force work has reached a stage where access to the options could provide the auditor with potentially valuable information about the ultimate Task Force work product. Thus, for example, an auditor whose non-Government work, either as an individual entrepreneur or as an employee of a firm, involves health care systems could be (conveniently) commercially advantaged by knowing before his or her competitors what the Clinton health care plan entails and does not entail.

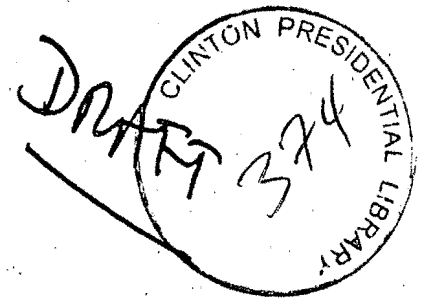
Two possible mechanisms have been considered for bringing these people in, by a contract or by personal "appointment."

CONTRACT

Since we are talking about this job being done without compensation, there are two types of no-cost contract that could

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March 24, 1993



MEMORANDUM TO IRA MAGAZINER

FROM: BETH NOLAN

SUBJECT: OUTSIDE AUDITORS ON HEALTH CARE OPTIONS

This is in response to your request for advice on the most appropriate way to bring in people from outside the existing working group process without compensation with particular expertise to assess the current thinking of the Healthcare Task Force on various options.

You are planning to set up "audit groups" in the Numbers, Legal and Consumer areas, consisting of a variety of people from a variety of entities to perform the work, over a 3-4 week period. All the work would not necessarily be done at OEOB.

A primary concern is that the Task Force work has reached a stage where access to the options could provide the auditor with potentially valuable information about the ultimate Task Force work product. Thus, for example, an auditor whose non-Government work, either as an individual entrepreneur or as an employee of a firm, involves health care systems could be (conveniently) commercially advantaged by knowing before his or her competitors what the Clinton health care plan entails and does not entail.

Two possible mechanisms have been considered for bringing these people in, by a contract or by personal "appointment."

CONTRACT

Since we are talking about this job being done without compensation, there are two types of no-cost contract that could

COPY

be awarded, one being to a firm, the other to the individual. Such a contract would contain non-disclosure, non-use, and non-advertising clauses of the type attached. Since no federal appropriations would be expended on the contract with a firm, it could be awarded without regard to federal requirements for competition. And a contract could explicitly cover the authorization to use the contractor's data processing equipment. If two or three firms are being utilized, this would spread the benefits of participation and reduce the appearance of any one firm having an inside track on data or Plan content. (Whether we can accept this "gift" from a firm may depend on which Federal agency "administers" the Task Force.) Independent contracts with the auditors could be an administrative problem, but not insurmountable. Each contractor, individual or a firm would have to deliver a written product, which probably would not be available to the public under FOIA. Proper clauses in the contract would assure its not being available under FOIA.

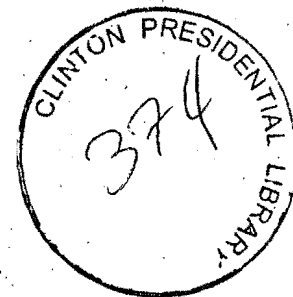
PERSONAL APPOINTMENT

We could also bring these auditors on as Special Government Employees (SGEs) who would be subject to an array of requirements about the non-disclosure and no-use of the materials; however, off-premises handling of the materials could be a problem for these federal employees, especially if the "crunching" of numbers or dissection of options is to be done with private sector colleagues or on equipment at the regular place of business.

Under either approach, the "product" would be recommendations, suggestions and reactions, but the auditor would not know, or should not know, what use the Task Force will be making of their input. That uncertainty, together with the pledges of confidentiality, non-disclosure and non-use should provide considerable protection against premature disclosure. In any event, if we do decide to go "outside" the existing process for

COPY

audits, we may indeed have to pay a price in the way of leaks or allegations that certain firms or people got an unfair competitive advantage. By taking the steps suggested above and by providing public access at the earliest possible time, we can reduce the chance of a serious problem.



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