

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	Bernard Nussbaum to John Conyers, Jr. and William Clinger re: Records of the President's Task Force on National Health Care Reform (7 pages)	10/25/1993	P5 731
001b. fax cover sheet	Jeff Gutman to Stephen Neuwirth [partial] (1 page)	10/22/1993	P6/b(6)
001c. memo	David J. Anderson to Stephen Neuwirth re: Response to the House Committee on Government Operation's Letter of October 21 (6 pages)	10/22/1993	P5 732

COLLECTION:

Clinton Presidential Records
Counsel's Office
Cerf, Chris and Divoll, Vicki
OA/Box Number: 10495

FOLDER TITLE:

Meeting with Rep. Clinger - 12/93

Kelly Hendren
2006-0225-F
kh256

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.

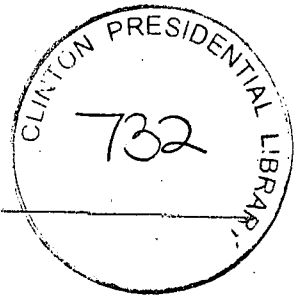
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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]

CLINTON LIBRARY PHOTOCOPY

U.S. Department of Justice
Civil Division

Washington, D.C. 20530

Memorandum ATTORNEY-CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT

To: Stephen R. Neuwirth
Associate Counsel to the President

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

Re: Response to the House Committee on Government Operation's
Letter of October 21 and the October 21 and 22 Articles
of the Washington Times

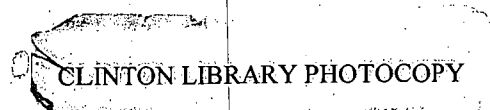
OCT 22 1993

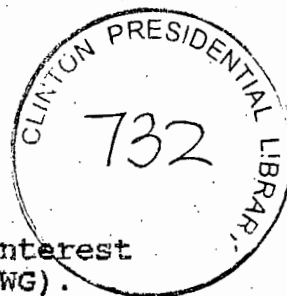
The following is a point-by-point response to the questions raised in the House Committee's letter and to the allegations made in the Washington Times. We have cited our discovery papers or motions briefs where appropriate in response to each point. Two general points are first in order.

First, the Times and the Committee have confused the distinction between the Task Force and the interdepartmental working group (IWG). The D.C. Circuit held that the Task Force was not subject to the FACA. AAPS v. Clinton, 997 F.2d 898 (D.C. Cir. 1993). The issue before the district court is whether the IWG was subject to the Act. Our response assumes that the Committee wishes information on the IWG, not the Task Force.

Second, both the House Committee letter and the October 22 Times article suggest that Judge Lamberth's Order requiring defendants to "maintain" (i.e. preserve) records may have been violated. As a technical matter, the Court's document preservation Order of June 15 was rescinded on July 22. More importantly, there is no evidence, much less an allegation by plaintiffs, that any ethics forms, expense vouchers, membership lists, etc. have been destroyed. As detailed below, some materials exist and others do not. However, the non-existence of materials is not the result of destruction; rather, they were never created in the first place. We are aware of no documents of this sort that have been destroyed.

If the Committee suggests that Judge Lamberth ordered the defendants to "maintain" (i.e. create) these administrative materials, it is mistaken. To the contrary, on March 10, Judge Lamberth held that the interdepartmental working group was not subject to the FACA and thus not subject to any of its procedural requirements, such as creating and keeping minutes.





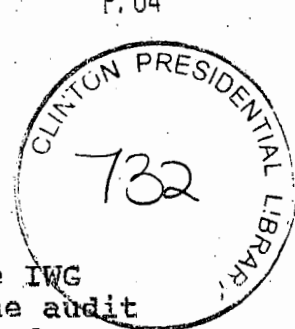
1. Ethics Forms

The Times has reported that there were 125 "special interest representatives" on the interdepartmental working group (IWG). There were 125 special government employees and consultants, but the notion that they were "special interest representatives" is untrue. Almost all were university professors, independent consultants, or employees of state or local governments or associations. See Defs' Disc. Resp. at Tabs 12-14.

In any event, we have disclosed that 36 of these individuals completed either a SF 278 or a SF 450. Defs' Disc. Resp. at p.20; Defs' Sur-Reply at 5 n.4. HHS is still searching for a 37th form. Defs' First Supplemental Resp. at 3. The remainder of the SGEs and consultants did not complete either form. Eight people from HHS, the one OPM consultant, the one DoD SGE, the OMB SGE and the three Commerce SGEs were contractors and, when retained, were not employees of the government. The requirement to complete an SF 278 or a SF 450 does not extend to non-employees. There is a tension between relying on their being non-employees while calling some SGEs, but the employer-employee relationship is a blurry one itself and can develop over time, making it difficult to determine when an obligation to complete a form is triggered, particularly because forms are not required to be completed until 30 days after the start of employment. In any event, the large bulk of non-signing SGEs came through the White House Office. Although the decision was not documented, it was, in effect, determined by Beth Nolan that these people were sufficiently far removed from particular policy decisions that a real or apparent conflict was remote. 5 C.F.R. § 2634.905(a); see Defs' Sur-Reply at 5 n.4. They were therefore exempt from filing. We are aware of no evidence that ethics forms were destroyed.

Nonetheless, SGEs and consultants were required to attend ethics briefings. Defs' Disc. Resp. at 20. Sign-in lists to those briefings (which we have not produced) reveal that most did. Others probably attended without completing a sign-in sheet. Moreover, Charlotte Hayes ran a conflicts check on these people. Id. It may have involved little more than a resume check, but she may have inquired orally into the financial holdings of some SGEs.

The Times' assertion that we said that we did not know who filled out ethics forms (Oct. 21) is wrong. The suggestion in the Times' article of Oct. 22 that we "shrugged off the need" to comply with ethics rules was also taken entirely out of context. Our brief argues that ethics forms are irrelevant to the issues before the Court, not that compliance was unimportant. See Defs' Compel Opp. at 21.



2. Membership Records

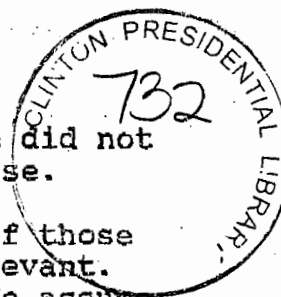
Defendants produced lists of the participants of the IWG (Defs' Disc. Resp. Tab 2), each working group (Tab 3), the audit groups (Tabs 4-8) and the consumer and "outreach" groups of health professionals (Tabs 9-10). The focus of the Times articles and the House inquiry are on the participants of the IWG.

Defendants described in detail, Defs' Disc. Resp. at 7-11 how the lists at Tabs 2 and 3 were created. A resume and/or security form exists on each of the individuals in Ira Magaziner's office and Jeff has personally looked at each. It simply would not have been candid for us to leave the impression that the lists were unalterably complete and accurate. Because the working groups operated with considerable autonomy and in different locations, it was very possible that colleagues of some of the permanent federal employee participants attended working group meetings without their names being forwarded to Mr. Magaziner's office. Defs' Compel Opp. at 10-11. An enormous amount of time was devoted to making sure the names and affiliations of the participants were as accurate as possible. That some names may not have been on the central list is not a function of disorganization, but of the informality and autonomy of working group meetings.

The Times stated that "records are so incomplete that the administration can't even determine who served on the task force . . ." Oct. 21. That statement is terribly misleading. We provided the plaintiffs with a list of over 500 individuals who participated on the working group. There may have been others, but that is not a product of incomplete records. The data base is as complete as the process of the working group allows. The Times (Oct. 21) also stated that the White House knew where only a few of the participants of the IWG worked. In reality, defendants identified and provided to plaintiffs the employment affiliations of each participant on the IWG, except some of the administrative people, such as the policy and special assistants.

3. Payroll Records

Defendants have disclosed whether each of the SGEs and consultants were paid, Defs' Disc. Resp. at 18-19, and have identified the contractual relationships the government had with those SGEs and consultants whose services were provided through a contract. Id. at 25-27; First Supp. Response; Second Supp. Response. A substantial majority of the SGEs and consultants were not paid and thus no payroll records exist for them. In particular, none of the White House Office SGEs and consultants were paid. Defs' Disc. Resp. at 18. (Although we have not revealed it, I also understand that none of the audit, consumer or outreach group members were paid either.) The Times



assertion (Oct. 21) that we argued that the White House did not "know how much consultants were paid" is completely false.

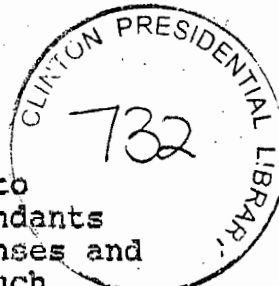
The defendants have not revealed payroll records of those who were paid, arguing that the amount of pay was irrelevant. Defs' Disc. Resp. at 19; Defs' Compel Opp. at 16-17. We assume that HHS has payroll records for the SGEs and consultants they retained, although we have not seen them. We also assume that HHS has records reflecting payment to the HHS contractors whose services were used on the working group. It must be noted, however, that many of these contractors had preexisting contracts with HHS to perform consulting services. The amount paid to the contractor (such as Georgetown) would reveal nothing about how much Georgetown paid its employee or subcontractor tasked with working group business. Similarly, we assume that OPM, Commerce and DoD have payroll records. The OPM contractor only worked two hours. Commerce hired its three contractors for the working group and payments under the contract should be easy to get from Commerce. The DoD contractor, in contrast, was an employee of Rand, who had a contract to do a study for DoD. Defs' Disc. Resp. at 27. DoD is very unlikely to have any record of payment to this contractor.

Of course, the permanent federal employees were paid their usual government salaries while they did working group work. Presumably, their agencies maintain their payroll records, but they would not reflect the degree to which the employee worked on the IWG.

In short, the Times' allegation that we admitted that the IWG failed to keep accurate payroll records (Oct. 21 article) is inaccurate. We said nothing of the sort; we said that such records were irrelevant. Most of the SGEs and consultants, we disclosed, were not paid in any event.

4. Expense and Travel Vouchers

With regard to non-travel expense vouchers, defendants argued that such information is irrelevant. Defs' Disc. Resp. at 19. Nonetheless, defendants disclosed that the HHS SGEs and consultants were not reimbursed for non-travel expenses. Although we have said so in our discovery response, we do not believe that the White House Office SGEs were reimbursed for non-travel expenses either. Plaintiffs have not directly pressed for expense vouchers and nothing was said about it at the hearing. The Times' suggestion (October 21) that we admitted that we failed to maintain accurate expense records is flatly wrong. Non-travel expense material has not been an issue so far. We frankly do not know how the permanent federal employees were reimbursed (if at all) if they paid for faxing, xerox, cab fares etc. out of their pockets on IWG business.



Nor did defendants at any time state that we failed to maintain accurate travel vouchers. To the contrary, defendants revealed that 17 HHS SGEs were reimbursed for travel expenses and the conditions under which they could be reimbursed for such expenses. Defs' Disc. Resp. at 19. We have not seen the HHS travel records, but we are reasonably confident that they have been maintained and can be accessed fairly easily. We're sure that the HHS travel records are no less accurate than travel records that agencies maintain for permanent employee travel.

Moreover, in our October 18 letter to plaintiffs' counsel, we listed each White House Office SGE who had received reimbursement for travel and the dates of their travel. The list is short because few White House Office SGEs received government reimbursement for travel. As we said in the letter, a small number of vouchers may yet be submitted, but, as of now, the list is accurate. Andrea Rutledge has the travel vouchers up which her staff created the list we provided.

In short, the Times' assertion that we argued that the White House did not know "if travel expenses were reimbursed" and that travel records were inaccurate (Oct. 21) is completely false.

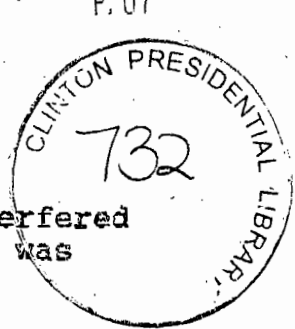
5. Minutes and Agendas

We argued that minutes and agendas should not be discoverable because they would contain the substantive working group information that plaintiffs seek on the merits. Defs' Disc. Resp. at 14; Defs' Compel Opp. at 5-8, 12-14. We repeated this point in our September 18 letter to plaintiffs' counsel and in Court.

Moreover, we revealed that there was no requirement imposed that the working group create agendas and minutes. See Tarmey Decl. (attached to Defs' Compel Opp.). Indeed, when the Court ruled on March 10 that the IWG was not subject to the FACA, the Court disposed of any possible legal requirement that minutes and agendas be created.

In the September 22 letter to counsel, we reported on the result of a review of a substantial portion of the IWG documents. That search revealed that very few of the thousands of WG meetings were preceded by an agenda or followed by minutes. Of those that existed, only a few mentioned the names of even one of the attendees. We provided plaintiffs an index of those documents.

The Times states that the IWG did not "keep" minutes and agendas. The Committee seems to have construed "keep" to mean "preserve." We are not aware that any agendas or minutes have been destroyed. They simply were not created in the first place. There was no legal requirement to do so. As we explained, to



have imposed the requirement would have substantially interfered with the working groups' abilities to do their work. Nor was there any practical need for agendas and minutes.

The Times reports that our papers reveal that we cannot conclude what each participant on the working group did. At bottom, that's true. There are few minutes and agendas. It is possible to look at each participants' documents, but their submissions to Terry Good contain material that was both created and received. The result of the working group process were the tollgate papers and briefing books, collaborative efforts. There is no documentary record that reflects who attended each of the thousands of IWG meetings, what each attendee did at each meeting and the degree to which each had a hand in writing each working group document. Does Congress have a record of who participated in each meeting dealing with a piece of legislation, what suggestions each offered at each meeting and how each contributed to the end product? We doubt it.

6. Status, Location and Inventory of Documents

The Committee asks whether the White House or Justice Department knows of the status, location and inventory of the IWG documents. There certainly is no inventory of the IWG documents.

A large volume of the IWG documents are in the Office of Records Management. Its difficult to estimate the percentage of working group materials over there, but we'd guess maybe a third.

Ira Magaziner's office has a substantial body of working group documents, including the final tollgate and briefing papers.

The remainder of the IWG documents are still in the hands of former participants in the IWG. In July, Terry Good sent a letter to each requesting their documents back. Somewhat less than half responded; some said they did not have any, some returned their documents and few requested permission to keep them as they were still working on health care related issues.