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Folder Title: JGR/FOIA
(Freedom of Information Act) (6 of 6)

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WITHDRAWAL SHEET

Ronald Reagan Library

Collection Name

Withdrawer

File Folder

JGR/FOIA (FREEDOM OF INFORMATION ACT) (6 OF 6)

SMF 8/30/2005

FOIA

F05-139/01

Box Number

26

COOK

SF-7

DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	HALL TO FIELDING (PARTIAL) 263257	1	9/21/1984	B6	876
2	MEMO	ROBERTS TO L. JEFFREY ROSS (PARTIAL) 284562	1	5/22/1985	B6	877
3	MEMO	ROSS TO FIELDING (PARTIAL) 309384	1	4/2/1985	B6	879

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]

E.O. 13233

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

THE WHITE HOUSE

WASHINGTON

October 19, 1984

MEMORANDUM FOR JAMES K. HALL
CHIEF, FOI/PA SECTION
FEDERAL BUREAU OF INVESTIGATION

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: FOI/PA Request of Gordon Cavanaugh
FBI FOI/PA #238, 859-001

By memorandum dated September 21, 1984, you asked for our views on the release of two documents with information originating in the White House in response to the above-referenced FOIA request. Our office has no objection to the release of these documents.

Attachment

FE010-01

**WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: James K. Hall☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: FOI/PA Request of Gordon Caranough
FBI FOI/PA #238, 859-001**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response Code	Completion Date YY/MM/DD
<u>CU Holland</u>	ORIGINATOR	<u>8/109/25</u>		<u>1 / 1</u>
<u>CUAT18</u>	Referral Note: <u>R</u>	<u>8/109/26</u>	<u>S</u>	<u>8/10/06</u>
	Referral Note:	<u>1 / 1</u>		<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>		<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>		<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>		<u>1 / 1</u>

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

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B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.

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Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.



U.S. Department of Justice

Federal Bureau of Investigation

263257CU

Washington, D. C. 20535

21 SEP 1984

To: Mr. Fred Fielding
General Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C. 20500

From: Chief
Freedom of Information/Privacy Acts
Section
Federal Bureau of Investigation

Subject: FOI/PA REQUEST OF [REDACTED]
FBI FOI/PA [REDACTED]

b6

The responsive files of the FBI contain two documents with information originating with the White House. I am referring the enclosed documents to you for any comments or recommendations you may have as to the sensitivity of this material.

A copy of the requester's initial letter is enclosed. Should you have any questions please contact Francine M. Greeson on 324-5548.

Enclosures (3)

COPY - Reagan Presidential Record

THE WHITE HOUSE

WASHINGTON

October 19, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: FOI/PA Request of Mark Allen
FBI/FOI/PA #211, 326 Regarding
House Select Committee on
Assassinations (HSCA)

By two separate memoranda, both dated October 9, the FBI has asked for our views on the release of documents originating in the White House that are responsive to the above-referenced FOIA request. The first item is a 1975 letter to President Ford from a private citizen, explaining a theory about the assassination of President Kennedy. I see no reason to withhold the letter. The second item is a telegram dated May 22, 1967 to the President from Marguerite Oswald, and a note of the same date from a White House staffer simply transmitting the telegram to the FBI. In her telegram Mrs. Oswald complains about FBI surveillance in connection with a visit to Dallas by Vice President Humphrey. I see no reason to object to the release of this item. An appropriate memorandum is attached for your review and signature.

Attachment

THE WHITE HOUSE
WASHINGTON

October 19, 1984

MEMORANDUM FOR JAMES K. HALL
CHIEF, FOI/PA SECTION
FEDERAL BUREAU OF INVESTIGATION

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: FOI/PA Request of Mark Allen
FBI/FOI/PA #211, 326 Regarding
House Select Committee on
Assassinations (HSCA)

By separate memoranda dated October 9, 1984, you requested our views on two items originating in the White House that are responsive to the above-referenced FOIA request. The items are a letter to President Ford from R.B. Cutler and a telegram of May 22, 1967 to the President from Marguerite Oswald, together with a transmittal note sending the telegram from the White House to the Bureau. I have no objection to the release of these items.

FFF:JGR:aea 10/19/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE
WASHINGTON

October 19, 1984

MEMORANDUM FOR JAMES K. HALL
CHIEF, FOI/PA SECTION
FEDERAL BUREAU OF INVESTIGATION

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: FOI/PA Request of Mark Allen
FBI/FOI/PA #211, 326 Regarding
House Select Committee on
Assassinations (HSCA)

By separate memoranda dated October 9, 1984, you requested our views on two items originating in the White House that are responsive to the above-referenced FOIA request. The items are a letter to President Ford from R.B. Cutler and a telegram of May 22, 1967 to the President from Marguerite Oswald, together with a transmittal note sending the telegram from the White House to the Bureau. I have no objection to the release of these items.

FFF:JGR:aea 10/19/84
cc: FFFielding/JGRoberts/Subj/Chron

JV

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

FE01001

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1/

Name of Correspondent: James K. Hall

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: FOI/PA Request of Mark Allen
 FBI/KOI/PA # 211,326 re: House
 Select Committee on Assassinations
 (HSCA)

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CW Holland		ORIGINATOR	84/10/11	WS		1/1
		Referral Note:				
CWAT/8			84/10/12		S	84/10/22
		Referral Note:		WS		
			1/1			1/1
		Referral Note:				
			1/1			1/1
		Referral Note:				
			1/1			1/1
		Referral Note:				

ACTION CODES:

A - Appropriate Action
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 C - Completed
 S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
 Code = "A"
 Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
 Send all routing updates to Central Reference (Room 75, OEOB).
 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE GENERATION AFTER

COMMITTED TO THE LESSONS OF THE HOLOCAUST

BOX 364 BAYCHESTER STATION

NEW YORK, N. Y. 10469

February 8, 1985

REGISTERED MAIL

Fred F. Fielding, Esq. ✓
Counsel to the President
Office of the Counsel to the President
The White House, 2/WW
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Hon. Faith R. Whittlesey
Assistant to the President for Public Liaison
The White House, 2/WW
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Freedom of Information Act Officer
Executive Office of the President
Old Executive Office Building
Washington, D.C. 20506

Gentlemen and Ambassador Whittlesey:

On January 4, 1985, this organization forwarded a Freedom of Information Act request (copy enclosed) to the last address listed above. That request was received at the White House on January 7, 1985 (see enclosed copy of U.S. Postal Service return receipt).

Our FOIA request was precipitated by a report carried in the November 10, 1983 issue of Draugas, a Lithuanian-language newspaper published in Chicago, that Mr. Linas J. Kojelis (Associate Director for Public Liaison, Executive Office of the President) had met privately with various parties who actively oppose the efforts of the Office of Special Investigations, U.S.

Fred F. Fielding, Esq.
Hon. Faith R. Whittlesey
Freedom of Information Act Officer

-2-

February 8, 1985

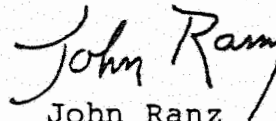
Department of Justice (Criminal Division), to investigate and prosecute suspected Nazi war criminals living in the United States. We enthusiastically support OSI and applaud its many successes in these important cases.

As you know, the Freedom of Information Act, 5 U.S.C. § 552, provides that the determination of whether to comply with an FOIA request must be made within ten working days after the receipt of the request, and that the requesting party must be notified of that determination "immediately." 5 U.S.C. § 552(a)(6).

Obviously, the statutorily-prescribed deadline for responding to our request passed some weeks ago. I trust that the failure to respond is attributable to an administrative oversight, and that we will receive the courtesy of a response forthwith, as required by law. If necessary, however, The Generation After is prepared to authorize our counsel to pursue such avenues of relief as may be available.

I look forward to your prompt reply.

Sincerely,


John Ranz
Secretary

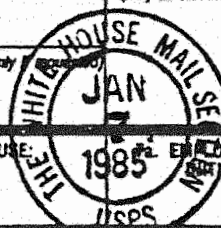
Enclosures

cc: Hon. William French Smith
Attorney General of the United States

PS Form 3811, July 1982

● SENDER: Complete Items 1, 2, 3, and 4. Add your address in the "RETURN TO" space on reverse.	
(CONSULT POSTMASTER FOR FEES)	
1. The following service is requested (check one). ☒ Show to whom and date delivered <u>60¢</u> ☐ Show to whom, date, and address of delivery .. <u> </u> ¢	
2. ☐ RESTRICTED DELIVERY <u> </u> ¢ (The restricted delivery fee is charged in addition to the return receipt fee.)	
TOTAL \$ <u> </u>	
3. ARTICLE ADDRESSED TO: <u>Freedom of Information Act Officer</u> <u>Executive Office of the President</u> <u>Old Executive Office Building</u> <u>Washington, D.C. 20506</u>	
4. TYPE OF SERVICE: ☒ REGISTERED ☐ INSURED ☐ CERTIFIED ☐ COD ☐ EXPRESS MAIL	ARTICLE NUMBER <u>R.004</u> <u>067 918</u>
(Always obtain signature of addressee or agent)	
I have received the article described above. SIGNATURE ☐ Addressee ☒ Authorized agent <u>N. ORFIELD</u>	
5. DATE OF DELIVERY	POSTMARK (may be on reverse side)
6. ADDRESSEE'S ADDRESS (Only if registered)	
7. UNABLE TO DELIVER BECAUSE: <u> </u>	

RETURN RECEIPT



THE GENERATION AFTER

COMMITTED TO THE LESSONS OF THE HOLOCAUST

BOX 364 BAYCHESTER STATION

NEW YORK, N. Y. 10469

VIA REGISTERED MAIL

January 4, 1985

Freedom of Information Act Officer
Executive Office of the President
Old Executive Office Building
Washington, D.C. 20506

Re: Freedom of Information Act Request

Dear Sir or Madam:

This is a request made under the Freedom of Information Act as amended (5 U.S.C. § 552). As you know, 5 U.S.C. § 552(e) expressly designates the Executive Office of the President an "agency" subject to the disclosure requirements of the Act.

I write to request access to certain documents received by Mr. Linas J. Kojelis (Associate Director for Public Liaison, Executive Office of the President) or by any member of his staff. Specifically, I request access to all such documents received after 1980 from members of the public and/or from private (i.e., non-governmental) organizations which documents refer or relate to any of the following matters:

- (1) the Office of Special Investigations ("OSI"), Criminal Division, U.S. Department of Justice.

- (2) efforts by the U.S. Department of Justice, or by any of its divisions, sections, offices, agents, officers, or employees to investigate or take legal action against suspected Nazi war criminals, suspected Nazi persecutors, suspected Nazi collaborators, or any individual suspected of ordering, inciting, assisting, or otherwise participating in the persecution of any person in Europe during all or part of the period 1933 to 1945.

As used above, the term "documents" refers to any and all kinds of written or graphic matter, of any kind or description, however created, including, but not limited to: letters, papers, books, correspondence, periodicals, memoranda, notes, bulletins, circulars, reports, announcements, advertisements, petitions, transcripts, litigation papers, promotional literature, and affidavits.

Under present regulations and case law pertaining to the Freedom of Information Act, I believe that these documents are available to me and to other members of the public. They are not exempted from required disclosure under present interpretations of the Act, and it is believed that the Justice Department would concur that the information must be released under terms of the Freedom of Information Act. Your agency is believed to have custody of these documents, but if it does not I would request prompt notice of their current location.

If any portion of this request is deemed denied, I request a detailed statement of the reasons for the withholding and an index or similar statement of the nature of the documents withheld. To expedite this request, I would be willing to discuss specific instances of deletion or other exemption claims in advance of a final decision by the agency. In the event of deletions, I request that a reason be stated for each partial denial of access.

Pursuant to the provisions of the Act, I promise to pay reasonable charges to cover expenses incurred in searching for and copying these documents, upon presentation of an invoice along with the finished documents. (If search and duplication fees exceed \$50, please write to me at the address above for agreement to such charges.) However, I ask that you waive any fees, pursuant to authorization in the Act for reduction or waiver of fees where "furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits within that category.

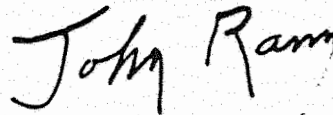
If you have any questions regarding this request, please write to me at the address above.

I would appreciate your handling this request as

January 4, 1985

expeditiously as possible, and I look forward to hearing from you within ten days, as the law requires.

Sincerely,

A handwritten signature in cursive script that reads "John Ranz". The signature is written in dark ink and is positioned above the printed name and title.

John Ranz
Secretary

THE WHITE HOUSE

WASHINGTON

April 23, 1985

MEMORANDUM FOR PATRICIA L. MANN
FREEDOM OF INFORMATION OFFICER
INTERNATIONAL TRADE ADMINISTRATION

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: FOIA Request from Margaret R. Polito

You have asked for our views on the possible release of a White House document responsive to the FOIA request of Margaret R. Polito. I have reviewed the document and have no objection to its disclosure in response to the FOIA request. I assume that the classified paragraph will be expurgated as indicated.

Ag

C.F.

FE010-01

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

Confidential Attachment

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

Date Correspondence
Received (YY/MM/DD) _____

Name of Correspondent: _____

Patricia H. Mann

☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: _____

FOIA Request from Margaret R.
Palito

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
OW Holland		ORIGINATOR	8510111			1 1
		Referral Note:				
OWAT18		R	8510111			8510121
		Referral Note:				
			1 1			1 1
		Referral Note:				
			1 1			1 1
		Referral Note:				
			1 1			1 1
		Referral Note:				

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UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

284562 CU

~~CONFIDENTIAL~~

JAN 10 1985

Mr. Fred Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Fielding:

The enclosed document(s) was/were identified by the International Trade Administration in responding to a Freedom of Information request from Margaret R. Polito.

You are requested to review this/these document(s) for possible declassification and/or release. Indicate any FOI exemptions you believe applicable to the document(s). Please return the document(s) and your recommendations so we may complete our reply to the requester. A copy of the requester's letter and our initial reply is enclosed for your convenience. If you have any questions concerning this referral, you may reach me on 377-3031.

Sincerely,

Patricia L. Mann

Patricia L. Mann
Freedom of Information Officer
International Trade Administration

3 Enclosures

FOI 1984-189

~~CONFIDENTIAL~~ 403 8/1/05

(This document is automatically declassified when
classified enclosure is removed.)



THE WHITE HOUSE
WASHINGTON

May 22, 1985

MEMORANDUM FOR L. JEFFREY ROSS
CHIEF, FOI/PRIVACY ACT UNIT
OFFICE OF ENFORCEMENT OPERATIONS
U.S. DEPARTMENT OF JUSTICE

FROM: JOHN G. ROBERTS *JGR*
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Privacy Act Request -- [REDACTED]

66

You referred records responsive to the above-referenced Privacy Act request which originated in this office to us "for direct reply to the requester." As a matter of policy the White House does not respond directly to such requests, other than to advise requesters that the White House is not subject to FOIA, see Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980). The procedure we have been following is for the agency to recommend to us a proposed course of action with respect to the responsive White House document, and to inquire if we have any objections to that course of action. All contact with the requester is handled by the agency. This procedure is followed, for example, by the FBI, which receives a large number of Privacy Act requests covering White House documents.

With respect to this particular request, we have no objection to your releasing the memorandum from Mr. Fielding to Deputy Attorney General Dinkins dated August 7, 1984, or copies of the materials [REDACTED] sent to Mr. Fielding.

66

309384

ID #

CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 1Name of Correspondent: L. Jeffrey Ross☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: FOIA Request - Frank Garkas; CRM-11677-P

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)

Action
CodeTracking
Date
YY/MM/DDType
of
Response

Code

Completion
Date
YY/MM/DDCUAT 18

ORIGINATOR

85, 04, 051 1

Referral Note:

R 85104198S 85104198

Referral Note:

1 11 1

Referral Note:

1 11 1

Referral Note:

1 11 1

Referral Note:

ACTION CODES:

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C - Comment/Recommendation
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to be used as Enclosure

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Code = "A"
Completion Date = Date of Outgoing

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Memorandum



309384 *cu*

COPY - Reagan Presidential Record

Subject	Date
Privacy Act Request - [REDACTED] <i>bl</i>	<i>2</i> APR 1985

To
Fred F. Fielding
Counsel to the President
The White House Office

for [unclear]

From
L. Jeffrey Ross, Chief
FOI/Privacy Act Unit
Office of Enforcement Operations

We are processing a Privacy Act request from the person named above. In searching our system CRM-001, we have located the attached records which originated in your office. We are referring these records to you for direct reply to the requester. Also attached is a copy of the request letter for your assistance. The requester has been advised of this referral.

Correspondence to us concerning this matter should be addressed to: L. Jeffrey Ross, Chief, Freedom of Information/Privacy Act Unit, Office of Enforcement Operations, Criminal Division, Department of Justice, Washington, D.C. 20530. Attention: Peggy A. Hill, 724-7215.

THE WHITE HOUSE
WASHINGTON

FOIA
file

May 29, 1985

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER
SHERRIE M. COOKSEY
H. LAWRENCE GARRETT III
JOHN G. ROBERTS ←
DEBRA OWEN
HUGH HEWITT

FROM: DAVID B. WALLER *DBW*

SUBJECT: Rushforth vs. Council of Economic Advisers

Attached is a copy of the May 24, 1985 opinion of the District of Columbia Circuit unanimously affirming the district court's ruling that the Council of Economic Advisers is not an "agency" subject to the Freedom of Information and Government in the Sunshine Acts.

The Court held that notwithstanding references in the legislative history of the FOIA to the CEA as a covered "agency," the controlling test for coverage of an Executive Office unit is that set forth in the Conference Report, viz. whether the unit's "sole function is to advise and assist the President." Soucie v. David, 448 F. 2d 1067, 1075 (D.C. Cir. 1971). Unless an Executive Office unit has some "independent authority or power," such as funding projects or issuing regulations, it will not be deemed a FOIA "agency." Slip op. at 11. Applying this test, the Court held that notwithstanding the "agency" status of other Executive Office units, the CEA is not an "agency" because it has no function beyond advising and assisting the President. Id.

With respect to the Sunshine Act, the Court held that since there is no legal requirement that the Council operate collegially, the un rebutted declaration of former Council Chairman Martin Feldstein that the Council does not operate collegially is dispositive. Thus, the Council is not an "agency" subject to either the FOIA or the Sunshine Act.

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

No. 84-5428

BRENT N. RUSHFORTH, APPELLANT

v.

COUNCIL OF ECONOMIC ADVISERS, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-02632)

Argued February 7, 1985

Decided May 24, 1985

Nicholas C. Yost, for appellant.

Andrea Newmark, Attorney, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, Department of Justice, *Joseph E. diGenova*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice were on the brief, for appellees.

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.

Before: WRIGHT, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge STARR*.

STARR, *Circuit Judge*: This action was brought under the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Government in the Sunshine Act, 5 U.S.C. § 552b (1982), seeking relief from the failure of the Council of Economic Advisers ("CEA" or "Council") to comply with those two statutes. The District Court dismissed the Freedom of Information Act ("FOIA") claim, but also opined that summary judgment for CEA would be warranted in any event. In addition, the trial court granted summary judgment in favor of the CEA on the Government in the Sunshine Act ("Sunshine Act") claim. We affirm.

I

Brent Rushforth, a Washington, D.C. attorney, submitted an FOIA request to CEA for copies of the Council's regulations implementing both FOIA and the Sunshine Act. In its response to Mr. Rushforth's inquiry, the CEA advanced the position that the Council is not an "agency" for purposes of FOIA and is thus not required to comply with the Act. Appellant thereupon brought suit in the United States District Court for the District of Columbia, seeking "declaratory, mandatory, and injunctive relief from CEA's total failure to comply with either the Government in the Sunshine Act . . . or with [FOIA]." Complaint at 1, *reprinted in* Joint Appendix at 6, 6. Specifically, appellant asked the District Court to declare CEA in violation of both statutes, to require CEA to adopt regulations implementing both Acts, to enjoin future violations of either Act, and to "issue such other and further relief as may be appropriate." Complaint at 7-8, Joint Appendix at 12-13. Appellant moved for summary judgment; CEA moved for dismissal or, alternatively, for summary judgment.

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Defendant. plaint or, alt rict Court in dum opinion ing summary ment in the S claim, the co In the court instance requ the court la to adopt an court went o standing in l be entitled to cil is not an

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After the cross-motions for summary judgment were filed, Mr. Rushforth submitted to CEA a second FOIA request. He requested all documents falling into any of eight categories. When no response was received within ten working days,¹ appellant filed a "Supplemental Complaint" in the already pending litigation. In that pleading, appellant averred that he had requested information with respect to studies, reports, and other documents from CEA and had received no response from the Council within ten working days. He also attached a copy of the FOIA request. When CEA eventually did respond through administrative channels, the Council again maintained that its records were not agency records subject to FOIA; while turning over voluntarily certain materials to appellant,² the CEA withheld some of the requested documents.

Defendants moved to dismiss the supplemental complaint or, alternatively, for summary judgment. The District Court in due course entered an order and memorandum opinion dismissing appellant's FOIA claim and granting summary judgment in favor of CEA on the Government in the Sunshine Act claim. With regard to the FOIA claim, the court held, first, that plaintiff lacked standing. In the court's view, Mr. Rushforth had not in the first instance requested a disclosure of *existing* documents, and the court lacked authority under FOIA to order the CEA to adopt and then release implementing regulations. The court went on to hold, moreover, that even if plaintiff had standing in light of his second FOIA request, CEA would be entitled to summary judgment inasmuch as the Council is not an "agency" within the meaning of FOIA. As

¹ An FOIA request not answered within 10 working days may be treated as denied. See 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).

² Several of the requested documents had, independently of appellant's FOIA request and this litigation, been made public by the Council and had already been made available to appellant's counsel.

to the Sunshine Act claim, the court held that the Act did not apply to CEA inasmuch as the Council is not a collegial body.³ This appeal followed.

II

The first issue before us is whether the CEA is an "agency" within the meaning of FOIA. The operative statutory provision sets forth the following definition of that term: "For purposes of this section, the term agency . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(e). Plaintiff's argument is simple and straightforward: since the CEA is an establishment in the Executive Office of the President, it is subject to FOIA. But the issue is not so easily resolved. As the Supreme Court has made clear, "'Executive Office' does not include the Office of the President . . . [, and] 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974)).

While not all units within the Executive Office of the President are subject to FOIA, appellant seeks to buttress

³ Mr. Rushforth clearly had standing as to the Sunshine Act action. See 5 U.S.C. § 552b(g) ("Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations within the time period specified herein."). With regard to the FOIA action, it is undisputed that appellant, in his second request, did ask for existing documents. Standing does, of course, lie as a general matter where a request is submitted under FOIA for existing documents, as opposed to a request that the agency create materials which did not previously exist.

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his position by repairing to the legislative history, specifically the House Report on the 1974 amendments to FOIA. That Report states that the definition of "agency" was being expanded from that which previously obtained.⁴ The Report further states that "[t]he term 'establishment in the Executive Office of the President,' as used in this amendment, means such functional entities as . . . the Council of Economic Advisers" H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974). It is thus clear, as appellant argues, that the House version of the 1974 amendments contemplated that the CEA would be subject to FOIA.

But the House report does not stand alone. The subsequent Conference Report directly undercuts the House Report's otherwise clear expression; while observing that "[t]he conference substitute follows the House bill," the Report goes on to say: "[W]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14-15 (1974); see also S. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974) (identical language). Thus, the Conference Report speaks to the precise issue of the meaning of the phrase "Executive Office of the President" and specifically states an intent to follow the result in *Soucie*, namely determining whether

⁴ The House Report states that "the definition of 'agency' has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public." H.R. REP. No. 876, 93d Cong., 2d Sess. 8 (1974). Now included were "Government corporations, Government controlled corporations [and] other establishments within the executive branch, such as the U.S. Postal Service." *Id.*

the sole function of the entity within the Executive Office is to advise and assist the President. Where, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect. Manifestly, the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of *Soucie* and the sole-function test enunciated in that case.

In *Soucie*, the issue was whether the Office of Science and Technology ("OST"), an entity in the Executive Office of the President, was an agency within the meaning of FOIA. Concluding that OST was indeed a FOIA-covered agency, the *Soucie* court began by observing OST's genesis as the creature of an Executive Branch reorganization plan. That plan transferred the functions of the National Science Foundation ("NSF" or "the Foundation") to the OST, an "administrative unit outside the White House, but in the Executive Office of the President on roughly the same basis as . . . the Council of Economic Advisers . . ." *Soucie, supra*, 448 F.2d at 1074. However, while this reorganization resulted in an administrative unit located, hierarchically, in the same position as CEA, there is no indication that the functional roles of CEA and OST were the same; and, critically, it was the functional role of the agency on which *Soucie* turned.

In *Soucie*, the court concluded that "[b]y virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." *Id.* at 1075. The court reached this conclusion only after expressly taking into account the fact that OST had assumed the functions of the National Science Foundation; moreover, the

court observed that the OST's functions were to evaluate and advise the President on environmental issues. The court concluded that the OST was not an independent staff and advisory agency, but rather an executive agency, the existence of which was required by the President pursuant to the functions of the Executive Office of the President. The court awarded summary judgment to the appellees, correlating the functions of the OST with those of the CEA. Those functions were taken by the OST. In a word, the court deemed the OST to be an agency for purposes of the FOIA. The court's decision in *Soucie* is binding on the court in this case.

The second issue presented by this appeal is whether the appellees are entitled to summary judgment on the issue of whether the OST is an agency for purposes of the FOIA. There, the court held that the appellees were not entitled to summary judgment. The court's decision was based on the fact that the OST was not an independent staff and advisory agency, but rather an executive agency, the existence of which was required by the President pursuant to the functions of the Executive Office of the President. The court awarded summary judgment to the appellees, correlating the functions of the OST with those of the CEA. Those functions were taken by the OST. In a word, the court deemed the OST to be an agency for purposes of the FOIA. The court's decision in *Soucie* is binding on the court in this case.

court observed that OST was specifically authorized to evaluate the scientific research programs of federal agencies. The court stated: "If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." It was, rather, the existence of the NSF functions, now vested in OST pursuant to the reorganization, that turned the tide. Those functions included the initiation and support of research, awarding scholarships, fostering the interchange of information and evaluating the status of the sciences in correlating the research and education programs undertaken by the Foundation. See 42 U.S.C. § 1482 (1982). Those functions clearly go beyond advice and assistance. In a word, OST could take direct action and thus was deemed to be an administrative agency. As we will discuss *infra*, the activities of the CEA and OST differ to the point that the status of CEA is not controlled by *Soucie*; but at the same time, the test formulated by *Soucie* is plainly the standard to be applied to determine the Council's status.

The second case from which appellant seeks to draw support is *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259 (D.C. Cir. 1980). There, the Council on Environmental Quality ("CEQ") was held to be an agency for FOIA and Sunshine Act purposes. Since the statutes organizing CEA and CEQ are, for all practical purposes, identical, compare 15 U.S.C. § 1023 (1982) with 42 U.S.C. §§ 4342-45 (1982), appellant argues that *Pacific Legal Foundation's* conclusion must carry over and apply to the CEA. However, while the statutes are the same, the functions performed by the two entities differ markedly. The court in *Pacific Legal Foundation* specifically observed that CEQ's functions had been expanded by several executive orders, that CEQ coordinated federal environmental regulatory programs, issued guidelines for preparing environmental im-

fact statements, and promulgated regulations for implementing the procedural provisions of the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970). *Pacific Legal Foundation, supra*, 636 F.2d at 1282. Furthermore, in that litigation the CEQ actually admitted that it was an agency; it contended more narrowly that it was not an agency at those times when it was advising the President and that the Sunshine Act did not apply to its advisory function. This court rejected the CEQ's proffered on-again-off-again definition and held that "[o]nce an entity is found to be an agency, this determination will not vary according to its specific function in each individual case." *Id.* at 1264 (quoting *Ryan v. Dept. of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980)).

Pacific Legal Foundation's conclusion—that CEQ is an agency—simply does not, on analysis, carry over to the case at hand. The expanded duties of the CEQ clearly took that body out of the realm of entities the sole function of which is to advise and assist the President. CEA's duties, in contrast, have not similarly been expanded. CEA simply has no independent authority such as that enjoyed either by CEQ or OST.⁵

Our task, then, is to apply *Soucie's* sole-function test to the role of CEA. Doing so leads ineluctably to the con-

⁵ Noting the near identity of the statutes creating CEQ and CEA, appellant mounts a policy argument that the President should not be allowed to take an entity out of, or place an entity in, FOIA agency status by the mere expedient of adding or eliminating duties. This argument is unavailing. Congress' intent would appear to have been to require entities having authority and the ability to act, but not those whose sole function was to render advice and assistance to the President, to be subject to FOIA. If the President adds duties to an entity which bring it outside the sole-function test, Congress would want the entity to be covered. There is no reason why any other entity with a similarly worded organic statute should be dragged along with it.

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clusion that its sole function is to advise and assist the President. Each one of the CEA's enumerated statutory duties is directed at providing such advice and assistance to the President.⁹ While appellant emphasizes that in

⁹ § 1023. Council of Economic Advisers

(a) Creation; composition; qualifications; selection of chairman and vice chairman

There is created in the Executive Office of the President a Council of Economic Advisers (hereinafter called the "Council"). The Council shall be composed of three members who shall be appointed by the President by and with the advice and consent of the Senate, and each of whom shall be a person who, as a result of his training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in the light of the policy declared in section 1021 of this title, and to formulate and recommend national economic policy to promote full employment, production, and purchasing power under free competitive enterprise. The President shall designate one of the members of the Council as chairman and one as vice chairman, who shall act as chairman in the absence of the chairman.

(b) Employment of specialists, experts, and other personnel

The Council is authorized to employ, and fix the compensation of, such specialists and other experts as may be necessary for the carrying out of its functions under this chapter, without regard to the civil-service laws, and is authorized, subject to the civil-service laws, to employ such other officers and employees as may be necessary for carrying out its functions under this chapter, and fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(c) Duties

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Economic Report;

(2) to gather timely and authoritative information concerning economic developments and economic

each instance the language "to the President" appears as part of a conjunction, that fact does not affect the conclusion fairly to be drawn. For example, the CEA is directed to appraise federal programs relative to a particular stat-

trends, both current and prospective, to analyze and interpret such information in the light of the policy declared in section 1021 of this title for the purpose of determining whether such developments and trends are interfering, or are likely to interfere, with the achievement of such policy, and to compile and submit to the President studies relating to such developments and trends;

(3) to appraise the various programs and activities of the Federal Government in the light of the policy declared in section 1021 of this title for the purpose of determining the extent to which they are contributing, and the extent to which they are not contributing, to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national economic policies to foster and promote free competitive enterprise including small and larger business, to avoid economic fluctuations or to diminish the effects thereof, and to maintain full employment, production, and purchasing power;

(5) to make and furnish such studies, reports thereon, and recommendations with respect to matters of Federal economic policy and legislation as the President may request.

(d) Annual report

The Council shall make an annual report to the President in December of each year.

(e) Consultation with other groups and agencies; utilization of Governmental services and private research agencies

In exercising its powers, functions and duties under this chapter—

(1) the Council may constitute such advisory committees and may consult with such representatives of industry, agriculture, labor, consumers, State and

utory policy and in that regard, appraise is directed to make recommendations under the statutory appraisal as OS procedures based

We can discern that CEA has been assisting the President in bringing forward proposals. The variety of appellant, does not have the power to

local government, visible, established, (2) the utilization of the existing agencies in order to be avoided

In its work and Balance seq. (1982)] and obtain independent studies essential

(f) Appropriate To enable and duties of appropriate

15 U.S.C. § 1022

⁷ Appellant are appointed and are required to be of important weight.

utory policy and make recommendations to the President in that regard. 15 U.S.C. § 1023(c)(3). The duty to appraise is directly connected to the Council's duty to make recommendations. CEA has no regulatory power under the statute. It cannot fund projects based on the appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might.

We can discern no basis in the statute for concluding that CEA has any function save that of advising and assisting the President. Nor has any evidence been brought forward to show that some other function in fact exists. The various acts of CEA members, as enumerated by appellant, do not evidence any independent authority or power;⁷ in consequence, we agree with Judge Ober-

local government, and other groups, as it deems advisable, and shall consult with the board or boards established under section 1022f of this title;

(2) the Council shall, to the fullest extent possible, utilize the services, facilities, and information (including statistical information) of other Government agencies as well as of private research agencies, in order that duplication of effort and expense may be avoided.

In its work under this chapter and the Full Employment and Balanced Growth Act of 1978 [15 U.S.C. §§ 3101 *et seq.* (1982)] the Council is authorized and directed to seek and obtain the cooperation of the various executive and independent agencies in the development of specialized studies essential to its responsibilities.

(f) Appropriations

To enable the Council to exercise its powers, functions, and duties under this chapter, there are authorized to be appropriated such sums as may be necessary.

15 U.S.C. § 1023 (1982).

⁷ Appellant argues that the fact that the members of CEA are appointed with the advice and consent of the Senate and are required to testify before the Congress should carry important weight. Neither the nature of the appointment nor

dorfer's conclusion that CEA should not be considered an agency for purposes of the FOIA.

III

Inasmuch as the Council of Economic Advisers is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that statute either. The reason is that the Sunshine Act expressly incorporates the FOIA definition of agency. *See* 5 U.S.C. § 552b(a)(1) ("the term 'agency' means any agency as defined in section 552(e) . . ."). Furthermore, even if CEA were an agency within the meaning of FOIA, the Council would still not fall within the scope of the Sunshine Act. The pertinent definition, set forth in section 552b, continues as follows: An agency for purposes of section 552b is one "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate" *Id.* The District Court held that CEA is not a collegial body. If that conclusion is correct, CEA is not subject to the Act.

First, the District Court determined, based on the declaration of then-CEA Chairman Martin Feldstein, that the CEA does not in fact operate collegially. That declaration is un rebutted; hence, to the extent that the question is one of fact, the Feldstein declaration would be fully adequate to support the court's grant of summary judgment in favor of the Council. However, if the CEA is legally constituted as a collegial body, its actual mode of operation might weigh less heavily in our analysis.

By its terms, the organic statute creating the CEA appears to envision a collegial group. After all, the statute creates a "Council" of advisers. The Council consists of

the accompanying duty to testify before Congress, however, speaks to the function of the CEA; it is, at bottom, its function that determines an entity's status for FOIA purposes.

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three members confirmed by the Senate, with one member later being designated by the President as chairman. This structure might reasonably be construed to suggest roughly co-equal status among the three members. The statute also speaks of various activities of the "Council" and does little or nothing to separate out the chairman.⁸

The CEA was reorganized in 1953, and administration of the Council was centralized in the chairman. See Reorganization Plan No. 9 of 1953, 18 Fed. Reg. 4543, 67 Stat. 644 (1953). However, it is not clear that the plan negated any collegiality that might otherwise be reflected by the statute. The increased responsibility enunciated in the 1953 Reorganization Plan spoke primarily to management of the Council's staff. The duty to report to the President was also vested in the chairman, rather than the Council. Appellant argues from all this that the fact that the chairman is to report on the *activities of the Council* indicates that the entity's action is joint and collegial. We are unpersuaded. Any head of a multi-member entity could, of course, be instructed to report on the activities of his or her agency. Such an instruction simply does not translate into a requirement that he or she run the agency collegially.

While there is language in the statute (that may or may not be weakened by the Reorganization Plan) evoking notions of collegiality, we can discern no requirement in the statute that the CEA must be so run. Absent such a requirement, and given the unrefuted factual averment that the Council is not and has not been run collegially, we conclude that the CEA is not a collegial group subject to the Sunshine Act.

Appellant argues that this conclusion would be contrary to *Pacific Legal Foundation, supra*, but his argument rests, at bottom, on the near identity of the statutes creating CEA and CEQ. Since the two entities have in

⁸ See *supra* note 6.

time evolved differently in their functions and would appear in actual practice to operate quite differently, *see Pacific Legal Foundation, supra*, 636 F.2d at 1265-66 (indicating that at least some CEQ business requires an affirmative vote of two members), the status of those two entities under the Sunshine Act simply need not be the same.

IV

The judgment of the District Court as to both the FOIA and Sunshine Act claims is, for the foregoing reasons,

Affirmed.

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U.S. Court of Appeals for the D.C. Circuit

GOVERNMENT INFORMATION COUNCIL OF ECONOMIC ADVISERS

Council of Economic Advisers is not an "agency" for purposes of Freedom of Information Act and Government in the Sunshine Act.

RUSHFORTH v. COUNCIL OF ECONOMIC ADVISERS, ET AL., U.S.App.D.C. No. 84-5428, May 24, 1985. *Affirmed* per Starr, J. (Wright and Bork, JJ. concur). *Nicholas C. Yost* for appellant. *Andrea Newmark* with *Richard K. Willard, Joseph E. diGenova* and *Leonard Schaitman* for appellees. Trial Court—Oberdorfer, J.

STARR, J.: This action was brought under the Freedom of Information Act, 5 U.S.C. §552 (1982), and the Government in the Sunshine Act, 5 U.S.C. §552b (1982), seeking relief from the failure of the Council of Economic Advisers ("CEA" or "Council") to comply with those two statutes. The District Court dismissed the Freedom of Information Act ("FOIA") claim, but also opined that summary judgment for CEA would be warranted in any event. In addition, the trial court granted summary judgment in favor of the CEA on the Government in the Sunshine Act ("Sunshine Act") claim. We affirm.

The first issue before us is whether the CEA is an "agency" within the meaning of FOIA. The operative statutory provision sets forth the following definition of that term: "For purposes of this section, the term agency . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §552(e). Plaintiff's argument is simple and straightforward: since the CEA is an establishment in the Executive Office of the President, it is subject to FOIA. But the issue is not so easily resolved. As the Supreme Court has made clear, " 'Executive Office' does not include the Office of the President . . . [and] 'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974)).

*** The subsequent Conference Report directly undercuts the House Report's otherwise clear expression; while observing that "[t]he conference substitute follows the House bill," the Report goes on to say: "[W]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R.

(Cont'd. on p. 1424 - Advisers)

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE FINGERPRINT EVIDENCE

Under circumstances which do not rule out innocent explanation, evidence based on fingerprint is held not to support burglary conviction.

RHYNE v. UNITED STATES, D.C.App. No. 83-462, May 20, 1985. *Reversed* per Newman, J. (Mack, J. concurs; Nebeker, J. concurs in result). *Martha J. Tomich*, Appellate Law Fellow, appointed by this court, with *Steven H. Goldblatt, Susan L. Siegal*, Appellate Law Fellow, *Susan McGoldrick* and *John Meagher*, Law Students, for appellant. *Kenneth J. Melilli* with *Joseph E. diGenova, Michael W. Farrell* and *Ronald Dixon* for appellee. Trial Court—Goodrich, J.

NEWMAN, J.: Rhyme asserts that his convictions for burglary and grand larceny must be reversed because of evidentiary insufficiency and prosecutorial misconduct. Since we agree with his first contention, we need not reach his second one. We reverse, concluding that viewing the evidence in its light most favorable to the government, including all reasonable inferences, *Miller v. United States*, 479 A.2d 862, 864 (D.C. 1984), it is insufficient to sustain the convictions.

During June 1981, the victims (the Matthews) hired Rhyme to do certain home repair work. Some of this work required Rhyme to enter the house, but it did not require that he enter the living room (the room from which the proceeds of the larceny were taken). During the course of his employment, Rhyme occasionally entered the house to eat, drink and to use the bathroom or telephone. None of these purposes required that he enter the living room. In connection with the work, Rhyme occasionally used Matthews' ladder which was stored outside the house and which was long enough to reach the second floor of the house where there were windows which were generally unlocked. A back door key was kept outside the house in a location of which Rhyme became aware. Rhyme never completed the work and abandoned the job in mid-July.

Bristol, the housekeeper, testified that on July 23, 1981, the day on which she left for vacation, she dusted the furniture, including the stereo equipment in the living room. A crime scene search officer testified that thorough dusting of a smooth surface would obliterate or smudge a fingerprint thereon.

On or about August 4, the Matthews' residence was burglarized, and stereo equipment with an approximate value of \$250 was stolen. A crime scene search officer (Wilson) dusted for fingerprints. Nine latent lifts were recovered from the turntable dust cover which the burglar would have touched in taking the stereo equipment; one of the prints was of Rhyme's thumb. Wilson testified that Rhyme's print was recovered from the side of the dust cover, although the document containing the latent lift indicates that it was taken from the top of the outside surface of the cover. Wilson testified that prints would remain on surface for an in-

(Cont'd. on p. 1424 - Evidence)

D.C. Superior Court

CRIMINAL LAW & PROCEDURE PERJURY

Court refers to U.S. Attorney 4 cases in which there was apparent perjury or fabrication of evidence.

NELLUM v. NELLUM, Sup.Ct., D.C., No. D-3951-81, **SMITH v. SMITH**, No. D-2774-80, **GADDY v. GADDY**, No. D-2809-73, **McFADDEN v. McFADDEN**, No. D-3394-79, May 30, 1985. *Opinion* per Schwelb, J. *Edward W. Abramowitz* for Judith R. Nellum. *Elizabeth Guhring* for Albert L. Nellum. *Donald T. Cheatham* for Theresa O. Smith. *Robert E. Smith*, Defendant., *Pro Se. Stephen M. Nassau* for Doris M. Gaddy. *Mabel D. Haden* for Roy J. Gaddy. *Jeffrey Ford* for Diane M. McFadden. *Angela Plater* for Maxcell McFadden.

SCHWELB, J.: Lying under oath is not uncommon in domestic relations cases in our Court. Referring to child custody litigation in particular, Chief Judge Hood remarked in *Coles v. Coles*, 204 A.2d 330, 331-332 (D.C. 1964) that

out of a maze of conflicting testimony, usually including a 'tolerable amount of perjury,' the judge must make a decision which will inevitably affect materially the future life of an innocent child.

Financial disputes between former marital partners over child support and alimony often bring out a similar disregard for the truth.

In the Family Motions Branch, this Court has encountered an extremely troubling scenario several times each week. The following state of facts is illustrative. A wife files the requisite financial statement. In it, she recites that her monthly net income is \$1,500, her monthly expenses \$2,500. She is sworn, and testifies that the financial statement is accurate. The Court inquires¹ if the listed expenses are actual or projected, and she replies that they indeed represent an average of what she has been spending. The Court asks how long she has been losing about \$1,000 each month, and she testifies that this has been going on for two years. The Court turns to the back of her financial statement and, noting liabilities totalling only \$500, asks the wife how she has managed to confine her debts to that amount when she should logically have acquired a deficit of \$24,000 in the past two

(Cont'd. on p. 1425 - Perjury)

1. For reasons as to which the Court will not speculate, opposing counsel seldom cross-examine in this fashion.

TABLE OF CASES

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Superior Court of the District of Columbia Position Vacancy Announcement

Family Division

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Hours of Duty: 8:30—5:00 p.m.

Announcement No.: 06-85-111

POSITION TITLE, SERIES, GRADE & SALARY

Chief Deputy Clerk

CS-945-15

\$51,060—\$63,800

(1 Vacancy)

AREA OF CONSIDERATION

Court-wide & Outside

DUTIES IN BRIEF:

Responsible for over all planning, direction and management of the Family Division.

Develops and implements policies and programs designed to enhance the accomplishment of the mission assigned to the Family Division. Responsible for the development, evaluation and research of special projects assigned to the Family Division by the Clerk of the Court.

Confers with and recommends to management proposed rules and legislation affecting family law procedures, and related matters.

Serves as principal legal liaison on all Court Family Division matters.

QUALIFICATIONS:

Candidates must have a law degree from an accredited college or university and preferably membership in the District of Columbia Bar, plus five (5) years of legal and administrative experience. Experience must include supervisory skills of a significant nature, which demonstrates that the candidate was involved at a high level with the managerial structure.

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EVIDENCE

(Cont'd. from p. 1421)

determinate period of time if not removed, and thus, he could not determine when Rhyne's print was made on the dust cover.

Rhyne contends that these facts are basically indistinguishable from those found insufficient to sustain convictions in *Townsley v. United States*, 236 A.2d 63 (D.C. 1967), and *Hiet v. United States*, 124 U.S.App.D.C. 313, 365 F.2d 504 (1966). On the other hand, the government contends these facts more closely approximate those found sufficient to sustain the convictions in such cases as *In re M.M.J.*, 341 A.2d 421 (D.C. 1975); *Hawkins v. United States*, 329 A.2d 781 (D.C. 1974), and *Patten v. United States*, 248 A.2d 182 (D.C. 1968).

While we recognize that the analysis of evidence found to be legally sufficient or insufficient to sustain convictions in prior cases may often be helpful in deciding a pending case, we also recognize that adjudication of this type of issue cannot be done by looking for the proper pigeonhole. Rather, the evidence in each case must be weighed for sufficiency. Here, there was no testimony or other evidence that the entry was not forced. Without such testimony, or other evidence (as distinguished from the lack thereof) from which the jury could reasonably conclude that the entry was not forced, we do not believe that a reasonable jury, acting reasonably, could find appellant's fingerprint to be sufficiently incriminating to find him guilty.

Reversed and remanded with instructions to enter a judgment of acquittal.

NEBEKER, J., concurring in the result: I believe that the government is entitled to a fuller

understanding than is given in the court's opinion of why the precedents on which it relies are distinguishable here and thus deemed not persuasive or binding. I conclude, as does the majority, that the evidence is insufficient in these unique circumstances. See *Jackson v. Virginia*, 443 U.S. 307 (1979).

The government's burden, when it relies on fingerprint evidence, is to negate at least the most reasonable explanations of that evidence which are consistent with innocence, and to show that the fingerprints were made during the commission of the crime. In *re M.M.J.*, 341 A.2d 421 (D.C. 1975). In *M.M.J.*, the print was found on a transom over an inside door, an area generally inaccessible to the public and to the appellant in that case; the government introduced evidence tending to show lack of access in fact by appellant. *Id.* at 423. In *Hawkins v. United States*, 329 A.2d 781 (D.C. 1974), Hawkins' fingerprints were found on the front of a ransacked dresser, located in the robbery victim's bedroom. Although Hawkins may have visited her home on one occasion, two months before the robbery, the victim's testimony precluded any reasonable possibility that he would have touched the dresser where the print was found. *Id.* at 782. Finally, in *Patten v. United States*, 284 A.2d 182 (D.C. 1968), Patten's fingerprints were on a paper bag which contained burglary tools and which was found beside a broken skylight over a store, in an area generally inaccessible to appellant or to any member of the public. *Id.* at 183.

Here, Rhyne did have access, with permission, to the room where the stereo equipment was kept, if not to the specific area of the equipment. The evidence presented does not rule out an innocent, although unauthorized, touching of the dustcover—particularly since we cannot be certain where the dustcover, which appears to have been totally removable, may have been in relation to the stolen items at the time of the burglary in an active household in which the stereo equipment was regularly used.

I also respectfully disagree with the statement in the court's opinion that because there was no testimony or other evidence that the entry was not forced, there was no evidence from which the jury could reasonably conclude that the entry was not forced. I believe a legitimate inference that entry into the house was not forced may be drawn from the owner's and the maid's testimony regarding the circumstances of the discovery of the theft: the house was left so undisturbed that the family did not realize a burglary had taken place until they noticed the stereo was missing. Here, the inference is bolstered by the fact that nothing in the house other than the stereo equipment was removed in the August burglary. The circumstances tend to rule out a burglar who needed to enter by force, not knowing another way in, and not knowing the location of a targeted valuable and relatively portable item.

ADVISERS

(Cont'd. from p. 1421)

Rep. No. 1380, 93d Cong., 2d Sess. 14-15 (1974); see also S. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974) (identical language). Thus, the Conference Report speaks to the precise issue of the meaning of the phrase "Executive Office of the President" and specifically states an intent to follow the result in *Soucie*, namely determining whether the sole function of the entity within the Executive Office is to advise and assist the President. Where, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect.

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Manifestly, the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of *Soucie* and the sole-function test enunciated in that case.

Our task then, is to apply *Soucie's* sole-function test to the role of CEA. Doing so leads ineluctably to the conclusion that its sole function is to advise and assist the President. Each one of the CEA's enumerated statutory duties is directed at providing such advice and assistance to the President. While appellant emphasizes that in each instance the language "to the President" appears as part of a conjunction, that fact does not affect the conclusion fairly to be drawn. For example, the CEA is directed to appraise federal programs relative to a particular statutory policy and make recommendations to the President in that regard. 15 U.S.C. §1023(c)(3). The duty to appraise is directly connected to the Council's duty to make recommendations. CEA has no regulatory power under the statute. It cannot fund projects based on the appraisal, as OST might, nor can it issue regulations for procedures based on the appraisals, as CEQ might.

We can discern no basis in the statute for concluding that CEA has any function save that of advising and assisting the President. Nor has any evidence been brought forward to show that some other function in fact exists. The various acts of CEA members, as enumerated by appellant, do not evidence any independent authority or power; in consequence, we agree with Judge Oberdorfer's conclusion that CEA should not be considered an agency for purposes of the FOIA.

III

Inasmuch as the Council of Economic Advisers is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that statute either. The reason is that the Sunshine Act expressly incorporates the FOIA definition of agency. See 5 U.S.C. §552b(a)(1) ("the term 'agency' means any agency as defined in section 552(e) . . ."). Furthermore, even if CEA were an agency within the meaning of FOIA, the Council would still not fall within the scope of the Sunshine Act. The pertinent definition, set forth in section 552b, continues as follows: An agency for purposes of section 552b is one "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate . . ." *Id.* The District Court held that CEA is not a collegial body. If that conclusion is correct, CEA is not subject to the Act.

First, the District Court determined, based on the declaration of then-CEA Chairman Martin Feldstein, that the CEA does not in fact operate collegially. That declaration is un rebutted; hence, to the extent that the question is one of fact, the Feldstein declaration would be fully adequate to support the court's grant of summary judgment in favor of the Council. However, if the CEA is legally constituted as a collegial body, its actual mode of operation might weigh less heavily in our analysis.

By its terms, the organic statute creating the CEA appears to envision a collegial group. After all, the statute creates a "Council" of advisers. The Council consists of three members confirmed by the Senate, with one member later being designated by the President as chairman. This structure might reasonably be construed to suggest roughly co-equal status among the three members. The statute also speaks of various activities of the "Council" and does little or nothing to separate out the chairman.

The CEA was reorganized in 1953, and ad-

ministration of the Council was centralized in the chairman. See Reorganization Plan No. 9 of 1953, 18 Fed.Reg. 4543, 67 Stat. 644 (1953). However, it is not clear that the plan negated any collegiality that might otherwise be reflected by the statute. The increased responsibility enunciated in the 1953 Reorganization Plan spoke primarily to management of the Council's staff. The duty to report to the President was also vested in the chairman, rather than the Council. Appellant argues from all this that the fact that the chairman is to report on the activities of the Council indicates that the entity's action is joint and collegial. We are unpersuaded. Any head of a multi-member entity could, of course, be instructed to report on the activities of his or her agency. Such an instruction simply does not translate into a requirement that he or she run the agency collegially.

While there is language in the statute (that may or may not be weakened by the Reorganization Plan) evoking notions of collegiality, we can discern no requirement in the statute that the CEA must be so run. Absent such a requirement, and given the unrefuted factual averment that the Council is not and has not been run collegially, we conclude that the CEA is not a collegial group subject to the Sunshine Act.

The judgment of the District Court as to both the FOIA and Sunshine Act claims is, for the foregoing reasons,

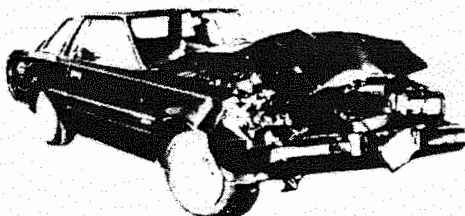
Affirmed.

PERJURY

(Cont'd. from p. 1421)

years. The wife now remembers that her father lent her an additional \$200, but she is otherwise unable to come up with an explanation for the discrepancy. Her case would surely collapse at this point, but the inconsistencies in the hus-

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band's statements are often even more acute.²

Domestic relations cases are not the only ones in which people lie. Criminal defendants do so with remarkable frequency, especially in drug cases,³ and there are unfortunately occasions when policemen have embellished the truth, or worse.⁴ The nature and frequency of perjury and like conduct which the Court has encountered in its current assignment to Family Motions is more extreme than in other assignments and altogether intolerable. Not every disingenuous financial statement can be referred for possible prosecution, but the Court has concluded that four recent cases which appear to it to be especially flagrant should be brought to the attention of the United States Attorney for any action that he may deem advisable.

II

A. *Nellum v. Nellum*

On March 6, 1984, following a two-day trial, Honorable Eugene N. Hamilton of this Court issued a comprehensive decision in this case in which he ordered the distribution of marital property, awarded the wife child support, but denied alimony and counsel fees. On May 8, 1985, the matter came before the undersigned on the wife's motion for relief from judgment. The wife alleged that the husband had secured an unfair decision by grossly misrepresenting his financial situation under oath. This Court found that this is exactly what occurred.

The husband is the president of a consulting business named A.L. Nellum & Associates Inc. (hereinafter ALNAI) and owns most or all of ALNAI's stock.⁵ His most recent financial statement, filed in connection with certain post-trial motions, reflected that his take home pay for the period from January 13, 1984 to November 14, 1984 was \$52,389.50. His bank statements for the same period, however, disclosed that he had made deposits of \$82,950.51. Proceeding to investigate this apparent discrepancy, the wife's counsel elicited testimony from ALNAI's accountant to the effect that the husband had obtained from the corporation during the years 1982, 1983 and 1984, in addition to his salary and certain travel advances, a total of \$113,000 in purported loans.

These loans were of a remarkably curious character. The husband testified, in response to questioning from counsel and the Court, that the transactions were negotiated between himself and ALNAI, and he acknowledged that he also represented the company in these negotiations.⁶ The terms of the purported loans were extraordinarily favorable to the husband. He executed no promissory note, pledged no collateral, and was not required to repay ALNAI at any

2. Counsel for one wife advised the Court that judges in effect compel litigants to overstate expenses in this way because they will not award enough support unless a sufficient loss is shown. The Court observed that even if judges were as lacking in fairness as counsel claimed, this would hardly warrant the submission of false documents under oath.

3. The Court routinely asks drug defendants at sentencing, after first warning them not to lie to the Court, when they last used unlawful drugs. With disheartening frequency, they say they have not used drugs since their arrest. The Court then suggests deferring the sentencing to allow them to go to the Pretrial Services Agency for a drug test, and ask the defendant what the test will show. After considerable hemming and hawing, the defendants usually acknowledge smoking a few "joints," often laced with some "lovely" (PCP), a few days earlier. The Court considers their original lack of candor when imposing sentence.

4. Fortunately, the Court has not encountered anything like the case in Milwaukee, Wisconsin in which the police, hunting what they called "niggers" to stop for traffic offenses in order to pad their arrest statistics, shot a young black man dead and then placed a large pocket knife in his hand in order to make it appear that he was armed. See *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

5. At the time of trial, Judge Hamilton found that the husband owned 87% of the stock.

6. Judge Hamilton found that the wife had at one time been an officer of the company but resigned because she was not given information about the business or brought into the decision making and did not wish to be a rubber stamp.

JV 1:

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THE WHITE HOUSE

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October 28, 1985

MEMORANDUM FOR SUSAN NELLOR
DIRECTOR, OFFICE OF LEGAL SERVICES
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
U.S. DEPARTMENT OF JUSTICE

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: FOIA Referral

This is in response to your memorandum of October 23 to Counsel to the President Fred F. Fielding, concerning the FOIA request of Thomas C. Hauser. Your memorandum referred White House correspondence responsive to the request to this office for direct reply to the requester.

The White House Office is not subject to the Freedom of Information Act. For this and other reasons, we do not respond directly to those filing FOIA requests, other than to advise them of the inapplicability of the Act to certain offices in the White House. The usual procedure in the case of White House documents found at other agencies that are responsive to FOIA requests filed at those agencies is for those agencies to refer the documents to us (after processing for possible exemption), to determine if we have any objection to the agency releasing them to the requester.

In this case, we have no objection to your releasing the White House document.