OGC 76-1146
9 March 1976

MEMORANDUM FOR: Deputy Director for Administration

ATTENTION : Mr. John N. McMahon, Associate Deputy Director for Administration

SUBJECT : Request for OGC Opinion by Mr. John McMahon Regarding Possible Violation of 18 U.S.C. § 1905 or 5 U.S.C. § 552a

1. Mr. McMahon requests an opinion from Office of General Counsel as to whether his referral of information consisting of allegations of possible criminal activity by a member of Congress to the FBI may have constituted a violation of the above-cited statutes as suggested by a letter from Representative Robert L. Leggett to Attorney General Levi.

2. It is the opinion of OGC that Mr. McMahon did not violate the Privacy Act [5 U.S.C. § 552a] or 18 U.S.C. § 1905 when Mr. McMahon referred the information he received to the FBI. OGC is further of the opinion that Mr. McMahon may have been under an affirmative obligation to report such allegations to the Department of Justice pursuant to 28 U.S.C. § 535.

3. Mr. Leggett suggests that subsection (b)(7) of the Privacy Act prohibits any release of information to a criminal law enforcement agency unless said agency requests the information in writing and specifies what information they wish to receive. It is clear from the legislative history of the Privacy Act and from the language of the Act that subsection (b)(7) applies only to those cases where a criminal law enforcement agency unilaterally seeks information from other federal agencies. The purpose of subsection (b)(7) is to limit so-called "fishing exhibitions" and/or informal investigative activity undertaken by law enforcement agencies. To accomplish this purpose, the Privacy

Act requires that when such law enforcement agencies, on their own behalf, seek information they are to specify the type of information they need and to formalize the process by making the request in writing, signed by the head of the agency or unit. This section, however, does not absolve government officials of the affirmative duty to report allegations of or evidence of criminal activity to the appropriate law enforcement authority. The guidelines published by the Office of Management and Budget, pursuant to subsection (6) of the Privacy Act, state that while blanket requests from law enforcement agencies for records pertaining to an individual are not permitted

> [a] record may also be disclosed to a law enforcement agency at the initiative of the agency which maintains the record when a violation of law is suspected; provided, That such disclosure has been established as a "routine use" .... [40 F.R. 132, page 28955].

The CIA, in its "Notice of Systems and Records" published in the Federal Register August 28, 1975 [40 F.R. 168, page 39778], has published such notice of "routine use" applicable to all record systems. Further, in the debate on this measure in the House of Representatives, the floor manager of the bill, Congressman William S. Moorhead, explained that

> [i]t should be noted that the "routine use" exception is in addition to the exception provided for dissemination for law enforcement activity under subsection (b)(7) of the bill .... [Congressional Record November 21, 1974, p. H10962].

4. Further, 28 U.S.C. § 535(b) requires that

> [a]ny information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of Title 18 involving Government officials and employees shall be expeditiously reported to the Attorney General by the head of the department or agency ....

Assuming that members of Congress are included within the definition of Government officials or employees, it would appear that Mr. McMahon was under an affirmative obligation to assure that the allegation he received was reported to the Department of Justice.

5. Finally, it would appear that Title 18, section 1905 is inapplicable to this matter. Section 1905 relates to information in the nature of financial records or trade secrets coming to a government agency in the course of official business. The purpose of section 1905 is to prohibit government employees from disclosing confidential financial information to unauthorized parties. It does not appear that a report of an allegation of criminal activity to an authorized law enforcement agency could possibly contravene 18 U.S.C. § 1905.

STATINTL

Assistant General Counsel
Freedom of Information and
Privacy Law Division

Attachments

credit conditions that exist not only in this country, but throughout the world? West Germany has the banking system that perhaps most nearly resembles our own. There is some evidence to suggest that the debacle concerning the collapse of Bankhaus Herstatt was in part due to the lack of coordination between the independent bank regulator and the central bank, the Bundesbank. In our own country, we apparently came perilously close to some major difficulties in the Franklin National Bank episode because of differences between the Federal Reserve and the Comptroller of the Currency.

Finally, it would be the Fed that would be called upon to provide the funds to alleviate any difficulties in the system.

On the other hand, almost daily new fears about the banking system are articulated. It matters not that these expressions are not well-founded. And it is a commentary on our times that reassurances from those in authority tend to aggravate rather than ameliorate. The truth is that the credibility of our banks, our banking system and its regulators have been dealt serious blows. Our banking system, in the final analysis, rests on confidence, and restoration of confidence is the paramount objective.

Therefore, notwithstanding the very valid reasons for allowing the Fed to become the principal regulator, we believe that, on balance, a fresh start is the best path. We endorse the House and Senate proposals that would establish a new federal banking commission, to be composed of five or more independent members appointed by the President and confirmed by the Senate serving staggered terms. We endorse the proposals that would amalgamate all of the regulatory powers now vested in the Fed, the Comptroller of the Currency and the FDIC into this commission.

At the same time, it becomes mandatory that the Federal Reserve and this new agency maintain effective liaison. It is not necessary that governors of the Fed be commissioners of the new agency, but an effective mechanism will have to be created to insure a continuous flow of information and dialogue between both agencies.

Finally, we recommend in the strongest possible terms that the nucleus of the new agency be the current regulatory system and staff now employed at the Federal Reserve.

LETTER TO ATTORNEY GENERAL EDWARD H. LEVI

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from California (Mr. LEGGETT) is recognized for 30 minutes.

Mr. LEGGETT. Mr. Speaker, I have asked for this special order today to simply read into the House RECORD a letter I am sending today to Attorney General Edward Levi concerning the salacious material that appeared in the Washington Post last week:

HOUSE OF REPRESENTATIVES,
Washington, D.C., February 25, 1976.

Hon. EDWARD H. LEVI,
Attorney General, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I regret that neither you nor your Deputy Attorney General Tyler have returned my telephone calls of yesterday. As has been indicated in the press, I was thunderstruck respecting the diabolic charges reported by Maxine Cheshire and the Washington Post last week.

Allegations of bribery are idiotic and false. I have not accepted, have not been offered any cash or thing of value from the Korean government or any representative thereof at anytime.

I did speak to Deputy Attorney General Tyler last Thursday, and he reported to me that the Cheshire article appeared to be excessively melodramatic, that there was an investigation of myself and a number of others that he did not precisely describe, but that I had to recognize that your agency gets all of the b.s. from around the U.S. and that 90 percent of it is just that. Tyler responded when I attributed Justice action solely to Maxine Cheshire as follows: "Not just that, but the C.I.A. and the Church Committee on C.I.A. in the Senate."

I subsequently reviewed that matter with Senator Church and his staff director, Bill Miller, and their counsel, Fritz Swartz. Without quoting verbatim the conversations held with the Senate Committee, it appears that an informant by the name of William Corson, co-editor of Penthouse Magazine, had provided some National Press Club gossip concerning an employee of the House of Representatives and had suggested some far-fetched ideas of his own respecting myself and others. The Senate Committee staff thought the matter bizarre and referred Corson to the C.I.A. and the Justice Department. The Committee staff did report the matter to Deputy Attorney General Tyler, not thinking the matter of particular significance or the Speaker of the House would have been immediately notified.

I subsequently spoke with Mr. William Corson and discovered that he had never been interviewed directly by your Department, but that he had talked to the C.I.A.

While you apparently made your determination to proceed with the investigation at the highest level and on the most sensitive of information, I apparently interviewed your star witness before you had the opportunity. Mr. Tyler did indicate that he would move forward with the investigation with all deliberate speed, recognizing the possible injury to my reputation. I took a ten-page statement from Corson over the telephone, a large portion of which was corroborated by Leo Rennert of the Sacramento Bee. The bottom line was that Corson had no information of any wrong doing on my part. Mr. Corson is a Penthouse editor, and I can understand how his stature demands certain consideration and respect.

I next called the C.I.A. and determined that Corson had given to Mr. John Mc-Mann a similar story to the one he gave the Church Committee, but different than the story he gave to Rennert and myself, that McMann referred Corson to the F.B.I. since a domestic matter was involved. The C.I.A. said through Mr. George Cary, their Legislative Counsel, that they had no file on this matter whatsoever until Corson came in. They denied that they today have a file. The Church Committee has no file. The C.I.A. did pass on to the F.B.I. the Corson material since Corson for some unkown reason did not want to talk to the F.B.I. directly. This last action probably was in violation of Title 18, U.S. Code, Section 1905 and the regulation promulgated thereunder 28 C.F.R. 735 and Title 5, U.S.C.A. 552a.

Based on this information and perhaps other Press Club bar gossip, your agency took action. But the problem is this—before your investigation is even off the ground, it appears that someone in the Department of Justice advised Maxine Cheshire and the Washington Post of your contemplated investigation or the same is solicited by Cheshire and lo and behold, it seems to me we have probably two Federal crimes—the giving and receiving of unauthorized information in violation of your regulations and the Privacy Act.

I know you are concerned with Confidentiality and Democratic Government because I read your article in Vol. 30 N.Y. Bar 323 from last June. You stated:

". . . One reason for confidentiality, for example, is to protect [illegible]

by government if widely disseminated would violate the rights of individuals to privacy. Other reasons for confidentiality in government go to the effectiveness—and sometimes the very existence—of important governmental activity."

". . . Throughout its history our society has recognized that privacy is an essential condition for the attainment of human dignity—for the very development of the individuality we value—and for the preservation of the social, economic, and political welfare of the individual. Indiscriminate exposure to the world injures irreparably the freedom and spontaneity of human thought and behavior, and places both the person and property of the individual in jeopardy."

"As a result, protections against unwarranted intrusion, whether by the Government or the public, have become an essential feature of our legal system."

". . . Confidentiality is thus a prerequisite to the enjoyment of the freedoms we value most. The effective pursuit of social, economic, and political goals often demands privacy of thought, expression, and action. The legal rights created in recognition of that need undoubtedly infringe on the more generalized right of the society as a whole to know. But the absence of these legal rights would deprive our society of the quality we prize most highly."

"The rationale for confidentiality does not disappear when applied to government."

". . . The Supreme Court addressed the point when it said:

'It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations.'"

". . . The rationale for confidentiality in this regard was stated by Attorney General Robert Jackson in 1941 in declining to release investigative reports of the Federal Bureau of Investigation which were demanded by a congressional committee. The Attorney General wrote:

'(D)isclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. . . .'"

". . . Disclosure could infringe on the privacy of those mentioned in the reports and might constitute 'the grossest kind of injustice to innocent individuals.' Mr. Jackson observed that 'investigative reports include leads and suspicions, and sometimes even the statements of malicious and misinformed people,' and that a 'orrection never catches up with an accusation.'"

Now having determined your position on fairness, I would respectfully again call your attention to the following laws:

Title 18, U.S. Code reads as follows:

"Whomever, being an officer or employee of the United States, or of any Department or Agency thereof processes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, or report, or record made to or filed with, such department or agency o officer or employee thereof, which information concerns or relates to the Trades Secrets processes, operations, style of work, or abstracts, or to the identity, confidential statistical data, amount or source of any information, profits, losses, or expenditures of any person, firm, partnership, corporation or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen [illegible] person except by pro-

vided by law; shall be fined not more than $1,000 or imprisoned not more than a year, or both; and shall be removed from office or employment."

The Regulations promulgated thereunder, 28 C.F.R. 45.735, read as follows:

"No employee (Department of Justice) shall use for financial gain for himself or for another person, or make any other improper use of, whether by direct action on his part or by counsel recommendation or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become part of the body of public information."

"Law enforcement investigatory material is not exempt from the restriction on disclosures clause of the statute nor from required accounting provisions. (5 U.S.C. 552a (b); (c)(1), (2); (j)). The restrictions on disclosure clause provides that:

No agency shall disclose any record which is contained in any system of records by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior consent of, the individual to whom the record pertains unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performrance of their duties:

(7) to another agency or to an instrumentality of any governmental jurisdiction ment activity if the activity is authorized States for a civil or criminal law enforcewithin or under the control of the United by law, and if the head of the agency or instrumentality has made a special request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee; (5 U.S.C. 552a (b))

For any disclosures, the agency is required to account for dissemination of any information. (5 U.S.C. 552a(c))

I would particularly call to mind: 5 U.S.C. 552a(i) Criminal Penalties.

"Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that the disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000."

I would respectfully suggest that a person or persons in Justice have committed a high misdemeanor and on more than one occasion in revealing information concerning your investigation.

I am prepared to file whatever affidavits are necessary with respect to the violations of which I am complaining.

Mr. Attorney General, in light of your deep concern for Civil Rights of all citizens, I would like to be advised of the actions which you plan to take to protect my rights after these false allegations have leaked from your Department.

As was said in Othelo: "Good name in man and woman, dear my Lord, is the immediate jewel of their souls; who steals my purse, steals trash; t'is something, nothing, t'was mine, t'is his and has always been slave to thousands, but he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed."

I look forward to an early reply.

Very sincerely,

ROBERT L. LEGGETT,
Member of Congress.

THE FBI AND DOMESTIC INTELLIGENCE ACTIVITIES

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Connecticut (Mr. DODD) is recognized for 10 minutes.

Mr. DODD. Mr. Speaker, the House Judiciary Subcommittee on Civil and Constitutional Rights, on which I have the privilege to serve, has been holding continuing oversight hearings into the domestic intelligence activities of the Federal Bureau of Investigation.

Yesterday, the chief of the General Accounting Office—GAO. Comptroller General Elmer B. Staats, presented to our subcommittee the results of an investigation by his agency into these FBI actions.

I want to take this opportunity to commend Comptroller General Staats and his dedicated staff for the superior professional quality of their report to this subcommittee. They have labored diligently over the past year under difficult circumstances in order to provide us with the first extensively documented analysis of the FBI's domestic intelligence operations.

The details of this report are no longer shocking. Americans are well aware of the illegal activities performed by the Bureau in the past—the Cointelpro Operations; the maintenance of unwarranted files on innocent individuals; and the extensive investigations of persons associated with so-called extremist or subversive groups without a prior determination of an individual's substantial propensity for violence or clear evidence of the "probability" of the commission of a Federal crime.

But these details remain ditsurbing, and this sense is deepened by the extensive evidence provided in the GAO report of poor management techniques and vague, or nonexistent, guidelines for decisionmaking authority within the Bureau regarding these illegal practices.

However, it is my belief that we must not dwell upon the past. It will serve no constructive purpose to continue to discredit the FBI. We must not focus upon the mistakes of the past for that sake alone. Rather we must utilize the lessons of our past experience as a tool for shaping the future of our domestic intelligence operations.

First, Congress must clarify its relationship with the Federal Bureau of Investigation. The Bureau should be provided with specific directives setting forth in detail the types of permissible domes-

requisites for the initiation of these activities. There must exist an unobstructed exchange of information—with appropriate security provisions—between the Bureau and Congress. A balance must be struck between the constitutional responsibility of Congress to exercise oversight on FBI operations and the FBI's central role in fighting crime and protecting our national security.

The refusal by the Department of Justice and the Federal Bureau of Investigation to permit the General Accounting Office, the research arm of Congress, to have even limited access to FBI investigatory files in order to verify their findings for this subcommittee amplifies the distrust which exists between Congress and these agencies—a distrust which may not be wholly without justification. To foster a more productive relationship, Congress must get its own house in order. We must honor the security arrangements made to control the use and dissemination of information shared with Congress, and where such arrangements do not exist we must formulate them without delay.

Furthermore, we cannot expect the Bureau to effectively and efficiently respond to the numerous identical requests for information by several congressional committees. Congress must decide which committee will have primary oversight responsibility for the FBI. The House Judiciary Subcommittee on Civil and Constitutional Rights chaired by my distinguished colleague, Mr. EDWARDS of California, has exercised longstanding legislative oversight responsibility for the Bureau and should be mandated with the sole responsibility for continuing this effort. Only then can Congress effectively carry out its oversight function and at the same time permit the Bureau to focus its attention on a regular working relationship with one committee.

Second, it is essential for Congress to clearly delineate the Attorney General's overall supervisory responsibility for all activities conducted by the FBI. As recently as 2 weeks ago, Attorney General Levi testified before this subcommittee that he would not accept complete and final responsibility for FBI operations. Mr. Levi admitted that as Attorney General he must exercise general supervision over FBI activities but he refused to accept final authority for the scope and direction of all FBI intelligence operations. It is imperative for Congress to crystallize this relationship between the Department and the Bureau. We must know which activities the Attorney General permits the FBI to conduct without direct supervisory control. And we must revise existing statutes to more clearly mandate the Attorney General's responsibility for all the activities conducted by this powerful agency.

Third, the FBI must demonstrate its willingness to cooperate with this reform effort by re-examining its own internal organizational structure and operations. The Bureau must consider measures which go beyond a limitation on the Director's tenure. They should evaluate the existing method of training FBI agents and examine changes which should be made in the manual of instruc-

§ 535. Investigation of crimes involving Government officers and employees; limitations

(a) The Attorney General and the Federal Bureau of Investigation may investigate any violation of title 18 involving Government officers and employees—

(1) notwithstanding any other provision of law; and

(2) without limiting the authority to investigate any matter which is conferred on them or on a department or agency of the Government.

(b) Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of Title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

(c) This section does not limit—

(1) the authority of the military departments to investigate persons or offenses over which the armed forces have jurisdiction under the Uniform Code of Military Justice (chapter 47 of title 10); or

(2) the primary authority of the Postmaster General to investigate postal offenses.

Added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 616.

Historical and Revision Notes

Reviser's Notes

Derivation: **United States Code** 5 U.S.C. 311a

Revised Statutes and Statutes at Large Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998.

Explanatory Notes.

The section is reorganized for clarity and continuity.

In subsection (a), the word "may" is substituted for "shall have authority". The word "is" is substituted for "may have been or may hereafter be".

In subsection (c), the words "This section does not limit" are substituted for "that the provisions of this section shall not limit, in any way". The words "(chapter 47 of title 10)" are added after "Uniform Code of Military Justice" to reflect the codification of that Code in title 10, United States Code.

Library References

Attorney General ⇐6.
United States ⇐10.

C.J.S. Attorney General §§ 5, 6.
C.J.S. United States §§ 38–40.

Notes of Decisions

1. Purpose

Even if special legislation might empower court to force prosecutions in some circumstances this section pertaining to investigation of crimes involving government officers and employees disclosed no congressional intent to alter traditional scope of Attorney General's discretion so as to permit federal court to order prosecution. Powell v. Katzenbach, 1965, 359 F.2d 234, 123 U.S.App.D.C. 250, certiorari denied 86 S.Ct. 1341, 384 U.S. 906, 16 L.Ed.2d 359, rehearing denied 86 S.Ct. 1584, 384 U.S. 967, 16 L.Ed.2d 679.

CENTRAL INTELLIGENCE AGENCY

Privacy Act of 1974

Notice of Systems of Records

Notice is hereby given that the Central Intelligence Agency in accordance with 5 U.S.C. 552a(e)(4) and (11), Section 3 of the Privacy Act of 1974 (Public Law 93-579), proposes to adopt the notice of systems of records set forth below. Any person interested in this notice may submit written data, views, or arguments to the Privacy Act Coordinator, Central Intelligence Agency, Washington, D.C. 20505, on or before September 15, 1975. All written comments received from the public through such date will be considered by the Central Intelligence Agency before adopting a final notice.

Effective date. This notice shall be effective August 28, 1975.

Dated: August 21, 1975.

JOHN F. BLAKE
Deputy Director for Administration

STATEMENT OF GENERAL ROUTINE USES

The following routine uses apply to, and are incorporated by reference into, each system of records set forth below.

1. In the event that a system of records maintained by the Central Intelligence Agency to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, state, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

2. A record from this system of records may be disclosed, as a routine use, to a Federal, state or local agency maintaining civil, criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to a Central Intelligence Agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, or the letting of a contract.

3. A record from this system of records may be disclosed, as a routine use, to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

4. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.

TABLE OF CONTENTS

CIA—1.

System name: Applications Division Tracking System.

System location:

Central Intelligence Agency
Washington, D.C. 20505.

Categories of individuals covered by the system: Agency and contract employees, employees of contractor supporting Office of Joint Computer Support, currently or formerly assigned to computer software development or maintenance projects in Application Division.

Categories of records in the system: Documentation of hours logged on each assigned programming or overhead project.

Authority for maintenance of the system: Section 506(a), Federal Records Act of 1950 (44 U.S.C., Section 3101).

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: Used by Application Division staff for periodic reporting to Applications Division management man-hours expended to develop assigned programming projects and overhead hours. Used for tracking the usage and scheduling of all resources for developing software.

Used to substantiate hours spent by contractor personnel on billable contractual activity.

Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the sytem:

Storage: Magnetic disk.

Retrievability: Name and employee number.

Safeguards: Limited to specifically designated and cleared personnel.

Retention and disposal: Records are erased when hours of activity are no longer needed by management.

System manager(s) and address:

Director, Office of Joint Computer Support
Central Intelligence Agency
Washington, D.C. 20505.

Notification procedure: Individuals seeking to learn if this system of records contains information about them should direct their inquiries to:

Privacy Act Coordinator
Central Intelligence Agency
Washington, D.C. 20505