

OGC 81-05487
30 June 1981

MEMORANDUM FOR: Deputy Director for Administration

FROM: Stanley Sporkin
General Counsel *M*

SUBJECT: Paperwork Reduction Act of 1980,

1. In December 1980, then-President Carter signed into law the Paperwork Reduction Act of 1980, Pub. L. No. 96-511. The effective date of the Act is 1 April 1981. Attached for your information is an analysis of that Act prepared by this Office for use by relevant Agency components.

2. As indicated by the length of the analysis, the Act itself is quite lengthy and detailed. Its more important provisions may be summarized as follows. The Act vests certain powers in the Director, Office of Management and Budget, and imposes reciprocal duties upon all agencies of the federal government. Essentially, the Director, OMB's powers are of an oversight nature in the areas of general information policy, information collection, records management, privacy protection and automatic data processing and telecommunications. The main purpose of the Act is to alter the federal agency regulatory scheme so as to invest the Director, OMB, with some degree of authority over the promulgation of regulations which seek to obtain information from the public at large.

3. Although the Agency is generally subject to the Act, the Agency will not be substantially affected by it since the Agency has relatively little involvement in the areas addressed by the Act. Further, there are two extremely important areas in which the Agency may be said to be completely exempt from the Act: "collection of information" and "automatic data processing and telecommunications equipment." To the extent that the Agency is effected by the Act, however, most of the effects will occur within your Directorate.

4. Finally, the powers which the Act vests in the Office of Management and Budget are made subject to this Agency's duty to protect intelligence sources and methods and other Agency information. The Act also provides for a review by OMB of certain Agency information systems but, again, this is subject to the Agency's duty to protect sources and methods.

5. I would also note that the actual extent of the OMB's power will depend on the regulations which are adopted under the Act and how OMB chooses to enforce those regulations. Any problems which may be presented by the Act would be minimized through our involvement in these two areas.

6. Finally, I note that Section 3506(b) of the Act requires the agency head to appoint an individual to oversee the agency's responsibilities under the Act and also requires that individual to be the individual who has responsibility for the delegation of procurement authority from the General Services Administration under the Brooks Act. Since most of the Agency's powers and duties under the Act will be exercised by components of the Directorate of Administration, it seems most appropriate that the occupant of a DDA position be named as designee.

7. The Agency (in the person of former Director Bush) has received a delegation of procurement authority from GSA under the Brooks Act and that delegation, in turn, has been delegated to the Director of the Office of Logistics (O/L). Since the person designated under Section 3506(b) would have a wide variety of powers and duties, however, most of which go beyond just procurement, no one position under the Deputy Director for Administration (DDA), including the D/O/L, would seem to have the capacity to manage the designation. In view of this, it seems that you, as DDA, would be the best person for the designation. Your position as Deputy Director meets the requirement of Section 3506(b) that designee have direct access to the agency head. Further, the requirement that the designee have an agency's Brooks Act delegation may be met by appropriate redelegation of this authority by the DCI from the D/O/L to you. You, of course, could make suitable redelegations of powers and duties as appropriate. Therefore, on the assumption that the Director may wish to designate you as responsible under Section 3506(b), I have prepared the necessary papers for his signature. You may wish to contact him directly to discuss the matter. Please remember that pursuant to the Act, this designation must be made on or before 1 July 1981.



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MEMORANDUM FOR: Legislative Counsel
Special Support Assistant, DDA
Director, Office of Information Services, DDA
Information Handling Systems Architect, DDA
Chief, Information Management Staff, DDO
Records Management Officer, NFAC
Chief of Support, DDS&T
Director, Office of Data Processing

FROM: Stanley Sporkin
General Counsel

SUBJECT: Analysis of the Paperwork Reduction Act of 1980

1. This memorandum is to advise you concerning the effects of the Paperwork Reduction Act of 1980, Pub.L. No. 96-511, upon the Agency and those portions of its operations which fall within the jurisdiction of your Office. In order that the specific effects might be more easily determined, I ask that you direct your attention to the request for information made in Part V below.

I. INTRODUCTION

The Paperwork Reduction Act amends Title 44 of the United States Code by adding a new Chapter, Chapter 35. Section 3504 of the Act (Authority and functions of the Director) vests the Director, Office of Management and Budget (OMB), with certain powers vis a vis the various federal agencies in the areas of: information policy, subsection (b); information collection, subsection (c); statistical policy, subsection (d); records management, subsection (e); privacy, subsection (f); automatic data processing and telecommunications, subsection (g); and other miscellaneous related duties. Section 3506 of the Act (Federal agency responsibilities) imposes reciprocal duties upon the various federal agencies: compliance with policies, principles, standards and guidelines prescribed by the Director, OMB, subsection (a); designation of senior agency official responsible for compliance, subsection (b); inventory of information systems and review of information management activities, subsection (c)(1); avoidance of system overlap, subsection (c)(2); assessment of paperwork burden of proposed legislation, subsection (c)(3); and assignment of Brooks Act delegation to agency official designated in subsection (b).

The Agency fits within the definition of "agency" as contained in Section 3502(1). Hence, as a general rule, it falls within the provisions of the Act. Accordingly, it is required to assume the duties placed upon federal agencies by Section 3506 and to comply with exercises of authority by the Director, OMB, under Section 3504.

The main purpose of the Act, however, is to insert the Director, OMB, into the process whereby federal agencies issue regulations requiring the provision of information to them by the general public. Since the Agency is not involved in the issuance of such regulations, it will not be greatly affected by the Act. Further, the Act contains a number of provisions, discussed below, which will limit its effect on the Agency.

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The actual extent of the powers and duties of the Director, OMB, and their effect upon the Agency will depend upon the rules, regulations, policies and standards promulgated under Section 3504. Hence, detailed analysis of the powers and duties must await the actual promulgation of rules, etc. At the time of their promulgation, this Office, in conjunction with the Agency official appointed under Section 3506 of the Act, will review them in detail to determine their effect upon the Agency. Should you have any questions concerning a specific rule, etc., please contact this Office.

II. COLLECTION OF INFORMATION

There are two extremely important exceptions to the above-noted general rule of Agency coverage under the Act. The first is in the area of collection of information and the second is in the area of automatic data processing.

"Collection of information" is defined by Section 3502(4) as follows:

(4) the term 'collection of information' means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods of calling for either--

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities or employees of the United States which are to be used for general statistical purposes;

As noted above, Section 3504(c) vests the Director with certain powers regarding "collection of information" by federal agencies. A reciprocal duty is imposed upon federal agencies by Section 3506. Sections 3507, 3508, 3509, 3510, 3511 and 3504(h) establish a system whereby the Director is inserted into and controls, to a certain extent, the process of a federal agency's collection of information.

Section 3518 of the Act, however, provides a number of exceptions to these provisions. Subsection (c)(1)(D) of Section 3518 provides:

(c)(1)...(T)his chapter (Chapter 35) does not apply to the collection of information

* * *

(D) during the conduct of intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978 or successor orders or during the conduct of cryptologic activities that are communications security activities.
(emphasis added)

In contrast to the language of Section 3518 (c)(1)(D), however, Section 4-206 of Executive Order 12036, in fact, does not define the term "intelligence activities." Instead, it defines the term "intelligence" and it defines that term as

"foreign intelligence and counterintelligence." Given this ambiguity, resort must be had to the legislative history of the Act to determine what the Congress intended to be the scope of the exception created by the use of the phrase "intelligence activities."¹

When it was originally introduced as H.R. 6410, the Act did not contain this exception for "intelligence activities." The phrase was added subsequently by the Committee on Governmental Affairs of the Senate. The language of the

^{1/} At first glance, the phrase "intelligence activities" might be thought of as encompassing those activities described by subsection (D) as "cryptologic activities that are communications security activities." As noted in the text, however, section 4-206 of the Executive Order does not define "intelligence activities;" instead, it defines "intelligence." Moreover, a literal reading of the definitions of the terms "foreign intelligence and counterintelligence," terms which the Executive Order uses to define the term "intelligence," would appear to exclude "personnel, physical, document, or communication security programs" from the scope of the term "intelligence." Therefore, it could be argued that a specific exemption in the Act for "cryptologic activities that are communications security activities" was necessary to insure that such "communications security" activities would not be covered by the Act. If this argument were accepted, the lack of a specific exemption for "personnel, physical, document ... security programs" would strongly imply that activities related to such programs are covered by the Act. However, the ambiguity in the scope of the exemptions for both "intelligence activities" and "cryptologic activities" is sufficient enough to require an examination of the pertinent legislative history. An examination of that history indicates that Congress intended "intelligence activities" to be construed broadly and that Congress did not intend by creating a specific exemption for "cryptologic activities," to narrow the scope of activities exempted by the "intelligence activities" exemption. By use of the phrase "cryptologic activities" that are communications security activities, Congress intended to create an exemption, in addition to any other exemption, for the activities of the National Security Agency.

exception was suggested by the Secretary of Defense and the Acting Director of Central Intelligence in letters to Senators Jackson and Chiles. In their letters, the Acting Director and the Secretary expressed concern that without these amendments, H.R. 6410 could have an adverse effect upon the nation's intelligence effort and suggested that in order to avoid this, the Committee adopt amendatory language, inter alia, creating an exception for "intelligence activities."

In its report, the Committee stated as follows in regard to these concerns.

The Committee unanimously adopted every amendment recommended by the Secretary and Director. The recommended report language accurately depicts the Committee's intent behind the amendments.

The Committee wants to make clear it intends that the Paperwork Reduction Act not affect adversely intelligence or national security missions. The recommendations of the Secretary of Defense and Director of the Central Intelligence Agency were incorporated into S. 1411 and its accompanying Committee report to ensure that the scope of the Brooks Act is not expanded and national security and intelligence missions are not adversely affected by provisions of the Paperwork Reduction Act. S. Rep. No. 96-930 19.

The Committee's actions in this regard are reflected in its amendments to the bill and in that portion of Part VII of the Report which analyzes Section 3518. S. Rep. supra, 56.

After reviewing all of the above, it is my opinion that the Congress, in using the phrase "intelligence activities" in Section 3518(c)(1)(D), intended to exclude from the requirements placed by the Act upon the "collection of information" those activities by agencies in the intelligence community which are related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities". This broad reading is strongly supported by the above-quoted language of the Senate Committee report. Further, nothing can be found in the legislative history which suggests Congress intended a narrower reading.²

^{2/} Had the Congress intended to create a narrower exception, perhaps it would have used the word "intelligence" in place of the phrase "intelligence activities."

Accordingly, insofar as the Agency engages in "collection of information" activities as defined in Section 3502(4), these activities are all exempt from the restrictions otherwise imposed by the Act since they are "related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities." Further, in view of this exemption, the Agency is also exempt from those other sections of the Act which establish the information collection system and prescribe how it shall function. These sections include: Section 3504(h) (rulemaking system for rules involving collection of information); Section 3507 (Public information collection activities--submission to Director; approval and delegation); Section 3508 (Determination of necessity for information; hearing); Section 3509 (Designation of central collection agency); Section 3510 (Cooperation of agencies in making information available); and, Section 3511 (Establishment and operation of Federal Information Locator System).

It would seem, in fact, that to the extent the Agency engages in any activities involving the "collection of information," they are all "related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities" and, hence, would be exempt from the provisions of the Act. If, however, there exists a specific collection activity which you believe is not related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities, please bring it to my attention.³

3/ Section 3512 of the Act provides that no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981 and does not display a current control number assigned by the Director or fails to state that such request is not subject to the Act. As noted above, due to the exception created by Section 3518(c)(1)(D), virtually no collection of information by the Agency would be subject to the Act. Further, to the best of my knowledge, there are no Agency forms for which a person is subject to a penalty under law for failure to complete. Hence, this provision has a negligible effect on the Agency.

III. AUTOMATIC DATA PROCESSING EQUIPMENT

As noted above, Section 3504(g) vests the Director with various powers regarding the use of automatic data processing and telecommunications equipment by federal agencies. Section 3506 imposes reciprocal duties upon federal agencies.

Section 3502(2) of the Act, however, creates an exception to these provisions as follows:

"(2) the terms 'automatic data processing,' 'automatic data processing equipment' and 'telecommunications' do not include any data processing or telecommunications system or equipment, the function, operation or use of which --

"(A) involves intelligence activities; (or)

* * *

"(E) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing or telecommunications equipment used for routine administrative and business applications such as payroll, finance, logistics and personnel management (emphasis added);

As regards subsection (2)(A), the term "intelligence activities" is not defined by the Act, and, as noted above, Executive Order 12036 defines "intelligence," not "intelligence activities." Hence, it is again appropriate to resort to the Act's legislative history in order to determine meaning of the phrase "intelligence activities" and the scope of the exclusion created thereby.

This provision was not contained in H.R. 6410 as originally introduced nor was it in the version of S. 1411 as reported to the full Senate by the Committee on Governmental Affairs. It was inserted in the bill by way of amendment on the Senate floor. At the time of the amendment's introduction, the principal sponsors, Senators Jackson and Chiles, discussed, on the Senate floor, the purpose behind the amendment. 126 Congressional Record, S. 14688 (1980).

A review of that discussion indicates that the purpose of the amendment was to create an exception to the Act's

procedures for agencies in the intelligence community. This exception was created, inter alia, to safeguard information concerning this equipment from unauthorized disclosure.

Given the above, it is my opinion that in using the phrase "intelligence activities" in Section 3502(2)(A), the Congress intended to create an exception to the Act's procedures for ADP equipment, the function, operation or use of which involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities. This interpretation is consistent with the meaning assigned to the phrase as used in Section 3518(c)(1)(D) (discussed above in Part II) as well as with the announced Congressional intention of protecting intelligence community ADP equipment information from unauthorized disclosure. Accordingly, insofar as the Agency has "automatic data processing equipment, the function, operation or use of which involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities", that equipment and information concerning it is excluded from coverage by the Act. This exemption would include an exemption for any such equipment from coverage by any rules, regulations, policies or procedures promulgated by the OMB pursuant to the authority of the Director, OMB as contained in Section 3504(g) of the Act.

It would seem that, in fact, the function, operation or use of all or substantially all of the Agency's ADP equipment involves activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities. Hence, all or substantially all of this equipment would fit within the exemption created by Section 3505(2). If, however, you have questions concerning a particular ADP system, please contact me.⁴

^{4/} Despite the above conclusion, the Agency remains subject to the Federal Information Processing Standards Publications (FIPS PUBS) for ADP equipment which are promulgated by the Department of Commerce pursuant to the Section 111 of the Federal Property and Administrative Services Act, 40 U.S.C. §759, referred to as the Brooks Act, and to Executive Order 11717. The Paperwork Reduction Act contains a number of provisions which make it clear that the passage of that Act in no way affected the provisions of the Brooks Act. This conclusion is also supported by extensive portions of the legislative history of the Paperwork Reduction Act. I also note that the Act does not increase or decrease the authority of the Director, OMB in this area.

As regards subsection (2)(E), the exemption created thereby appears to refer to those systems and equipment which are not usually used for military or intelligence missions but which may be called upon, from time to time, to perform such missions. It provides that in such instances if the function, operation or use of the system or equipment is critical to the direct fulfillment of such a mission, then that system is exempt from the ADP provisions of the Act. While it is not clear from the language of the Act or the legislative history, it appears that this exemption was directed at "intelligence-related activities," i.e., those specialized intelligence activities conducted by offices within the Department of Defense for the collection of specialized intelligence through reconnaissance programs. Cf. Executive Order 12036, Section 1-1203. In any event, however, as noted above, all Agency ADP is, in fact, used for "intelligence activities" and thus would fall within the exception created by subsection (2)(A). Hence, no resort to subsection (2)(E) would be required.

IV. DESIGNATION OF SENIOR AGENCY OFFICIAL FOR COMPLIANCE

Subsection (b) of Section 3506 provides that the head of each agency shall designate, no later than July 1, 1981 (three months after the Act's effective date of April 1, 1981), a senior official to carry out the agency's responsibilities under the Act. This official must report directly to the agency head and, if the agency has received a delegation of authority under Section 111 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §759, known as the Brooks Act, the official must be responsible for acquisitions made under that delegation.

Accordingly, no later than July 1, 1981, the Director of Central Intelligence must appoint an Agency employee to assume the duties established by Section 3506(b). Further, as you know, the Agency currently is operating under a Brooks Act delegation from the General Services Administration. This delegation was made to the Director and he, in turn, delegated it to Director, Office of Logistics. Accordingly, in making his appointment, the Director of Central Intelligence either must appoint Director, Office of Logistics, to the position or, if he chooses to appoint another individual, he must simultaneously reassign responsibility for the Brooks Act delegation to that individual. The Director of Central Intelligence is being advised of this by separate memorandum.

V. PARTICULAR AGENCY DUTIES

As noted above, the actual scope of Agency duties under the Act will depend upon the substance of the rules promulgated by the Director, OMB. Section 3506, however, imposes several duties upon the Agency independent of any promulgations by the Director, OMB. Those are: to systematically inventory its major information systems; to periodically review its information management activities, including planning, budgeting, organizing, directing, training, promoting, controlling and other activities involving the use and dissemination of information;⁵ to ensure information systems do not overlap; and, to develop procedures for assessing the paperwork and reporting burden of proposed legislation affecting the Agency.

~~These requirements seem to be consistent with sound management practices and would appear to impose little in the way of additional administrative burden. Further it would seem that the Agency already may have procedures which could be viewed as meeting these obligations. In order to determine what, if anything, additionally needs to be done under this Section, however, I would ask that each addressee provide this Office with information concerning what current procedures of his office could be said to meet these obligations. We will then proceed, in conjunction with the official appointed under Section 3506(b), to determine what, if any, additional steps need to be taken.~~

VI. SELECTIVE REVIEW AND ASSIGNMENT OF TASKS

Section 3504(b)(5) of the Act vests the Director with the power to evaluate "agency information management practices to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director." Subsection (a) of Section 3504 provides, however, that the Director's authority under Section 3504 "shall be exercised consistent with applicable law." Hence, as noted in the Introduction, in exercising this authority vis a vis the Agency, the Director must do so in a manner which is consistent with both the statutory responsibility of the Director of Central Intelligence to protect sources and methods of intelligence and the statutory exemption from disclosure of information relating to Agency personnel.

^{5/} These duties are also imposed in regard to the collection of information. The Agency is not subject to this aspect of these duties, however, due to the exception created by Section 3518(c)(1)(D). See Part II, above.

To implement his evaluation authority, Section 3513 of the Act requires that the Director, OMB, selectively review, at least once every three years, the information management activities of each agency for the purpose of evaluating their adequacy and efficiency with particular regard to compliance with Section 3506. It further states that the results of these reviews shall be provided to the Congress and, thereafter, that the agency involved shall transmit to the Congress a response to that report.

I note the following in regard to the exercise of this review power. Since this selective review is an exercise of the Director's more general power contained in Section 3504 to evaluate agency practices, it is therefore subject to the condition, placed upon the exercise of that power by subsection (a) of Section 3504, that it be exercised consistent with applicable laws. The "applicable law," in the instance of a selective review, would be the aforementioned statutory duty of the Director to protect sources, methods, and Agency personnel information from disclosure. Further, as regards the provision of the results of the review to Congress as called for by subsection (b) of Section 3513, an additional "applicable law" would be Senate Resolution 400 (94th Congress) and House Resolution 658 (95th Congress), which inter alia, establish a special relationship between the Agency and its congressional oversight committee. Hence, the provision of the results of this review to Congress would have to be in a manner consistent with these resolutions. At the time this Agency is made the subject of a selective review, this Office will work with the OMB to ensure the review is conducted and subsequently handled in the manner consistent with these provisions.

Section 3505(2)(A) concerns audits of major information systems. Under this section, the Director, OMB, is charged with establishing, within a year after 1 April 1981, standards and requirements for agency audits of major information systems under an agency's jurisdiction. In addition to providing guidance relating to the conduct of audits by individual agencies of major information systems under their jurisdiction, the Director, OMB, is also required by Section 3505(2)(A) to assign responsibility for the conduct of Government-wide or multiagency audits, presumably to an agency with the expertise and capability to conduct broadscale audits, such as the General Accounting Office. However, Section 3505(2)(A) explicitly provides that major information systems used for the conduct of "intelligence activities," as defined in section 4-206 of Executive Order

12036, shall not be included in any Government-wide or multiagency audit conducted by any agency pursuant to an OMB assignment.⁶ Again, as in Sections 3518(c)(1)(D) and 3502(2)(A), the phrase "intelligence activities" is used and, again, as in those sections, the phrase does not coincide with a term actually defined in Executive Order 12036.

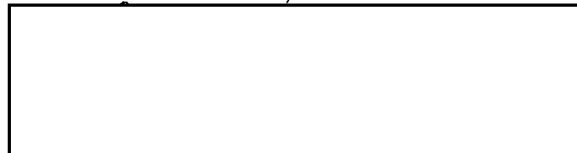
It is my opinion that the phrase "intelligence activities" may be interpreted as meaning "activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities". This interpretation is consistent with the meaning assigned to the phrase as used in Sections 3518(c)(1)(D) and 3502(2)(A) (see Parts II and III above) and is strongly supported in the legislative history of the Act. Hence, the caveat regarding assignability which is set forth in Section 3505(2)(A) applies to major information systems used for the conduct of activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities.

Since virtually all of the Agency's systems appear to be used for the conduct of activities related to the collection of information concerning activities such as foreign intelligence, counterintelligence, covert action and security activities, the caveat on assignability would exempt all Agency systems from inclusion in any Government-wide or multiagency audit assigned by OMB under Section 3505(2)(A). Thus, while the Agency must follow the general standards and requirements promulgated by OMB as guidance for the conduct of individual agency audits, the Agency is exempt from any Government-wide or multiagency audits conducted pursuant to any assignment made by OMB under Section 3505(2)(A). Please note that this exemption from OMB assigned audits does not affect in any way the authority of the Director, OMB, under Sections 3505(b)(5) and 3513, to evaluate major information systems through selective review on a Government-wide or individual agency basis.

^{6/} It should also be noted that under Section 3519 of the Act and the Budget and Accounting Act of 1921, as amended by the General Accounting Office Act of 1980, P.L. 96-226, the Director, OMB, would be precluded from releasing Agency information, gained in the course of a review under Section 3513 to the General Accounting Office in an audit by that office of the OMB.

I hope that the above will answer all questions you may have concerning the Act. I look forward to receiving your responses in regard to Part V. Should you have any questions, feel free to contact me or of my staff.

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