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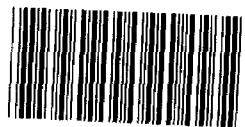
United States  
General Accounting Office  
Washington, D.C. 20548

General Government Division

B-233631

May 13, 1993

The Honorable Gary A. Condit  
Chairman, Government Information, Justice,  
Transportation and Agriculture Subcommittee  
Committee on Government Operations  
House of Representatives



149269

Dear Mr. Chairman:

This letter responds to the Subcommittee's request that we determine if the Department of Justice (DOJ) acted in accordance with applicable procedures in providing documents to former Attorney General Richard Thornburgh after he left office in August 1991.

To make this determination, we interviewed Mr. Thornburgh's private archivist and the DOJ records managers who handled Mr. Thornburgh's documents. We also reviewed a sample of Mr. Thornburgh's documents to determine if they contained classified or sensitive information. In addition, we reviewed DOJ policies and federal regulations on removal of documents by former employees. We did our work during March and April 1993 in Washington, D.C., and Pittsburgh.

MATERIALS PROVIDED TO MR. THORNBURGH

In December 1992 and January 1993, DOJ provided Mr. Thornburgh 102 boxes of materials relating to his position as Attorney General.<sup>1</sup> According to DOJ, the 102 boxes consisted of 11 boxes of original documents, 89 boxes of copied documents, and 2 boxes of microfilm. DOJ records managers said that they did not keep the 11 boxes of original documents because these documents were determined to be either personal, which the Department had no right to

<sup>1</sup>In addition to the 102 boxes of materials, DOJ records managers said that Mr. Thornburgh took 156 boxes of personal and nonrecord material in September 1991, one month after he left the Department. Records managers said DOJ did not incur the costs of shipment.

GAO/GGD-93-39R Thornburgh Papers

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keep, or nonrecord documents.<sup>2</sup> They also said that the microfilm was copied from official Attorney General files maintained by the DOJ Executive Secretariat. DOJ officials said that they had provided a microfilmed copy of official Attorney General files to departing Attorneys General since 1988.

DOJ shipped the 102 boxes of materials to Business Records Management, a private records storage facility in Pittsburgh, where they are now stored. The original documents of the 89 boxes of copied material that were provided to Mr. Thornburgh are in the main DOJ headquarters building in Washington, D.C., and are awaiting processing by DOJ records managers before being transferred to the Washington National Records Center in Suitland, MD.

DOJ records managers said that Mr. Thornburgh initially sought to remove 100 boxes of original documents and provide DOJ with copies, in addition to the two boxes of microfilmed material. However, DOJ decided that the Department should retain the originals and give Mr. Thornburgh the copies.<sup>3</sup> Current DOJ officials were unable to identify who decided that the Department should retain the originals because they said that the officials involved in making this decision are no longer employed by DOJ and there is no documentation of the decision.

The 89 boxes were copied by the Federal Bureau of Investigation (FBI) and DOJ at a cost of \$27,829, according to DOJ and FBI records managers. The FBI charged DOJ

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<sup>2</sup>Federal records are documentary materials that are made or received by any agency under federal law or in connection with transacting public business and preserved as evidence of agency activities or because of the value of the information they contain. Government-owned documentary material that does not meet the criteria is commonly called nonrecord material. The Federal Records and Disposal Acts do not govern the removal of nonrecord materials. Senior agency officials who have agency permission legally can take nonrecord materials with them after leaving office.

<sup>3</sup>DOJ order 2710.8, dated May 27, 1977, allows departing employees to receive copies of documents that are not specifically precluded under the order, such as official records and classified information.

\$20,606 to copy 70 boxes of documents, including paper and overtime pay for copying 53 of the boxes. According to the FBI, it took about 9 staff hours to copy the contents of each box. DOJ spent \$7,223 to copy the contents of the remaining 19 boxes. In addition, DOJ said that the 2 boxes of microfilmed material, consisting of 149 reels of microfilm, cost the Department \$1,404.<sup>4</sup> Mr. Thornburgh paid for shipping the 102 boxes to Pittsburgh. DOJ did not ask Mr. Thornburgh to pay any of the costs for copying the materials. DOJ records managers said there is no DOJ policy or National Archives and Records Administration (NARA) regulation requiring departing officials to pay for copies of documents they receive. Current DOJ officials were unable to identify who decided that Mr. Thornburgh would not have to pay for the copying and the reasons for the decision. Current officials said those officials involved in making that decision are no longer employed by DOJ and there is no documentation of the decision.

DOJ DID NOT SCREEN RELEASED MATERIALS

The Subcommittee asked us to determine whether any of the materials that DOJ gave to Mr. Thornburgh contained classified information, records subject to the Privacy Act of 1974, or sensitive law enforcement investigatory materials. According to DOJ records managers, no classified documents were provided to Mr. Thornburgh. They said classified documents are maintained separately and are not to be commingled with other documents, making them easier to identify. However, DOJ records managers said that since they did not screen the materials for sensitive documents, which were commingled with other documents, they thought that some sensitive information could have been given to Mr. Thornburgh. The records managers said the two boxes of microfilmed official Attorney General files, for example, did contain sensitive information. DOJ officials said they did not screen the materials for sensitive documents because guidance from the Department and from NARA is unclear about what constitutes such information and Mr. Thornburgh's staff wanted the materials removed soon after the November 1992

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<sup>4</sup>DOJ said that in estimating the \$1,404 cost of microfilming files, it only included the incremental materials costs because these files were already being microfilmed for DOJ purposes and labor costs for making an additional copy for the departing Attorney General would be minimal.

election. DOJ records managers said they lacked the resources to identify such information between October 1992 and December 1992.

Before DOJ gave Mr. Thornburgh the 102 boxes of materials, Mr. Thornburgh stated in a September 3, 1992, letter to the Department that

"In return for the release of these documents, I promise and agree not to disclose any privileged information which is contained in the documents, including, without limitation, any information which is covered by Rule 6(e) of the Federal Rules of Criminal Procedure or by the Privacy Act, or which constitutes tax return information. Further, I certify that I have not removed any classified documents from the Justice Department."<sup>5</sup>

Mr. Thornburgh's private archivist in Pittsburgh said that any access to the materials would be granted only with Mr. Thornburgh's permission. The archivist also said that as of April 15, 1993, no one except GAO had asked to review the documents.<sup>6</sup>

Federal regulations regarding the removal of nonrecord material, (such as extra copies of official documents) contained in 36 C.F.R. 1222.42 (c), state that

"[a]gencies shall ensure the appropriate protection of nonrecord material containing information which is restricted from release under the Privacy Act or other statutes, when such restricted nonrecord material is removed from Government agencies."

According to DOJ records managers, the Department's protection regarding the materials in Pittsburgh is Mr.

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<sup>5</sup>Rule 6(e) of the Federal Rules of Criminal Procedure pertains to safeguarding the confidentiality of grand jury testimony.

<sup>6</sup>On March 16, 1993, we asked Mr. Thornburgh for permission to inspect the boxes stored in Pittsburgh. His archivist allowed us to inspect the material on April 15, 1993.

Thornburgh's September 3, 1992, agreement not to disclose any privileged information. DOJ officials said that they had not visited the Pittsburgh storage facility to check the adequacy of the security, but they had met with Mr. Thornburgh's archivist and were assured that the materials would be adequately protected.

OUR REVIEW OF DOCUMENTS

We judgmentally sampled seven boxes of the materials given to Mr. Thornburgh for detailed examination. We chose the seven boxes from an index of file folders with labels that suggested some of their contents might contain classified or sensitive material. For example, some of the folders we selected were labeled "Iran-Contra," "Marcos Indictment," and "Inslaw." Of these seven boxes, we reviewed both DOJ's originals in Washington, D.C., and Mr. Thornburgh's copies in Pittsburgh to determine whether any documents were marked classified or sensitive. We also checked whether Mr. Thornburgh had received any original documents in the seven boxes.

Our review disclosed no documents marked classified, but 31 documents were marked "sensitive" and "limited official use." These documents pertained primarily to law enforcement investigations. For instance, we found (1) reports regarding a former Member of Congress that were prepared to determine whether to appoint an independent counsel; (2) files regarding the status of criminal cases, including an organized crime figure; (3) memoranda regarding international drug enforcement; and (4) files on the leak of information from the Department.

DOJ Order 2710.8 prohibits former employees from removing

"[d]ocuments containing information which might reveal or prejudice the conduct of civil or criminal enforcement proceedings or litigation involving the interests of the United States or information which falls within the attorney-client privilege of the United States . . . ."

The order allows employees to request an exemption from its requirements by making a request in writing to DOJ. DOJ's position is that Mr. Thornburgh's September 3, 1992, letter constitutes such a request and that by releasing copies of his papers, DOJ granted the exemption.

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Included with Mr. Thornburgh's copies, we also found three file folders that contained nonsensitive original material, which should have been retained by DOJ. According to Mr. Thornburgh's private archivist, the three file folders could have been inadvertently mistaken for copies and included in Mr. Thornburgh's boxes when they were copied by DOJ or FBI.

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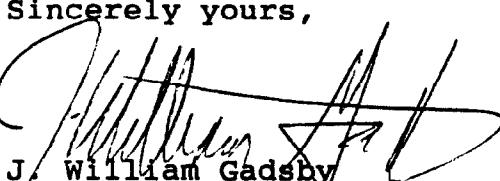
AGENCY COMMENTS

When we discussed the issues in this letter with senior DOJ records officials on April 28, 1993, they said that the Department's guidance on the removal of documents by former employees is being revised because it is unclear. They also said that some of the documents that we reviewed may have been marked "sensitive" incorrectly or may no longer be sensitive. They generally agreed with our facts and made some clarifications that we incorporated where appropriate.

As arranged with the Subcommittee, unless you publicly announce the contents of this letter earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Attorney General and Mr. Thornburgh. We will also make copies available to other interested parties upon request.

If you have any questions, please call me on (202) 512-8387. Other major contributors to this letter were John S. Baldwin, Sr., Assistant Director, and Robert Homan, Evaluator-in-Charge.

Sincerely yours,



J. William Gadsby  
Director, Government Business  
Operations

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GAO/GGD-93-39R Thornburgh Papers