



B-192406

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December 1, 1978

The Honorable Newton I. Steers, Jr.
House of Representatives

Dear Mr. Steers:

This is in reply to your letter of October 17, 1978, requesting that we reconsider the conclusion stated in our decision of October 12, 1978, B-192406, that the files and work papers of the law firm of Rogovin, Stern, and Hoge (Rogovin) retain their private character unless they are voluntarily submitted to the Civil Service Commission with its final report, since they are not necessarily required to be submitted to the Commission pursuant to the contract between these two parties. You also requested that we perform an investigative audit of Rogovin's performance of this contract and related matters.

We have reviewed our position concerning the nature of Rogovin's work papers and files, and believe that our original conclusion is correct. Documents produced by a contractor in carrying out the terms of a contract do not automatically become Government records, unless the contract specifically provides that the supporting documentation as well as the report itself must be submitted together. Documents not required to be submitted but which the contractor chooses to submit to the agency, or which are required to be submitted but not until a specified future date, may be considered Government records but not until the contractor relinquishes control of the materials and submits them to the agency. In addition to the authorities cited in our earlier letter, see _____ v. Central Intelligence Agency, Civil No. 76-1800 (D.C. Cir., May 23, 1978); _____ v. Califano, Civil No. 76-1308 (D.C. Cir., July 11, 1978), construing the term "agency records," for purposes of the Freedom of Information Act. 5 USC 552

In this case, the contract provides that all of Rogovin's files considered by Rogovin to be relevant to the findings in its final report will remain within the sole control of Rogovin for 3 years after the submission of the final report. Contract: Methods and Procedures, section B.1.(c). At the conclusion of this period, these documents will be submitted to the Commission and will then become "agency records" subject to both the Federal Records Act and the Freedom of Information Act (FOIA). All such relevant documents are required by 44 USC 392-401

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the terms of the contract to be retained intact by the contractor for eventual submission to the Commission. The terms of the contract preclude their destruction by Rogovin at any time.

Documents deemed by Rogovin to be irrelevant to the report are not required by the contract to be retained for eventual submission to the Commission and are therefore not "agency records." By the terms of section B.1.(c), these irrelevant documents may be destroyed by the contractor. However, they are required to be retained in compliance with the contractual and statutory right of access of this Office to all of the contractor's "books, documents, papers, and records * * * involving transactions related to the contract." 41 U.S.C. § 254(c); General Provisions, paragraph 10(b). Our right to examine any such documents does not constitute receipt by the Commission, and does not convert the materials into Federal records. See _____ v. Califano, supra, slip opinion at 21.

With respect to your stated concern that agencies may use contracts like the one at issue here to circumvent the FOIA, an agency may not resort to a contractual arrangement solely to thwart the purpose of the FOIA. B-166506, October 20, 1975. On the basis of the present record, we cannot conclude that the instant contract is being used for such a purpose.

The effect of section B.1.(c) is to delay the conversion of the contractor's records to Government records and thereby to preclude FOIA disclosure of records during the delay. However, in view of the fact that, other than the parties' contractual agreement, there is no requirement for the contractor-generated documents to be turned over to the Commission, we find no basis for concluding that the contract-sanctioned delay in turning them over is contrary to the FOIA or otherwise improper. Thus, while it is possible to question the wisdom of the provision, we cannot conclude that it is illegal.

In your final question, you ask whether the "facts" pointed out in the last substantive paragraph of our previous letter to you would lead to the conclusion that a "fraudulent" contract had been consummated. As stated above, the wisdom of particular contractual provisions, from a policy point of view, is certainly debatable but, in our view, their legality is not.

In the paragraph of the previous letter to which you refer, we were expressing a policy reservation. We cannot state as a fact that it would be impossible to take appropriate action against the employees

under investigation, had the contractor so recommended, without the materials embargoed for 3 years, nor do we have any reason to believe that the contractor would not have voluntarily supplied the necessary documentation immediately. However, we would have preferred to have seen an explicit provision in the contract to that effect rather than placing total reliance on the contractor's good faith and discretion in supplying the materials. Nevertheless, as you point out, the contractor was required by the terms of the contract only to investigate certain allegations and make recommendations as to whether further disciplinary proceedings were warranted. Nothing in the contract precludes him from fulfilling that precise responsibility. We are therefore unable to characterize the contract as "fraudulent."

In your October 17, 1978, letter, you requested that we investigate various aspects of Rogovin's performance of its contract with the Commission, and determine whether the findings in the Rogovin report are supported by the preponderance of the evidence.

Allegations of abuse of the merit system surfaced in 1973-74 and were examined in early 1974 by the House Post Office and Civil Service Committee, Subcommittee on Investigations, in their hearings and report on recruiting and examining for senior level Federal positions. In 1974 the Commission's Office of Analysis and Audits also conducted an internal investigation of the operations of the Bureau of Recruiting and Examining.

Instances of political influence in personnel practices in the General Services Administration, Department of Housing and Urban Development, and Small Business Administration were investigated in 1974 and 1975 by the House Post Office and Civil Service Committee, Subcommittee on Manpower and Civil Service. In 1975 the same subcommittee conducted extensive hearings and in 1976 issued a detailed final report. In 1975, the Subcommittee on Manpower and Housing, Committee on Government Operations, investigated alleged personnel abuses in the Community Services Administration. In the course of these hearings, Civil Service Commission employees were questioned on a broad range of personnel issues. At that time, the General Accounting Office (GAO) also reported on the relationship of certain Commission employees and Kepner-Tregoe, Inc.

Both systemic problems in Federal personnel management and related merit abuses were reviewed in:

--a monograph on the merit system in the U.S. Civil Service by Bernard Rosen, former executive director of the Commission;

- a report by a Commission merit staffing review team (known as the Sharon report);
- "Blueprint for Civil Service Reform" an analysis of politics in the Civil Service Merit System by the Fund for Constitutional Government; and
- a GAO staff study on Management of Civilian Personnel in the Federal Government.

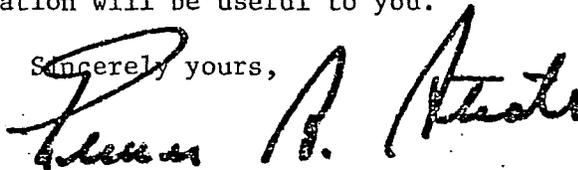
After some of these investigations and reports, materials were turned over to the Justice Department and a grand jury concluded no criminal prosecution was warranted.

Based on our preliminary examination of the Rogovin independent investigation and the recent Lyle report, our past reviews of studies of abuses of the merit systems, and the Justice Department and grand jury investigations, we do not believe that further effort by the General Accounting Office is warranted.

We are committed to monitor intensively the current implementation of Civil Service reorganization and reform and we will devote considerable attention to the management and activities of the Office of Personnel Management, the Merit Systems Protection Board and the Federal Labor Relations Authority. We hope that this emphasis will better assure that the implementation of the reform legislation will meet the spirit and letter of the law. Should you desire, we will be pleased to share these future findings with you.

We trust this information will be useful to you.

Sincerely yours,



Comptroller General
of the United States