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## Memorandum on Agency Review Information and Document Policy

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To: Agency Review Teams  
From: Jon Molot & Lisa Brown  
Subject: Agency Review Information and Document Policy

As a member of an agency review team for the Transition, it is vital that you follow Transition policy regarding the acquisition, handling, and use of confidential documents and information. All Transition personnel must of course respect the confidentiality of our work and we have all signed an ethics form to that effect. As members of an agency review team who will be going into government agencies, however, your obligations extend beyond that general duty of confidentiality. There are a number of laws governing administrative agencies that will bear upon your acquisition, handling, and use of confidential information. In addition, your access to information will be governed by a Memorandum of Understanding executed by the Transition and the Administration (“MOU”), relevant provisions of which are included at the end of this memo.

This memo is intended to provide guidance on three sets of core issues you will encounter as you proceed with your work: (1) there are certain categories of confidential government documents you should avoid acquiring in the first place; (2) once a confidential document is in your possession – whether obtained from the government or created by Transition personnel – you must follow specified procedures in handling that document; and (3) before you incorporate any confidential information into your finished product, you must revisit whether that information was obtained and handled properly and be sure that you present the information in a manner that is sensitive to its confidential nature and tailored to its audiences. In addition, the memo provides special guidance for agency review teams charged with reviewing independent regulatory agencies, as those teams will encounter special problems and will have to take care to avoid the appearance of intruding upon agency independence.

The memo is intended as a high-level roadmap. As specific questions arise, you should initially contact your agency Team Leader. Team Leaders and working group members will be in regular touch with the Transition’s legal team for guidance on document access and handling. If a Team Leader cannot resolve a problem with his counterpart in the Agency, the Team leader will bring the matter to the attention of the working group member who oversees your agency. That working group member will coordinate with [REDACTED] to pursue a resolution with the Administration.

If you have any questions on this memo, feel free to contact [REDACTED].

### GUIDELINES ON ACQUIRING INFORMATION & DOCUMENTS

DO NOT SEEK OR ACCEPT:

- **Personnel Files Protected by the Privacy Act (Paragraph 7 of MOU)**
  - Do not request or accept access to any individual’s personnel file. In the course of your interviews you will likely learn a great deal about current agency personnel, and may become privy to sensitive information, such as which civil servants are likely to be more or less sympathetic to the new administration’s policy agenda. There is no legal prohibition on acquiring this sort of soft, informal information. You may not, however, obtain more concrete information from an employee’s personnel file, such as performance evaluations, disciplinary records, employment history etc.
- **Attorney-Client Materials (Paragraph 7 of MOU)**
  - Do not request or accept any documents protected by attorney-client privilege. In the course of your investigation, you may request and accept documents summarizing and/or analyzing pending

lawsuits, investigations, or rulemakings. To the extent that you learn of documents that are marked confidential and written (1) by any employee of the agency to an agency lawyer requesting legal advice or (2) by an agency lawyer to any employee of the agency providing legal advice, you should not accept these documents. To accept these documents would risk violating the agency's attorney-client privilege

#### AVOID NON-PUBLIC INFORMATION REGARDING ADJUDICATIONS

- **Adjudication versus Rulemaking**
  - Agencies sometimes make policy through rulemaking proceedings with broad public participation and sometimes make (and enforce) policy through case-by-case enforcement actions, litigation and other adjudications involving specified private parties.
  - The law strictly prohibits agencies from engaging in off-the-record, ex parte communication regarding adjudications, but is more forgiving of free exchanges of information regarding rulemaking proceedings.
- **Information Regarding Adjudications, Enforcement Actions and Litigation**
  - You should not request, accept, or discuss non-public information regarding adjudications, enforcement actions, or lawsuits involving private parties. You may request and accept public information regarding pending enforcement actions, lawsuits, and adjudications. You may also request and accept information regarding future enforcement plans on a general level—that is, information that does not discuss individual parties. You should not, however, seek or accept confidential information regarding pending or planned actions against or involving specified private parties. To do so may be deemed to violate administrative law prohibitions against ex parte communications and/or to prejudice the rights of private parties.

#### GUIDELINES ON HANDLING INFORMATION & DOCUMENTS

##### TREAT ALL DOCUMENTS AS CONFIDENTIAL

- **Government Documents**
  - Any document received from any agency, even if a public document, should be kept confidential within the Transition and not shared with anyone outside the Transition. Electronic copies should be stored on your agency review team's portion of the Transition's virtual private network. Do not store documents in your home or private office or on your personal computer, except with express permission from your team leader.
- **Transition Prepared Documents**
  - Any document prepared by Transition personnel, even if it does not appear to contain non-public information, should be kept confidential within the Transition and not shared with anyone outside the Transition.

##### FOLLOW SPECIAL PROCEDURES FOR "LIMITED ACCESS" DOCUMENTS

- **"Limited Access" Documents (Paragraph 10 of MOU)**
  - Both (1) non-public documents obtained from the government and (2) Transition-generated documents containing non-public government information should be prominently labeled "limited access" and should be shared only with authorized members of your agency review team and other expressly authorized Transition personnel.
- **"Limited Access" Label and Storage**
  - "Limited Access" documents should be labeled: "CONFIDENTIAL DOCUMENT. LIMITED ACCESS ONLY. THIS DOCUMENT CAN BE SHARED ONLY WITH AUTHORIZED INDIVIDUALS"
  - "Limited access" documents should be stored only in the separate, password-protected section of your agency review team's portion of the Transition's virtual private network, or, in the case of hard copies, in a separate "Limited Access" file in the team's office at the agency.

- **Distinguish from Classified Documents (Paragraph 9 of MOU)**
  - Most agency review teams will not have access to any classified (secret) documents. Access to classified documents is restricted to those with the requisite clearance and need to know, and maintenance of such documents must comply with rules for documents with those classifications.

#### SEGREGATE DRAFTS AND INTERNAL MEMOS FROM DELIVERABLES

- **Finished Products versus Drafts and Internal Memoranda**
  - The only documents prepared by your team that should ever become part of government files after January 20 are the finished products delivered by your team leader to your final audience.
  - As January 20 approaches you will receive additional guidance on what you should do with drafts, internal memoranda, and other documents.

### GUIDELINES ON PREPARING DELIVERABLES

#### DO NOT INCLUDE LIMITED ACCESS DOCUMENTS IN DELIVERABLES

- **Appendix not to Include Limited Access Documents**
  - To the extent that your User's Manual includes copies of original government documents in an appendix, the appendix should not include limited access documents.

#### REVIEW FINAL DRAFTS TO EXCLUDE PROHIBITED INFORMATION

- **Correct Earlier Errors**
  - To the extent that your agency review team has acquired information it should not have, the negative consequences of this error will only be compounded if the information is included in any finished products.
- **Submit Finished Products for Central Review Before Delivery**
  - Before an agency review team leader delivers a finished product to its target audience, the team leader will obtain clearance from a Transition lawyer to ensure that it does not include inappropriate confidential information.

#### ANTICIPATE AUDIENCE REACTION

- **Tailoring Information for the Target Audience**
  - Agency Review memoranda are intended to be useful to appointees, senior agency personnel, White House policy teams, OMB officials, and White House personnel involved in the nomination of senior appointees in agencies. (As noted below, however, the target audience for independent regulatory agencies will not include White House policy teams.)
  - Be sure to present the materials in a manner most useful to those audiences—highlighting the ways in which the campaign's stated policy goals relate to matters pending in the agency.
- **Anticipating Other Audiences**
  - Despite our efforts at confidentiality, you should write every document with the expectation that the documents will be read by people outside the targeted audiences. (They may even be leaked to the press.)
  - The substance and tone of your deliverables should accurately reflect the law and policy in your agency and, where critical of Bush administration policy, should be respectful and cast no aspersions or make personal judgments about agency personnel or any current or past agency officials.
- **Oral Briefings as a Complement to Written Deliverables**
  - Your investigation may produce information that is appropriate to share with the White House and/or nominees for agency positions, but which might have negative repercussions if leaked to a broader audience. In those instances you should consider carefully whether the information can be conveyed in oral briefings and left out of your written deliverables.

## SPECIAL GUIDELINES FOR INDEPENDENT AGENCIES

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o avoid the appearance of improperly intruding on agency independence:

### STEP 1—BE TRANSPARENT AND DEFERENTIAL FROM THE START

- Your team leader should contact the Chair and/or his Chief of Staff and set up an initial meeting in which the team leader explains what your team needs to collect.
- At that meeting, you should give the Chair the option of either (1) inviting you to come into the agency to gather the relevant documents and interview the relevant agency staff, or (2) having the Chair's Office itself oversee the initial gathering of this information which it would then provide to you. If helpful, you may provide the Chair with a copy of the Independent Regulatory Agency Users' Manual outline as a starting point and discuss the information you plan to collect.
- If the Chair chooses to gather the information himself, you should say that you would like to follow up with interviews with all of the Commissioners and senior staff (as appropriate) to make sure you have an accurate sense of pending issues.
- You should make clear that your information collection efforts have only three purposes: (1) to provide the President-elect and his personnel team with adequate information about the agency to make informed decisions in the appointments process; (2) to brief the President-elect's nominees and assist them in the confirmation process; and (3) to inform incoming OMB personnel about any budget or management issues. Make clear that you have no authority on matters of regulatory policy and will not offer opinions on pending rulemaking proceedings, lawsuits, enforcement proceedings, or agency adjudications.
- If the Chair refuses to gather the information AND denies permission to collect the information, please immediately contact your working group leader.

### STEP 2—MAINTAIN CONSISTENT TONE IN FOLLOW UP INTERVIEWS

- In the course of interviewing other Commissioners and staff, you should explain your mission just as you did to the Chair.
- Commissioners and staffers may offer additional useful information beyond what you request, such as their views on which civil servants are likely to be more or less sympathetic to the incoming Administration's policy goals. You should avoid any questioning designed to elicit this sort of information, however, as your questions may be perceived as an unwarranted intrusion upon agency independence. You should never suggest, through your conduct or questions, that you expect the White House to control agency policymaking.

### STEP 3—FINISHED PRODUCTS MUST REFLECT AGENCY INDEPENDENCE

- Draft all of your deliverables as if they will be read not only by your intended audiences, but also by the current Commissioners and their staffs.
- Your deliverables should, in tone and substance, reflect the limited scope of your work: (1) to educate the President-elect and the Transition team's personnel team to inform their appointment decisions; (2) to prepare appointees for office; and (3) to provide limited information to the new OMB. You should not suggest in your deliverables that agency policy can or will be controlled by the White House.

## RELEVANT PROVISIONS OF THE MOU

### *Paragraph (7)*

- “In order to facilitate a smooth transition, it likely will be necessary in some circumstances to provide specified transition personnel with access to non-public information that may be protected by constitutional, statutory, or common law privileges, and material whose distribution is otherwise restricted by law. The Chief of Staff has advised the Chair of the PETT that Administration personnel will take steps required by law, including Executive Branch standards of conduct, the Privacy Act, and the attorney-client privilege, to protect such information. In particular, a government employee may not allow the improper use of non-public information to further his own private interest or that of another by knowing unauthorized disclosure. 5 C.F.R. 2640. The PETT recognizes that there is some information that the Department or Agency may not be able to provide in order to comply with statutory requirements, or otherwise preserve applicable privileges.”

### *Paragraph (8)*

- “In order to facilitate a smooth transition and provide a mechanism for expeditiously addressing any concerns, including ethical, privacy, and privilege concerns, regarding access to non-public information as described in paragraph (7), the Chief of Staff and the Chair of the PETT will each designate in writing an individual or individuals authorized to confer in order to resolve such concerns informally.”

### *Paragraph (9)*

- “The Chief of Staff further advises that, before providing any classified information to a member of the PETT, pursuant to Executive Order 12958, as amended, it must be established:
  - That the member has the security clearances necessary to have access to that information, and the requisite need to know, and
  - That the member has signed the requisite non-disclosure agreement.”

### *Paragraph (10)*

- “The Chief of Staff advises that, before providing non-public information (including classified information) as described in paragraph (7) to a member of the PETT authorized to receive it under the guidelines established in this memorandum, Departments and agencies will expeditiously:
  - Brief the Transition Team member on the importance of maintaining the constitutional, statutory, and/or common law safeguards afforded the non-public information.
  - Clearly label non-public records provided to Transition Team personnel with a warning against subsequent disclosures to unauthorized individuals, including unauthorized members of the Transition Team.
  - Specifically advise Transition Team members that non-public information provided to them cannot be shared with other Transition Team personnel unless those other personnel satisfy the requirements for access to that information set forth in the memorandum.
  - Require the Transition Team member to sign a statement representing that, to the best of the member’s knowledge, he or she has no financial interest or imputed financial interest that would be directly and predictably affected by a particular matter to which the information is pertinent. The Department or Agency may require such additional information from the Transition Team member as the Department or Agency deems necessary, in light of the proposed disclosure.
  - Where advisable, prohibit the Transition Team member from removing the records containing non-public information from the offices of the Department or Agency.
- Upon Request from the EOP, a Department, or an Agency, the PETT will provide a written statement indicating the Transition Team member’s need for access to the non-public information. The statement of need will be provided by the Chair of the PETT (or his designee) to the Chief of Staff (or his designee).
- Department or Agency personnel shall make a written record of any disclosure of non-public information made to a member of the PETT.”

### *Paragraph (11)*

- “It likely will be necessary for members of the PETT to share with the Administration information that they wish to be kept confidential. Accordingly, to the extent permitted by law, the Administration agrees to protect the confidentiality of information provided to it on a confidential basis by the PETT.”

*Paragraph (12)*

- “Any disagreements between the Administration and the PETT concerning the subject matter of this memorandum that are not resolved informally pursuant to paragraph (8) or otherwise will be referred by the Administration to the Chief of Staff (or his designee) and by the PETT to the Chair of the PETT (or his designee).”

*Paragraph (13)*

- To the extent permitted by law, the Administration with respect to its staff members and the PETT with respect to its transition team members, state that they intend to take appropriate steps to discipline any person who fails to comply with the terms of this agreement.”



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