



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

February 19, 2014

Tuan Samahon  
Professor of Law  
Villanova University School of Law  
samahon@law.villanova.edu

**Re: FOIA Tracking No. FY14-017**

Dear Professor Samahon:

This letter responds to your Freedom of Information Act request to the Office of Legal Counsel ("Office") dated January 18, 2014, in which you request a copy of the Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Closing of Government Offices in Memory of Former President Eisenhower* (Apr. 1, 1969). Your request was received by the Office on January 22, 2014, and has been assigned tracking number **FY14-017**.

We have searched the Office's files and located the document that you requested. The record is protected by the deliberative process, attorney-client, and presidential communications privileges and exempt from mandatory disclosure pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), but we are releasing it to you as a matter of administrative discretion.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You have the right to file an administrative appeal. You must submit any administrative appeal within 60 days of the date of this letter by mail to the Office of Information Policy, United States Department of Justice, 1425 New York Avenue, N.W., Suite 11050, Washington, D.C. 20530; by fax at (202) 514-1009; or through OIP's e-portal at <http://www.justice.gov/oip/oip-request.html>. Both the letter and the envelope, or the fax, should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink that reads "Paul P. Colborn".

Paul P. Colborn  
Special Counsel

Enclosure

4 APR 1 1968

4 MEMORANDUM FOR THE HONORABLE EGIL KROGH  
4 Staff Assistant to the Counsel to the President

Re: Closing of Government Offices in  
Memory of Former President Eisenhower.

You have asked us to advise whether the provisions of 5 U.S.C. 6105 pose any obstacle to the President's order closing all government offices on Monday, March 31, 1969, the day of the state funeral of former President Eisenhower. We believe that the statute is not applicable in these circumstances.

Section 6105 states: "An Executive department may not be closed as a mark to the memory of a deceased former official of the United States." It is derived from section 4 of the Act of March 3, 1893 (27 Stat. 715). The original provision read: "The Executive departments of the Government shall not be closed as a mark to the memory of any deceased ex-official of the United States."

The 1893 enactment was a floor amendment to the Annual Appropriation Act for the civilian expenses of the Government. Hence, its legislative history is understandably scanty. No reference is made to the section in the reports that accompanied the legislation. See H.R. Rep. No. 2359, S.Rep.No. 1308, 52d Cong., 2d Sess (1893).

The debates in Congress give no indication that the measure was aimed at the situation of the death of a former President, even though former President Hayes died about two weeks before the matter was before the Congress. Rather, the indications are that the Congress was concerned about the amount of vacation time federal employees were receiving as a result of annual leave, sick leave, holidays, funerals and other occasions. Another section of the same Act required all federal employees to work at least seven

hours every day except Sunday, subject to certain exceptions. It appears that the statute in question was aimed at preventing a proliferation of closings for the funerals of lesser officials.

In introducing the amendment, Representative Ealoe stated:

"We have reached a point in our history where we have so many distinguished men in public life, and so many who have retired from public life, that, in addition to the thirty days' leave of absence given to Department employes by law, we have many other holidays given on account of the desire of the heads of Departments to pay respect to the memory of persons who held public office at the time of their deaths or who formerly held such office. It is time to put a limit on these Departments in such matters." 24 Cong. Rec. 1393 (February 9, 1893).

In addition to the above statement, there are further indications that Congress was concerned with the head of a department closing a department. In one of the few references to the section in the debates in Congress, Representative Dockery referred to the section as "the provision which forbids heads of Departments from closing the Departments on account of the death of any deceased ex-official of the United States." 24 Cong. Rec. 2467 (March 2, 1893).

Therefore, the legislative history indicates that the purpose of the section was to prevent the head of a department from closing a department to mark the death of a lesser official. There is no indication that its purpose was to prohibit closing the Executive branch in memory of a former President, action which would normally be taken by the President rather than by any individual department head.

Generally, statutes which refer to "officers" or "officials" of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive. This principal seems to be particularly applicable where the issue is whether an obscure statute extends to the special situation of national mourning that arises on the relatively infrequent occasion of the passing of a former President.

4 William H. Rehnquist  
/ Assistant Attorney General  
/ Office of Legal Counsel