



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

November 30, 1979

MEMORANDUM FOR: Mary M. Goggin, Chief
Administrative Law Branch, HEW

FROM: William M. Nichols *Nichols*

SUBJECT: Application of Subsection (m) of the
Privacy Act

This is in response to your request for our comments on the HEW interpretation of the application of subsection (m) of the Privacy Act (5 U.S.C. 552a) to certain research and other (unspecified) contracts. Subsection (m) provides that:

"When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its Authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency."

The HEW position, as stated in the memorandum entitled "Application of Privacy Act to HEW Contracts," from William H. Taft, General Counsel, to John Ottina, Assistant Secretary for Administration and Management, dated May 17, 1976, (so-called "Taft memorandum"), is that:

". . . the requirements of the Privacy Act of 1974 are not applicable to HEW research and other contracts which call for the contractor merely to furnish to the HEW contracting agency statistical or other reports, even though it is necessary for the contractor to establish a system of records to perform the contract.

* * *

Where the contracting agency is interested only in obtaining the results of the research or other work performed under the contract (generally in the form of a report) and does not require the contractor to furnish it individually identifiable records from the system established by the contractor, it cannot be said that the system is one which 'but for' the contract, the agency would have established." (Taft memo, p. 2).

We disagree with this interpretation. The application of Subsection (m) is not dependent upon the disclosure of individually identifiable records by the contractor to the agency. Nothing in the statute, its legislative history, or the OMB Privacy Act Implementation Guidelines (40 Fed. Reg. No. 132, Wednesday, July 9, 1975, p. 28948) supports such a reading of the law.

The contract puts the personally identifiable information into the hands of the contractor. The data would have been collected and maintained by the agency if the work performed under contract had remained in-house. The contractor is performing an agency function and the Act applies.
