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COMPTROLLER GENERAL OF THE UNITED STATES

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IN REPLY REFER TO: B-178205.42

The Honorable John D. Dingell
Chairman, Subcommittee on Energy and Power
Committee on Interstate and Foreign Commerce
House of Representatives

MAR 15 1979

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DOE - AGC00912

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Dear Mr. Chairman:

This responds to several questions raised in your letter, dated October 30, 1978, concerning the Energy Information Administration's proposed Energy Company Financial Reporting System (FRS) collection form EIA-28. This form was published in the Federal Register on June 22, 1978, (43 F.R. 27056) and was approved October 10, 1978, by the Office of Management and Budget (OMB) with several conditions. AGC00027

Section 205(h) of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, is cited by the EIA-28 General Instructions as the legislative authority for the form. 43 F.R. 27120. Section 205(h) aims to obtain a "statistically accurate profile of each line of commerce" in the United States energy industry from information provided by major energy-producing companies. Section 205(h)(1)(A).

The vehicle for collecting information will be an "energy-producing company financial report." With respect to the energy-related activities of such companies, the report should enable the EIA Administrator to (1) evaluate a company's financial condition; (2) analyze the competitive structure of elements of the energy industry; (3) segregate energy information by energy source and geographic area; (4) determine the costs associated with the various stages of energy development, production and utilization; and (5) make such other analyses or evaluations as are necessary to carry out the purposes of the Act. Section 205(h)(2).

At first, the report will be used to collect information on energy-producing companies' activities in 1978 and previous years. Afterwards, it will be required to be filed at least annually by such companies and certain information in the report may be requested quarterly.

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Staff of your Subcommittee, GAO, DOE and OMB have already given considerable attention to the development and use of the FRS and EIA-28. (In this connection, see GAO's report "Improvements Needed in the Department of Energy's Efforts to Develop a Financial Peporting System," July 31, 1978, EMD-78-95, B-178205, and my letter to you, dated November 1, 1978, on the same subject, EMD-78-112, B-178205.) The issues your letter raises do not concern the substance of the form. Rather, they involve OMB's authority to approve the form's use and to attach conditions to its approval and the access of other governmental agencies to confidential information submitted by private companies to DOE.

The questions you have asked are:

I OMB Approval

1. Does OMB have authority pursuant to section 3509 of the Federal Reports Act to approve the form of a financial report (EIA-28) which energy-producing companies are required to file periodically by section 205(h) of the Department of Energy Organization Act?

2. If the answer to Question 1 is "Yes," does this authority include the authority to subject such approval to a number of conditions?

3. Do each of the conditions imposed by OMB reduce the burden, cost or duplication of effort for a company or otherwise make the collection of information more efficient?

II Confidentiality of Data Collected

4. Can confidential data collected from energy-producing companies completing EIA-28 be disclosed by DOE to other DOE units, certain governmental agencies, GAO and the Congress?

5. If the Federal Reports Act is applicable to EIA-28, does a DOE legal memorandum proposing guidelines for the disclosure of confidential information, together with the EIA-28 instructions announcing such disclosure, amount to a declaration by DOE, pursuant to section 3508(b)(2) of the Act, that it considers the information to be confidential?

I OMB Approval

QUESTION 1: Does OMB have authority pursuant to section 3509 of the Federal Reports Act to approve the form of a financial report (EIA-28) which energy-producing companies are required to file periodically by section 205(h) of the Department of Energy Organization Act?

The Federal Reports Act, 44 U.S.C. §3501 et seq., is designed to minimize the burden to the public, the cost to the Government and the duplication of Federal agency efforts to obtain information needed for governmental activities. More specifically, the stated congressional policy for the Act aims (1) to obtain the information needed by Federal agencies with a minimum of burden on business, especially small business, and at a minimum of cost to the government; (2) to eliminate as rapidly as possible unnecessary duplication of Federal agency efforts in obtaining information through the use of reports, questionnaires and other methods; and (3) to have a Federal agency tabulate information it collects as far as expedient to maximize the utility of such information to other Federal agencies and the public. 44 U.S.C. §3501.

The Director of OMB (previously the Director of the Bureau of the Budget) has been given the central role in carrying out this congressional policy for most departments and agencies. From time to time, the Director must investigate the needs and methods of various Federal agencies to obtain information from business enterprises, other persons and other Federal agencies and coordinate their information collection services. 44 U.S.C. §3503. After a hearing, he may designate a collecting agency to obtain information for two or more agencies. 44 U.S.C. §3504. In addition, he may determine whether or not a Federal agency's collection of information is necessary for the proper performance of its functions or for any other purpose. 44 U.S.C. §3506.

The Director can require a Federal agency to make information available to another Federal agency under certain circumstances. 44 U.S.C. §§3507, 3508(b). Also, a Federal agency may not collect or sponsor the collection of information upon identical items, from 10 or more persons, other than Federal employees, without the Director's prior approval of the plans or forms or any revisions to such documents. 44 U.S.C. §3509. The Director has authority to promulgate rules

and regulations to carry out his responsibility under the Act. 44 U.S.C. §3510. These rules are set out in OMB Circular A-40.

The term "Federal agency," as used in the Act, includes an executive department, a commission, an independent establishment, a corporation owned or controlled by the United States, or a board, bureau, service, office, authority or administration in the Executive Branch. Independent regulatory agencies were specifically excluded from this definition by a 1973 amendment to the Act, which gave GAO a more limited authority than OMB over these agencies' request for information. Pub. L. 93-153, Title IV, Sec. 409(a), 87 Stat. 93.

One principal reason for the change was to prevent OMB's veto of requests for information which a regulatory agency considered it needed to carry out its work. 119 Cong. Rec. 24085 (1973). Under the amendment, the Comptroller General seeks to implement the same policy objectives as OMB in terms of minimizing burden and duplication. 44 U.S.C. §3512(a). However, his authority is more limited. He must review the plans or forms to be used by an independent regulatory agency to collect information, upon identical items from 10 or more persons, other than Federal employees. The Comptroller General must ascertain whether the information is available from another source in the Federal government and determine whether the proposed plans or forms are consistent with the policy objectives of this section. 1/ 44 U.S.C. §3512(c). This latter determination does not include "the final determination as to the necessity of the information in carrying out" the agency's statutory responsibilities and "whether to collect such information." This determination is the responsibility of the independent regulatory agency. 44 U.S.C. §3512(d). In contrast, OMB has the authority to make such a determination of necessity with respect to Federal agency report forms. 44 U.S.C. §3506.

With this as background, we turn to the first question your letter raises. Under the Federal Reports Act, the Director

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1/ The Comptroller General must make such determination within 45 days of receipt of such proposed plans or forms. Otherwise, the agency may proceed to collect such information. 44 U.S.C. §3512(d).

of OMB must review proposed plans and forms to collect information. Also, the Director has authority to determine whether or not the information to be collected is necessary. Form EIA-28 is an energy-producing company financial report form required to be filed periodically by section 205(h) of the Department of Energy Organization Act.

Section 3502 of title 44 defines the term "information" to mean, in part, "facts obtained or solicited by the use of written report forms * * * calling for answers to identical questions from 10 or more persons other than agencies, instrumentalities, or employees of the United States * * *." OMB Circular A-40, paragraph 1.e., defines the term "report form" to mean "any application or other administrative form questionnaire, schedule, interview guide, telegraphic request or other similar device for the collection of information." In a doubtful case, the Director of OMB will decide whether a report form is or is not within the scope of the Act and Circular A-40. Circular A-40, para. 13a.

A literal reading of the Act indicates reports mandated by law are within the coverage of the Federal Reports Act. However, it is appropriate to examine the reason for the Federal Reports Act's enactment in order to answer your question completely. Discussions on the House floor on the bill, H.R. 7756, eventually enacted indicate that the Act was designed to eliminate duplication and the cost of information required by Federal agencies from the public in order to carry out their responsibilities and obligations. The Act did not give the Director of the Bureau of the Budget the authority to eliminate information required by a congressional statute.

Congressman Smith of Ohio proposed the following amendment to the section of the bill which gave the Director authority to determine whether the information an agency is seeking is necessary for the proper performance of its functions: "Provided, however, that this authority shall not exist where the collection of information is required by Federal statute." 88 Cong. Rec. 9160 (1942). He argued that without this amendment the Director could have "final authority and power to set aside any legislation which the Congress has passed directing the collecting of information." 88 Cong. Rec. 9159 (1942).

Congressman Whittington, a member of the Committee which had reported the bill, answered this argument:

> "* * * the purpose, and the important purpose, of the bill is to carry into effect the recommendations respecting reports of the two committees on small business. It is not a question of investigation and reports and information being required by law, it is a burden that is imposed by the bureaus without Congressional authority and without law * * *. Its purpose is to reduce as far as possible the burdens on business where no such burdens are required by law." 88 Cong. Rec. 9159 (1942) (Emphasis added.)

> "* * * its sole purpose is to prevent duplication and to prevent the requirement on businessmen which puts them to enormous expense* * *. The sole purpose of this bill is to vest in some agency of Government discretion as to limiting these expenses * * * under no circumstances would there be eliminated any information that by statute law the legislative body required to be obtained or furnished.' 88 Cong. Rec. 9159-60 (1942) (Emphasis added.)

Congressman Robinson of Kentucky proposed another amendment, which in part, covered the area of the Smith amendment. This amendment passed the House, but was eliminated by the Conference Committee. H. Rep. 2722 (1942). P. 5. It stated:

> "Provided further, That the provisions of this act shall not apply to any information now required by law to be given or required by law to be withheld." 88 Cong. Rec. 9165 (1942).

Congressman Whittington disagreed with this amendment. He stated that "there is no occasion to write or repeat what is law already, because if we did that we would have to do

it on every bill we pass. The amendment is without merit." 88 Cong. Rec. 9165 (1942). His additional comments on the amendment included:

> "* * * There is no language in this bill which authorizes the elimination of any information required by law * * *. The purpose of this bill is to prevent an agency from requiring information from the citizen, the little businessman or the large businessman, that he has already furnished another agency for the use of that agency or for the use of any other government agency.
>
> "* * * there is no provision in this bill that authorizes any citizen not to give or relieves any citizen from giving information that he is required to give by law * * *. It deals only with information that the Federal agencies may require within the law, and in order to provide for economy and efficiency, it relieves duplication of the information that is permitted under existing law * * *. There is no occasion for the language in the amendment * * *." 88 Cong. Rec. 9165 (1942) (Emphasis added.)

This legislative background and history clearly shows that the impetus for enactment of the Act was the need to correct and regulate Federal agencies' collection of information that they considered necessary to carry out their responsibilities. Congressman Whittington's remarks on the House floor stated what was apparently obvious to him, namely, that the Act would not give the Director of the Bureau of the Budget the authority to prevent or veto agency information collection specifically required by congressional statute.

But, the Act contains no provision limiting its applicability only to agency-generated information gathering. The language of its provisions covers both agency-generated and congressionally-mandated information collection.

Neither the present form nor superseded versions of Circular A-40 have specifically excluded reports or forms

required by statute. See revisions of Circular A-40, dated respectively, May 3, 1973, May 25, 1962, and October 25, 1948. Each contains a provision that either OMB or the Bureau of the Budget will determine whether any matter, including a report form or plan, is within the scope of the Act. Such a provision is a valid exercise of the rule making authority granted to the Director to carry out the provisions of the Act. 44 U.S.C. §3510 (Sec. 6, Pub. L. 77-831, 56 Stat. 1074). OMB has informed us that it has for some time with full congressional knowledge approved plans and forms for information gathering specifically required by congressional statute.

From a policy standpoint, it makes sense to assign OMB the role of reviewing the specific data Federal agencies want to include in reports required by Congress. Statutes usually leave it to Federal agencies to determine what specific data needs to be collected in a required form or questionnaire. If OMB were not to review such agency information gathering from the public, it could become burdensome, costly and repetitious.

It is our view, based on the foregoing, that the Federal Reports Act is applicable to congressionally-mandated information collection. However, the authority OMB has pursuant to section 3506 to determine relevancy of information collection does not apply to the extent that it would be inconsistent with the statutory mandate.

The Director of OMB's role is to determine whether the specific data items which make up a form or questionnaire are germane to its statutory purpose and whether the manner and form in which they are presented does not pose an undue burden on the persons providing the information. Circular A-40 embraces the Director's role in reviewing the relevancy of both agency-generated forms to carry out an agency responsibility and the specific data items which comprise statutory-mandated and agency-generated forms.

QUESTION 2: If the answer to Question 1 is "Yes," does this authority include the authority to subject such approval to a number of conditions?

The review of proposed agency plans and report forms for information collection that the statute requires is aimed at reducing the burden, including cost and duplication of effort, private companies and others face in providing such

information. This is in keeping with the legislative mandate of the statute. As a general matter, we believe that any conditions attached to the approval of such plans or report forms which have this effect are appropriate.

QUESTION 3: Do each of the conditions imposed by OMB reduce the burden, cost or duplication of effort for a company or otherwise make the collection of information more efficient?

The letter from OMB approving the use of Form EIA-28 made such approval subject to eight conditions. These conditions were aimed at reducing the burden, cost and duplication in reporting the information. Your letter cited six of these conditions and asked that we review each of them to determine their effectiveness in achieving the goals of the Federal Reports Act. We have reviewed each of the conditions and our comments follow. We will first discuss the conditions listed in your letter and then the two remaining conditions contained in the OMB letter:

1. Data from affiliates and joint ventures - OMB considers that data obtained from 27 energy-producing domestic companies will yield sufficient financial information about Caltex and Aramco, which are affiliates or joint ventures of some of these companies. No reports from either company should be provided unless the information to be obtained from the owning companies is not sufficient.

We view this as a reasonable requirement related to the purpose of the Federal Reports Act. It is up to EIA to demonstrate why the information from the owning companies will not yield the information it seeks.

2. No copy of SEC Form 10-K and audited financial statements - This condition would prevent EIA from requiring companies to include with EIA-28 a copy of the most recent Form 10-K that they have filed with the SEC. Since the Form 10-K contains the company's most recent audited financial statements, they also would not need to be provided.

We consider that this OMB condition is reasonable and eliminates unnecessary duplication of information provided to the Federal Government. SEC and DOE have worked closely together on a number of matters affecting energy-producing

companies and it should be easy for DOE to obtain a copy of the Form 10-K from the SEC. As the Form contains audited financial statements, there is apparently no need to require a company reporting on EIA-28 to submit such statements again. A company must consent to provide allegedly confidential information in a Form 10-K to Federal agencies as a precondition to the Commission's consideration of its request to bar disclosure of such information to the public.

3. No limitation in discretion of company to designate certifying officials - The original version of EIA-28 submitted to OMB for review required that an officer of the company had to certify the form. OMB considered that this limited the discretion of the reporting company to designate who could serve as certifying officials. We understand from discussions with DOE that they meant to use the word "certifying officer" instead of "officer." The new version of the form reflects this meaning. It now provides that the form can be certified to by any certifying officer.

4. Form approved only for use through December 1979 - OMB approved the use of the form through December 1979 to collect information covering 1977 and 1978. Based on the data received for these two years, EIA must evaluate the utility and effectiveness of the financial reporting system in achieving its stated objectives. The analysis of its results must be submitted to OMB by December 1979.

This condition enables OMB to review the adequacy of the EIA-28 in providing the information required by the statute. To limit the use of the form until such a review can take place is in keeping with OMB's responsibility to avoid any unnecessary burden and duplication in information gathering under the Federal Reports Act.

5. Information gathered for 1974-1976 must await evaluation results for 1977 and 1978 - OMB requires that an evaluation of the effectiveness of the data collection process with respect to 1977 and 1978 and its implications for the information requested for 1974-1976 take place before such information is collected. It approved the outline of such an audit, and requires the analysis of the evaluation by June 1979.

OMB's reason for deferring gathering information from prior years is similar to the reason for not approving the form for use beyond 1979. The evaluation of its use with respect to 1977 and 1978 will demonstrate its utility and effectiveness for further use.

6. Need for DOE procedure to handle requests for extensions, exceptions, etc. - OMB requires that DOE establish and make known to the companies preparing the reports that a procedure exists for handling requests for extensions, exceptions and modifications in the requirements governing use of the form.

DOE plans to use an existing review group to answer any inquiries. Such a group reviews similar questions arising out of other DOE reporting requirements. As a result, DOE considers no additional staff will be needed to cope with questions raised about EIA-28. In our view, a requirement of this kind is an important element in obtaining information from private sources in an efficient and effective manner. It provides a vehicle for alleviating unduly burdensome aspects of the reporting requirement.

7. Elimination of other DOE reporting requirements - OMB has requested DOE to identify existing departmental reporting requirements which can be eliminated, simplified or consolidated as a result of the information to be made available under EIA-28. In addition, DOE should compile a list of other agency reporting requirements that can be modified on the basis of the knowledge it gained in preparing EIA-28.

Reducing the incidence of DOE reporting requirements as a result of EIA-28 is a condition in keeping with the objectives of the Federal Reports Act. DOE's research work in developing the financial reporting system, also, places it in a unique position to suggest areas in which duplicate information is being obtained by other agencies.

8. Amendments to previous reports - Several restrictions were placed on amendments to previous reports. To the extent that such restrictions prevent reporting companies from being burdened with unnecessary requirements, this OMB condition is in keeping with the objectives of the Act.

II Confidentiality of Data Collected

QUESTION 4: Can confidential data collected from energy-producing companies completing EIA-28 be disclosed by DOE to other DOE units, certain governmental agencies, GAO and the Congress?

The EIA "Instructions" accompanying the proposed EIA-28 Form state:

> "In responding to specific requests from members of the public, FRS data will be held confidential to the extent that they are determined by DOE to be within the exemption for trade secrets and confidential commercial information as specified in the Freedom of Information Act (5 U.S.C. §522(b)(4)).
>
> "Without regard to the foregoing and in accordance with applicable legal authority, FRS data will be made available to the Attorney General, the Federal Trade Commission, the Secretary of the Interior, the Comptroller General and the offices within DOE." (43 F.R. 27120)

As your letter indicates, these two paragraphs tell the companies completing EIA-28, (1) that DOE will not disclose to the public information it determines to be within the trade secrets and confidential commercial information exemption of the Freedom of Information Act and (2) that all the information furnished, including trade secrets and confidential commercial information will, in accordance with law, be made available to other DOE units, a regulatory agency (FTC), two cabinet officers (the Attorney General and the Secretary of the Interior) and the Comptroller General.

Several provisions of section 205 of the DOE Organization Act affect the disclosure of information obtained pursuant to section 205(h). Section 205(h)(7) applies section 1905 of title 18 of the United States Code to the information obtained through EIA-28. Section 1905 makes it a crime for a U.S. Government employee to disclose without authorization trade secrets and other confidential information obtained from information filed with the government. (Emphasis added.)

Also, section 205(c) requires that duly established congressional committees, upon request, receive the information to be provided under section 205(h). It makes section 59 of the Federal Energy Administration Act of 1974, as amended, Pub. L. 94-385, Title I, Part B, Sec. 142, 90 Stat. 1140, applicable to the Administrator's performance of any function under the DOE Organization Act. 2/ With respect to section 1905, subsections 205(c) and (f) are clearly legal authorizations to make such disclosures and section 1905 would not be applicable. In this connection, see Chrysler Corp. v. Schlesinger (3rd. Cir. 1977) 565 F.2d 1172, certiorari granted March 6, 1978, 55 L Ed.2d 504. 3/

No other provision of the DOE Organization Act directly or indirectly authorizes the transfer of confidential information obtained under section 205(h) to any other Federal executive branch agency, whether regulatory or non-regulatory. We have been unable to find any provision of energy legislation that would authorize such a disclosure.

Section 11(d) of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 262, is not, as your letter suggests, applicable. It provides for disclosure of confidential information obtained under section 11 of that Act, without violating section 1905, to certain government officials or agencies including the Attorney General, the Secretary of the Interior, the Federal Trade Commission, and GAO. Section 205(g) of the DOE Organization Act applies section 11(d) to information obtained by the Administrator of EIA under section 11 of the Energy Supply and Environmental

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2/ Section 59 further provides that such information is the property of the committee and cannot be disclosed, except in accordance with the rules of the Committee and the appropriate House of Congress and as permitted by law.

3/ Legal authorizations for disclosure to the other governmental entities are probably provided by the statutes discussed below.

Coordination Act. It does not extend 11(d) to all the provisions of section 205. 4/

The Federal Reports Act provides authority to disclose information to other Federal agencies, in directing Federal agencies to cooperate to the fullest extent practical in making information available to other agencies. 44 U.S.C. §3507. The Act's legislative purpose, to reduce the burden and duplication of Federal agency information collection activities, is facililtated through the sharing of information.

But, the Act also limits the kinds of information that may be released to a Federal agency. It may be released in one of the following situations:

"(1) in the form of statistical totals or summaries;

(2) if the information as supplied by persons to a Federal agency had not, at the time of collection, been declared by that agency or by a superior authority to be confidential;

(3) when the persons supplying the information consent to the release of it to a second agency by the agency to which the information was originally supplied; or

(4) when the Federal agency to which another Federal agency releases the information has authority to collect the information itself and the authority is supported by legal provisions for criminal penalties against persons failing to supply the information." 44 U.S.C. §3508(b)(1)-(4)

In the present situation, subparagraph 2, supra, would probably support disclosure of the information to anotner

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4/ Section 203(a)(1) of the proposed DOE FY 79 Authorization Act, H.R. 11392, would have amended section 205(g) of the DOE Organization Act to apply section 11(d) to any information obtained by the Administrator under any law. In this connection see H. Rep. No. 95-1166 (1978) p. 141-142.

Federal agency. The information which EIA is collecting through EIA-28 has not been declared by either EIA or DOE in the form (at the time of collection) to be confidential. In general see Reynolds Metal Co. v. Rumsfeld, 417 F. Supp. 365, 370, affirmed in part, reversed in part and remanded on other grounds, 564 F.2d 663 (1976). With respect to confidentiality, DOE has stated that information which in its judgment falls under the trade secret and confidential commercial information exemption of the Freedom of Information Act would not be disclosed to the public. Such DOE determinations take place when FOIA requests are received. They do not take place at the time the information is obtained.

Section 3502 defines the term "Federal agency." It includes executive departments, but not regulatory agencies. The effect of this exclusion, which was made to accommodate the new role GAO would play in approving regulatory agencies' forms, is to permit disclosures of section 205(h) information to the Departments of Justice and Interior, but not to the FTC. 5/ One must look elsewhere for the authority of DOE to provide such information. In this connection, section 8 of the Federal Trade Commission Act, 15 U.S.C. §48, provides that the departments and bureaus, when directed by the President, shall furnish the FTC, upon its request, with all records, papers, and information they possess concerning any corporation subject to the Act's key provisions.

Section 207 of the DOE Organization Act provides the legal basis for GAO to receive information obtained from EIA-28. Section 207 applies the functions of the Comptroller General under section 12 of the Federal Energy Administration Act of 1974 to the monitoring and evaluation of all DOE functions and activities under the Act or any other act administered by DOE. Under section 12, the Comptroller General,

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5/ The changed definition mandated by GAO's new role results in a consequence which may have been unintended. While it was necessary to exclude regulatory agencies from the definition of "Federal agency" for the purpose of form approval, another result of this exclusion is that they are not authorized under the statute to receive information from another Federal agency and a Federal agency is not authorized to provide information to them.

notwithstanding any other law, has access to any data in FEA's possession from a public or private source to carry out its responsibilities under the Act.

QUESTION 5: If the Federal Reports Act is applicable to the EIA-28 report form, does a DOE legal memorandum proposing guidelines for the disclosure of confidential information, together with the second paragraph of the EIA-28 "Instructions," amount to a declaration by DOE, pursuant to section 3508(b)(2) of the Act, that it considers the information at the time of collection to be confidential?

As noted previously, subsection 3508(b) of the Act lists the only circumstances pursuant to which such information may be released to another Federal agency. Subparagraph (2) of subsection 3508(b) allows release of information to another Federal agency if it "had not, at the time of collection, been declared by the collecting agency, or by a superior authority to be confidential."

The second paragraph of EIA-28 "Instructions," quoted above, informs the companies that all the information contained in the form will be made available to certain governmental agencies. You have forwarded with your letter a legal memorandum from Thomas C. Newkirk of the DOE General Counsel's office to Lincoln Moses, Administrator, EIA, dated August 1, 1978, entitled "Access to EIA-28 Data." The memorandum provides proposed guidelines for making all kinds of disaggregated (easily identifiable to a specific company) EIA-28 data available to certain governmental agencies including the Attorney General, the FTC and the Secretary of the Interior. You have asked whether this memorandum, together with the paragraph in EIA-28 "Instructions" announcing disclosure to Federal agencies, amounts to a declaration under section 3508(b)(2) at the time of collection, that the information being gathered is confidential.

In our view, the two documents taken together do not amount to such a declaration. The paragraph only informs companies that the information will be made available to certain governmental entities. The memorandum, we understand, is a suggestion from the General Counsel's office of the conditions (guidelines) that ought to be applied to the release of any EIA-28 information to Federal agencies. None

of the conditions concern the labeling of information as confidential at the time EIA collects it. We have been informed by DOE that neither DOE nor EIA have adopted the memorandum or its contents as agency policy. Thus, the memorandum is merely legal advice from the General Counsel s office to the head of EIA.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

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