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United States

February 7, 2022

The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
United States House of Representatives
Washington, DC 20515

Dear Ranking Member Comer:

I write in response to your letter of January 19, 2022, in which you requested that the National Archives and Records Administration produce Presidential records of the Obama Administration concerning “Hunter Biden, cobalt mines, China Molybdenum, Tenke Fungurume, or Freeport-McMoRan,” and your letter of July 14, 2021 (which was also signed by several of your colleagues), in which you requested communications between the Executive Office of the President or Office of the Vice President and members or associates of the Biden family referring or relating to the 2013 trip to China and the 2016 trip to Mexico” and “communications referring or relating to any security incidents on Air Force Two during the 2013 trip to China and the 2016 trip to Mexico.” I apologize for the delay in responding to your letters.

The Presidential Records Act (PRA) provides that otherwise restricted presidential records may be made available “to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof.” 44 U.S.C. § 2205(2)(C). Such “special access” requests must come from the Chair of the Committee and cannot be made by the Ranking Member of the Committee.

Accordingly, we are unable to respond to your request. For your information, I am enclosing a copy of the August 2, 2018, letter that I sent to then Senate Minority Leader Schumer explaining the legal requirements of the PRA in more detail.

Sincerely,

David S. Ferriero

Enc.

cc: The Honorable Carolyn Maloney



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2 August 2018

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, DC 20510

Dear Minority Leader Schumer:

On Monday, July 30, 2018, you called me to discuss how the National Archives and Records Administration (NARA) responds to requests from the ranking minority member of a committee for non-public Presidential records under the Presidential Records Act (PRA).

Our conversation referenced my correspondence with Senate Judiciary Committee Ranking Member Feinstein concerning section 2205(2)(C) of the PRA, 44 U.S.C. § 2205(2)(C), which provides that otherwise restricted presidential records may be made available “to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof.” I informed Senator Feinstein, in my letter dated July 26, 2018, that this section requires such “special access” requests to come from the Chair of the Committee, and that NARA has always followed this requirement. In her letter of July 26, 2018, Senator Feinstein questioned NARA’s “unduly restrictive reading” of the special access authority under section 2205 of the PRA. Chairman Grassley also sent a letter to me on July 30, 2018, addressing this issue.

In our conversation, you noted that the minority staff of the Judiciary Committee believe that the special access section of the PRA could be interpreted to include requests from the ranking minority member. You then asked if I would seek a new interpretation of this provision, and I responded that we would seek further guidance on this issue. Accordingly, following our conversation, I directed my General Counsel to consult with the Department of Justice on this matter.

NARA’s longstanding practice of responding only to requests from committee chairs under section 2205(2)(C) is based on who in Congress can act on behalf of a “committee or subcommittee” of either House of Congress. We have always understood that such authority rests only with the chair of the committee (or the committee itself), unless it has been specifically delegated to the ranking minority member. The PRA was passed by Congress in 1978. The relevant language in section 2205(2)(C) is

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identical to the language in 5 U.S.C. § 552a(b)(9) of the Privacy Act, which was passed by Congress in 1974. Both statutes establish specific conditions of disclosure for otherwise non-public information “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee.”

In 2001, the Department of Justice, Office of Legal Counsel (OLC), issued a Letter Opinion for the General Counsel, Department of the Treasury, on the “Application of Privacy Act Congressional-Disclosure Exception to Ranking Minority Members.” 25 Op. O.L.C. 289 (2001). This OLC opinion concluded that “the Privacy Act prohibits the disclosure of the Privacy Act-protected information to the ranking minority member.” *Id.* The opinion noted further that “the essential analysis underlying our conclusion is that although the congressional-disclosure exception to the Privacy Act disclosure prohibition is available for disclosures to either House of Congress or to a committee of Congress, ranking minority members generally do not act on behalf of congressional committees.” *Id.* The opinion went on to state that this conclusion “follows the longstanding Executive Branch practice on this question,” and noted that “the Congressional Research Service takes the same view as we do concerning the lack of authority of ranking minority members, as a general matter, to act on behalf of congressional committees.” *Id.* at 290 (citing to CRS Rpt. 95-464A).

Because the relevant language in the PRA is identical to the Privacy Act language addressed in the 2001 OLC opinion, NARA has relied on the parallel interpretation of the Privacy Act as the legal basis for not recognizing requests under section 2205(2)(C) from ranking minority members. For example, as noted in Chairman Grassley’s July 30 letter, NARA has declined to process such requests from former Judiciary Committee Ranking Member Spector in connection with the nomination of Attorney General Holder and from former Judiciary Committee Ranking Member Sessions in connection with the nomination of Justice Kagan. NARA’s position here is therefore consistent with its prior application of section 2205(2)(C) across presidential administrations.

Per your request, my General Counsel has consulted with the Department of Justice about whether a different interpretation of the PRA is possible. The Department confirmed that the reasoning and conclusion of the 2001 OLC opinion on the Privacy Act would apply equally to the same language in the PRA – i.e., a request from a committee under section 2205(2)(C) must be from the chair (or the committee itself), unless specifically delegated by the committee to the ranking minority member.

Accordingly, NARA remains unable to respond to PRA special access requests from ranking minority members.

Sincerely,



DAVID S. FERRIERO
Archivist of the United States

cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary