

Department of Justice
Washington, D.C. 20530

JUN 14 1973

William G. Casselman II, Esq.
General Counsel
General Services Administration
Washington, D.C. 20405

Dear Mr. Casselman:

This is in response to your request, under the circumstances stated in your letter of June 7, 1973, for the opinion of this Office on the question whether the National Archives and Records Service of the General Services Administration may now allow accredited public research access to microfilm copies of the original reports of the Twelfth Decennial Census, taken in 1900.

As we understand your position, it is that the restriction for an unlimited period of time of access to census records now codified as 13 U.S.C. 8, 9, and 214, has been superseded by § 507(b) of the Federal Records Act of 1950, now codified as 44 U.S.C. 2104. The latter section provides that statutory restrictions on access to records that are binding on an agency head shall also bind the Administrator of General Services with respect to records transferred to his custody or that of the Archivist of the United States, but that such statutory restrictions shall remain in force only during the first fifty years of the records' existence unless extended by the Administrator. With respect to the microfilm copies of the particular census records here at issue, we understand that they were transferred to the National Archives in 1953 pursuant to a 1952 agreement between the Archivist and the Director of the Bureau of the Census (Director) which provided that they would not be available for public research until the lapse of seventy-two years from the date of the census, and then only under circumstances protecting against disclosure to the detriment of any individual.

It appears that the transfer occurred in the following manner:

In 1949 the original schedules of the Twelfth and Fourteenth Censuses were transferred from the Department of Commerce to the National Archives because they were not needed for the current work of the Bureau of the Census, and in any event Census had microfilm copies. The transfer document recited that legal custody of the reports was being officially transferred to Archives subject to a restriction on public access. This transfer was made under the 1934 National Archives Act (48 Stat. 1122) which was later repealed by the Act of September 5, 1950, enacting the Federal Records Act of 1950 (64 Stat. 570, 583, 590), providing a new system of governmental records management.

In 1952 there was an exchange of letters between Census and Archives covering the subject of periodical transfers of census reports to the National Archives and Records Service, an administrative unit of General Services Administration. This exchange provided for a transfer of "the original schedules of each decennial population census when these are no longer needed for active statistical use, the negative microfilm of these population schedules for which the Bureau of the Census possesses adequate positive microfilm copies, and the positive microfilm copies of those population census schedules which the Bureau of the Census no longer desires to retain for reference use." The arrangement further provided that "the master set of negative microfilm to be transferred shall be preserved as the permanent records of the decennial population census schedules * * and (3) that after 'seventy-two years from the enumeration date of a decennial census, the National Archives and Records Service may disclose information contained in these records for use in legitimate historical, genealogical or other worth-while research.'"

Pursuant to this agreement the negative microfilm of the 1900 and a number of other census schedules were transferred from the Department of Commerce to a regional federal records center of the National Archives and Records Service. Later,

the original schedules were physically disposed of by Archives. In 1961 the microfilms so transferred were taken from the Center and deposited in Archives.

The General Counsel of the Department of Commerce takes the differing position that after the enactment in 1950 of § 507(b), supra, the Bureau of the Census had no authority to transfer census records to the National Archives and Records Service, since the applicable census laws require that census records continue to be subject to a confidentiality requirement indefinitely, and could not, therefore, be so transferred that they become subject to the Federal Records Act.

On June 28, 1972, at the request of the Department of Commerce, the Administrator announced that the 1900 census records would not be opened to public access pending resolution of conflicting questions on confidentiality of individual census records and public access to this information. On June 7, 1973, you renewed your earlier 1972 request for our opinion on the question of such access.

For the reasons discussed hereafter, it is our view that, as a matter of law, the transfer of the census records to the National Archives and Records Service was authorized, and the records are now subject to the provision of the Federal Records Act removing the statutory restriction on confidentiality after fifty years. Thus, the authority to permit access at this time rests with the Administrator. We express no views on the policy question of whether it is appropriate to permit such access.

I

We turn first to a review of the relevant census statutes. Under §§ 18 and 21 of the Act of March 3, 1899 (30 Stat. 1014, 1019-20), which authorized the Twelfth and subsequent censuses, a Census employee was required to take an oath that he would not, without the Director's authority, communicate any information obtained in the performance of his duties to any unauthorized person. Penal sanctions were imposed for violation of this duty of confidentiality.

The 1909 Act authorizing the Thirteenth and subsequent censuses contained similar provisions, but with more severe penalties. 1/

The 1919 Act for the Fourteenth and subsequent censuses also contained similar provisions, but added (1) a requirement that only sworn Census employees could examine individual reports by a business enterprise, and (2) a discretionary authorization for the Director to make certain information available to State and local officials, private concerns, and individuals, so long as it was not used to the detriment of an individual. 2/ Similar but strengthened provisions were contained in the 1929 Act for the Fifteenth and subsequent censuses. 3/ This Act remained in effect until title 13 of the United States Code was codified in 1954 (68 Stat. 1012).

The 1899 Census Act and each succeeding Act cited above specifically repealed the preceding act and all laws and parts of laws inconsistent with the latest enactment. The legislative reports on these Acts do not indicate why the repeals were couched in this form. There is, however, a statement respecting the repeals in the House report on the Act of August 31, 1954 (68 Stat. 1012), codifying the census laws. 13 U.S.C. 3 note.

"These repealing provisions are somewhat ambiguous, but it was probably the intent of Congress * * * to continue in effect all provisions of the Act of Mar. 3, 1899, that were not inconsistent with the Act of July 2, 1909."
H.R. Rep. No. 1980, 83rd Cong., 2d Sess. 6.

This statement suggests that the confidentiality provisions would continue to bind Census employees with respect to prior censuses despite the repealers. The General Counsel

1/ 36 Stat. 1.

2/ 40 Stat. 1291.

3/ 46 Stat. 21.

of the Department of Commerce states that the Census Bureau and the Department have interpreted the prohibitions on disclosure in a given Census Act as applicable not only to reports taken thereunder, but also to like reports taken under comparable prohibitions in earlier census laws. We concur in this conclusion, but that does not resolve the issue.

The restrictions on disclosure of census records binding Census Bureau employees are also binding on other federal agencies to which census records may be transferred. In 1944 the Department of Commerce, prior to transferring certain census records to the National Archives, requested the opinion of the Attorney General as to whether the Archivist would be bound to accord the records the same confidential treatment as was required of the Census Bureau. Acting Attorney General Fahy advised that the Archivist was legally bound under the 1934 National Archives Act, supra, to observe the various confidentiality provisions respecting census records transferred to his custody. (40 Op. A.G. 326 (1944)). The Opinion referred to the policy of insuring against unauthorized use of census information detailed at greater length in an earlier opinion holding that census records could not be made available to the Department of Labor to assist it in a study of industrial conditions in a particular city. 36 Op. A.G. 362 (1932). In the 1944 Opinion the Acting Attorney General observed: "It would require very clear language in a general statute relating to the custody of records to justify attributing to Congress an intention to depart from that policy, and there is no such clear intention in the Archives Act."

When the original records of the 1900 Census were transferred to the National Archives in 1949, there was no such general statute indicating an intent to depart from the non-disclosure policy. Thus, as the Acting Attorney General's opinion indicated, the Archivist was bound by the restrictions

on disclosure contained in the census laws. 4/ The question that remains is the legal effect of the later enactment of the Federal Records Act in 1950 and the subsequent transfer of the microfilm copies of the records of the 1900 census.

II

The General Counsel of the Department of Commerce states that had that Department been aware of the provisions of the Federal Records Act when it was pending in Congress, it would have objected to it, or at least requested an exemption from the fifty-year disclosure provision for census records. Although the Department of Commerce did in fact have an opportunity to comment on a similar provision and interposed no objection, 5/ the presence or absence of such an objection is immaterial. The Act was passed without an exemption for census records, and it seems clear that this was not mere oversight on the part of Congress.

In testifying on the proposed Federal Records Act, Dr. Wayne C. Grover, then Archivist, explained that the purpose of the fifty-year limitation on restrictions on disclosure was to make records available for scholarly research after a suitable period of time. He cited the population census schedules as an example of records which were then subject to indefinite restrictions on disclosure, but would

4/ The record of the National Archives Accession Inventory reflects this under the heading "Binding Restrictions on Use of the Records", where it is stated: "These records may not be examined by or copies of or information from them provided by any person except by permission of the Director of the Census."

5/ The Bureau of the Budget requested comments from several departments, including Commerce, on H.R. 8416, 81st Cong. Title V thereof is virtually identical to Title V of the bill that became the Federal Records Act. Commerce submitted no comments. File F6-1/49.2, Series 47.1b, Records of Bureau of the Budget, National Archives Record Group 51.

be covered by the fifty-year limit in the bill. 6/ The legislative reports on the bill reflect the sweeping application of the fifty-year limitation on disclosure restrictions:

"* * * The third proviso is new. It provides for terminating all restrictions (referred to in this subsection [507b]) after the records to which they are applicable have been in existence for 50 years unless otherwise determined by the Administrator with respect to specific bodies of records. This proviso would enable the Administrator to extend the restricted period upon a proper showing of need for such extension, but would otherwise provide a general repeal clause to statutory and other restrictions governing the use of records by scholars and the public generally." (Emphasis supplied.) 7/

In our view, the plain language of 44 U.S.C. 2104 as well as its history constitute, in the Acting Attorney General's words in the 1944 opinion, "very clear language in a general statute relating to custody of records to justify attributing to Congress an intention to depart from that [nondisclosure] policy."

III

The Department of Commerce does not question the applicability of 44 U.S.C. 2104 to records in the custody of the Archivist. It maintains, however, that after 1950 the

6/ Hearings To Amend the Federal Property and Administrative Services Act of 1949 Before the Executive and Legislative Reorganization Subcommittee of the House Committee on Expenditures in the Executive Departments, 81st Cong., 2d Sess. 98.

7/ S. Rep. No. 2140, 81st Cong., 2d Sess. 16; H.R. Rep. No. 2747, 81st Cong., 2d Sess. 15.

Director of the Census had no authority to transfer additional census records knowing that they would be subject to the fifty-year limitation, or to enter into an agreement with the Archivist to protect the records from disclosure for only seventy-two years.

The Acting Attorney General held in 1944, and the Department of Commerce concedes, that there was no legal barrier to the transfer of census records to the Archives for custody and preservation under the 1934 National Archives Act, supra, subject to the then applicable restrictions on disclosure. In our view, the authority of the Director in 1953 to transfer the microfilm copies of these records was not altered by the congressional decision to impose a time limit on disclosure restrictions. "We see no legal objection to the 1953 transfer of the microfilm negatives to a regional federal records center or the subsequent 1961 deposit of them in the National Archives."

Whether or not the Director had authority to enter into the 1952 agreement preserving the census records from disclosure for seventy-two years, the Archivist had unilateral authority to add such a restriction under 44 U.S.C. 2104. 8/ While the policy expressed in the agreement has apparently not been formalized in an "order" of the Archivist, it has been adhered to, and the census records in question have been preserved from disclosure until this time. We conclude that under 44 U.S.C. 2104 the Archivist has the authority either to continue the disclosure restrictions "by order" or to release the census records for accredited public research. Whether he should extend the restrictions for a further period is a matter of policy on which we express no opinion.

8/ The Administrator's authority under the statute has been delegated to the Archivist. GSA Manual GS 1, Vol. GS 1-2, Delegation of Authority, dated March 1952, ch. II, Part 4, Section 401.00 Archives and Records, 400.01, Federal Records Act of 1950, paragraph g.

A copy of this letter is being furnished to the General
Counsel of the Department of Commerce.

Sincerely,

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel