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THE WHITE HOUSE

WASHINGTON

October 16, 1974

MEMORANDUM FOR: MR. WARREN HENDRIKS

FROM: WILLIAM E. TIMMONS

SUBJECT: Action Memorandum - Log No. 663
Enrolled Bill H.R. 12471 - Freedom of Information Act Amendments

The Office of Legislative Affairs concurs in the attached veto proposal and has no additional recommendations.

Attachment

GERALD R. FORD LIBRARY

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 663

Date: October 16, 1974 Time: 10:45 a.m.

FOR ACTION: Geoff Shepard
Phil Buchen
Bill Timmons
NSC/Kennedy
Paul Theiss

cc (for information): Warren K. Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: October 16, 1974 Time: 3:00 p.m.

SUBJECT: Enrolled Bill H.R. 12471 - Freedom of Information Act Amendments

ACTION REQUESTED:

___ For Necessary Action

X For Your Recommendations

___ Prepare Agenda and Brief

___ Draft Reply

___ For Your Comments

___ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

GERALD R. FORD LIBRARY

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OCT 16 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 12471 - Freedom of Information Act amendments
Sponsor - Rep. Morehead (D) Pennsylvania and 11 others

Last Day for Action

October 19, 1974 - Saturday

Purpose

To amend the Freedom of Information Act.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Justice	Disapproval (Draft veto message attached)
Central Intelligence Agency	Disapproval
Department of the Treasury	Disapproval
Department of Commerce	Disapproval (informally)
Department of Defense	Disapproval (informally)
Civil Service Commission	Disapproval
Department of State	Disapproval (informally)
General Services Administration	No objection (informally)
Department of Health, Education and Welfare	Defers (informally)

Discussion

In 1958 the Congress enacted an amendment to the 1789 "housekeeping" statute which had authorized Federal agencies to establish files and maintain records. The 1958 amendment provided that the housekeeping statute did not authorize withholding information from the public. In 1966 the Freedom of Information Act established procedures by which the public could acquire documents in order to know about the business of their government. That law

provided for de novo Federal court review of agency decisions to withhold information and placed on the government the burden to prove that the withholding was proper.

In 1971, a comprehensive review of the administration of the 1966 Act was undertaken culminating, after extensive studies and hearings, in H.R. 12471.

H.R. 12471 is intended to provide more prompt, efficient, and complete disclosure of information.

Specifically, H.R. 12471 would:

-- require that indexes be made available of information such as final opinions and orders in adjudication of cases, statements of policy not published in the Federal Register, staff manuals and instructions and other material. It further provides for an exception to the requirement for publication under prescribed circumstances.

-- require information be made available in response to a request which "reasonably describes" the information. This is essentially a codification of existing case law.

-- require agencies to promulgate a fee schedule for document search and duplication and for a waiver of charges where release of information would be of benefit to the general public.

-- authorize courts in their discretion to examine agency records in camera to determine whether the records can be properly withheld under the Act.

The enrolled bill would reverse the Supreme Court decision in Environmental Protection Agency v. Mink, et al., 410 U.S. 73 (1973), which held that judicial review of classified documents pursuant to Freedom of Information Act litigation was limited to ascertaining whether the document was in fact classified and precluded an in camera review to insure the reasonableness of the classification. The decision was based on the legislative history of the classified documents exemption to the Freedom of Information

Act and therefore Constitutional issues were not addressed. Present law permits de novo review of Freedom of Information Act complaints. The enrolled bill would additionally authorize a review of the classified documents in camera to determine whether the documents were properly classified and to release them if the court found they were not properly classified. The burden of proof would be on the agency to sustain its action of classification.

Your August 20 letter to the Conferees stated that "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." The Conferees did not alter the language of the bill but urged in the Conference Report on the bill that courts give "substantial weight" to the "agency's affidavit concerning the details of the classified status of the disputed records."

The Justice Department believes that this provision is unconstitutional because of the degree of proof that agencies must demonstrate to a court to maintain the classification. All affected agencies strongly urge a veto as a result of this provision. Although some judicial review may well be permissible except for those documents with a direct Presidential nexus, documents classified in the interest of our national security should be disclosed only if the classification was unreasonable and in camera judicial review should be utilized only if the evidence presented does not indicate that the document was in fact reasonably classified pursuant to the standards of the Executive order.

Since this provision may be unconstitutional, the provision could be eliminated or altered by court decision. Signing the bill and litigating this provision would result in a judicially constructed review provision instead of a statutory procedure. Vetoing the bill and simultaneously submitting curative language would risk an override and criticism for vetoing a "truth and candor" bill.

-- provide for a limit of 10 days on determinations whether to comply with a request for documents and a limit of 20 days on determination of an appeal from any withholding. Treasury in its views letter on the enrolled bill states categorically that this limit would be impossible for them to meet in view of the nearly 100 million records in nearly 100 locations. Treasury would need at least 30 days for its initial determination. In your letter to Senator Kennedy you called the time limits "unnecessarily restrictive." In his response dated September 23, Senator Kennedy states that the Conference Committee adopted the Senate version which granted agencies additional time and provided for additional time by the court. Administratively, this provision could have the most significant cost and operational impact upon the agencies, and the time limits may be unworkable.

-- provide for a limit of 30 days on the time during which an agency must respond to a complaint and for priority treatment of these cases in the courts.

-- provide for court assessment, against the United States, of attorney fees and litigation costs incurred in any case in which the complainant has substantially prevailed.

-- provide for CSC action to determine whether an employee should be disciplined in any case where a court issues a finding that information has been arbitrarily or capriciously withheld. CSC would, after consideration, submit its findings and recommendations to the agency concerned and the agency must follow those recommendations. In your letter to Senator Kennedy you stated that personnel discipline should be left with the agency and judicial involvement then follow in the traditional form. Senator Kennedy replied that the Conference version was substantially modified to place disciplinary proceedings in CSC and then only after a "written finding by the court that circumstances raise questions whether agency personnel acted arbitrarily or capriciously."

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-- amend the law enforcement investigatory files exemption to permit withholding of documents only if their disclosure would result in any one of the following six specific occurrences:

a. interfere with enforcement proceedings;

b. deprive a person of a right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential sources;

e. disclose investigative techniques and procedures; and

f. endanger the life or physical safety of law enforcement personnel.

The agency would have to bear the burden of proof in demonstrating to a court that the record would result in one of these events. Current law generally exempts all such files compiled for law enforcement purposes and has been given an expansive interpretation by the courts consistent with its legislative history.

Your August 20 letter urged deletion of the words "clearly unwarranted" from the personal privacy exemption to disclosure (item c above). The Conferees deleted the word "clearly" from the bill. The letter further expressed concern that this provision not "reduce our ability to effectively deal with crimes." The bill was altered following your letter to exempt material which would disclose a

confidential source. However, when combined with the provision of the bill which would permit disclosure of any reasonably segregable portion of a record, this provision would require a detailed review of a large number of records to identify each portion as disclosable or not. There are concerns with this provision which stem primarily not from the conditions for withholding, but from the sheer administrative burden of screening through each requested record and applying the provisions of this exemption to each reasonably segregable portion of the record. Although most other agencies screen records in the manner that law enforcement activities would be required to do under this provision, there are a tremendous number of these records and the cost of compliance would be significant. This administrative impact appears to be, however, the only credible objection to the provision. The only solution to this would be movement back towards the current provision.

-- provide for release to a claimant of any "reasonably segregable portion of a record..." This is essentially a codification of existing case law.

-- provide for annual reports and record keeping.

-- provide for an expanded definition of "agency" to include the Postal Service and the Postal Rate Commission, government corporations or government-controlled corporations, and the Executive Office of the President except for those units whose sole function is to advise and assist the President.

In view of the foregoing, we recommend disapproval and have prepared the attached draft of a veto message for your consideration.

Director

Enclosures

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TO THE HOUSE OF REPRESENTATIVES

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I was graciously afforded an opportunity to review this proposed legislation. On August 20, because I believe so strongly in the need for a more open Executive branch, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. I stated that I would go more than halfway to accommodate Congressional concerns with this legislation, and I am very pleased that Congress has also demonstrated a spirit of cooperation and accommodation.

In my letter, I stated that, notwithstanding my preferences, I would accept several provisions in the bill which would be burdensome. I am certain that Congress made similar adjustments. However, I am still deeply concerned with some provisions of the enrolled bill.

First, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents.

Second, as I previously stated "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." That provision remains unaltered in the enrolled bill.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. I am not, however, able to accord the courts what amounts to a power of initial decision rather than a power of review, in a most sensitive and complex area where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would have to be overturned by a district judge if, even though it was reasonable, the judge thought the plaintiff's position just as reasonable. And if the district judge's decision of equal reasonableness is based upon a determination of fact, it cannot even be undone by a higher court unless "clearly erroneous." Such a provision would violate constitutional principles and it would give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.

I propose, therefore, that where classified documents were requested the courts could review the classification but would have to uphold the classification if there is reasonable

basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

I shall shortly submit language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

THE WHITE HOUSE

October , 1974

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

October 15, 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Dear Sir:

Reference is made to the proposed veto message on H.R. 12471.

We have prepared and enclose herewith a modification of the draft veto message submitted by the Department of Justice. We have made those changes that we believe are indicated by the position taken in the Treasury Department letter of comment delivered to you last week. The language which would be deleted from the Justice Department draft is enclosed in brackets and the language which Treasury would add to that draft is underlined.

Very truly yours,

Richard R. Albrecht

Enclosure

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

OCT 9 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined the enrolled bill (H.R. 12471), to amend section 552 of Title 5, United States Code, known as the Freedom of Information Act. Since the facsimile of the enrolled bill is not yet available, the review has been made of the bill as it appears in the conference report (Senate Report No. 93-1200 of October 1, 1974).

The enrolled bill is designed to improve the administrative procedures for handling requests by the public under the Freedom of Information Act for access to government documents. The bill makes numerous substantial changes in the present Act. While there are many provisions with which we do not disagree, there are some points upon which we take strong exception.

The attached proposed memorandum of disapproval gives general support to the principle of strengthening the Freedom of Information Act and promoting the cause of openness in government, while at the same time highlighting the defects which we see in the bill and requesting their elimination.

It is recommended that the enrolled bill not receive Executive approval and that the substance of the attached proposed memorandum of disapproval be included in the veto message.

Sincerely,

W. Rakestraw

W. Vincent Rakestraw
Assistant Attorney General

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

26 SEP 1974

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

It appears that H.R. 12471, the Freedom of Information Act amendments now in conference in the Congress, may be approved by the Congress. In that event, I respectfully urge your veto of this bill.

I have serious concern over the interjection of the courts into the classification process. The courts are ill equipped to make the judgments of what matters are classified. The courts themselves have consistently so indicated and have pointed to the ability of the Executive branch to bring to bear all the necessary knowledge to make proper judgments on matters of classification. The courts have acknowledged that the Executive may have other highly classified information derived from numerous sources, including the results of intelligence efforts, which are not available to the courts.

I strongly support the position you took on court review in your letter to the House and Senate Conferees of 23 August 1974. I also agree that court review could be acceptable under certain circumstances if the court upon review determines that the classification had been arbitrary and capricious.

In urging a veto of this bill, I am mindful of the responsibility placed on me by the Congress in the National Security Act to protect "intelligence sources and methods from unauthorized disclosure." By law, therefore, that responsibility rests on me, and I do not believe that I can effectively and securely conduct intelligence activities if a court after a de novo review can substitute its judgment for mine as to what information requires protection. Our current difficulties in the courts with Mr. Victor Marchetti, an ex-employee, have clearly shown us the problems of acquainting courts with the subtleties and sensitivities of the intelligence process.

There are other provisions in this bill which I feel are most unsatisfactory. For example, the bill would require Agency responses within 10 days. Experience has shown that the scope of requests under the Freedom of Information Act generally requires far greater lengths of time to do a proper search and subsequent review. Also, the bill provides for sanctions to be administered by the Civil Service Commission where employees are charged with improperly withholding information. In my view this would be in derogation of the command responsibilities of the heads of departments and agencies.

While I am fully in agreement with the concept that the Executive branch should make available as much information as possible to the American public, I do not feel that this bill serves that objective in an appropriate fashion. Consequently, I urge your veto of this bill if it is approved by the Congress.

Respectfully,

/s/ W. E. Colby

W. E. Colby
Director

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

OCT 10 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of H.R. 12471, the Freedom of Information Act Amendments.

The enrolled enactment would amend 5 U.S.C. 552, the so-called Freedom of Information Act, in several respects, each of which is designed to expedite or assure access by the public to information held by the Government.

While this Department is prepared to support the overall objectives and intent of the legislation, it is firmly of the opinion that certain of its provisions require refinement in order to be workable or constitutionally sound. We therefore believe the President should withhold his approval pending such refinements and hereby strongly so recommend. We have had the benefit of a copy of the draft veto message prepared by the Department of Justice. That draft message discusses the major areas in which the enrolled enactment requires refinement. This Department would support the substance of the Justice draft veto message. However, we would like to emphasize several matters which are of peculiar concern to this Department for possible incorporation into a veto message.

The relatively inflexible time limits of subparagraph (6) of 5 U.S.C. 552(a), as it would be amended by § 1(c) of the enrolled enactment, are, in our opinion, totally unworkable. The Internal Revenue Service has literally tens of millions of files in several hundred locations throughout the country. It may well require in excess of the permitted times to locate the record requested. Moreover, tax records are subject to a high degree of confidentiality. An employee of IRS cannot be expected to weigh carefully the taxpayer's right to the confidentiality of his records when he is faced with an inflexible short deadline and his failure to release the records may well result in disciplinary action against him.

Neither the best interests of the taxpayer nor the IRS are served by such a Hobson's choice. Essentially the same argument can be made for the Customs Service.

Because of these factors, the Department believes that at least 30 days should be allowed for a response to the initial request and that there should be a right to an extension of a further 30 days if required, with Court review only for any extension beyond this 60 day period.

While we believe such time limits may be generally warranted, we are firmly of the opinion that they are essential in the IRS and Customs context, if in no other.

We are also particularly concerned about the refinement of the investigatory file exemption contained in § 2(b) of the enrolled enactment. Our principal concern is expressed in the Justice draft veto message and relates to the word "would" which applies to clauses (A) through (F). More and more citizens are using 5 U.S.C. 552 as an alternative or an addition to discovery under Court rules. If the request for records is denied and the denial is appealed to the Courts, it would be necessary to prove, among other things, that production of the records would interfere with enforcement proceedings. This requirement could delay the investigation until the request for records suit is resolved. Such delays may have a significant impact on the collection of the revenue by the Internal Revenue and Customs Services and possibly even the Bureau of Alcohol, Tobacco and Firearms.

We also wish to raise one matter which is not discussed in the Justice draft veto message. Section (b)(2) of the enrolled enactment would add a new paragraph (4) to 5 U.S.C. 552(a), which in subparagraph (4)(F) would have a Court make written findings as to whether agency personnel acted arbitrarily or capriciously with respect to the withholding of documents. The Civil Service Commission is then directed to initiate proceedings to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Civil Service Commission is to submit its findings and recommendations to the agency concerned and that agency is to take the corrective action that the Commission recommends. However, in the Treasury Department final decisions to withhold may be made by Presidential appointees. It is questionable whether the Civil Service Commission has jurisdiction over such officials and whether the agency can take disciplinary action against them. It would seem inappropriate for such action to be taken by an officer other than the President.

In view of all of the foregoing, the Department would strongly support a recommendation that the enrolled enactment, H.R. 12471, not be approved by the President in its present form.

Sincerely yours,

Richard R. Albrecht
General Counsel

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

11 October 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Department of Defense on the enrolled enactment of H. R. 12471 of the 93d Congress, to amend Section 552 of Title 5, United States Code, known as the Freedom of Information Act.

This department cannot recommend that the President sign the enrolled H. R. 12471, 93d Congress, in view of the remaining technical deficiencies in some of the provisions. More specifically:

(1) The Department of Defense is opposed to the authority of district courts all over the country to review classified documents on a de novo basis for the purpose of determining whether they "in fact" meet the criteria of the executive order authorizing their classification. Under this provision no presumption in favor of the validity of the classification is specified and, therefore, judges without background in the subject matter of the questioned record will be asked to "second guess" the justification for the classification. This formidable burden on the courts, many of which have had little or no experience with such documents, will necessitate extensive effort by the Department of Defense to explain to deciding judges foreign policy and national security matters which are often of great sensitivity and complexity. To relieve this burden to some extent it would be appropriate to recommend to the Congress that they adopt the language proposed by the Senate Committee on the Judiciary in Report No. 93-854, 93d Congress, endorsing amendment of this Act. After carefully studying this difficult problem, the Judiciary Committee recommended language which, in effect, directed the courts to sustain the classification of a document unless "the withholding is without a reasonable basis." A further desirable qualification would be to restrict suits challenging classification determinations to the Seat of Government in order that there could be uniformity of treatment and development of an expertise in a single District Court.

(2) The proposed time limits for responding to Freedom of Information Act requests are unduly rigid and may promote litigation by requiring the agency to make negative determinations on requests for records when there has been inadequate opportunity to locate and evaluate them. Moreover, these time limits create priority for Freedom of Information Act requests that may be inconsistent with the public interest. Officials required to review and evaluate documents to determine their releasability will be diverted from other important government duties that may be far more significant to the public than a random request for a record by "any person", no matter what his purpose or motive.

(3) The potential sanction against personnel who appear to have arbitrarily and capriciously withheld records may create a climate in which records which should be withheld in the interest of privacy, national security, or agency efficiency will be released in order to avoid the possibility of punishment. Moreover, the Act might be interpreted to authorize Civil Service Commission determinations of whether disciplinary action is warranted against those responsible for withholding records, even when the responsible official is a member of the armed forces. This prospect is wholly inappropriate. Members of the armed forces are entitled to carefully prescribed procedures for the impositions of administrative sanctions, and these are not compatible with the sanction provision of the enrolled bill.

(4) The modification of subsection (b)(7) to prescribe the circumstances under which investigative records may be withheld from public requesters is inadequate in its protection of information contained in some investigative files that cannot qualify as involving criminal investigations or security intelligence investigations. Although the Conference Report alludes to background security investigations as coming within the area of protection, it is by no means clear that courts will interpret the term "national security intelligence investigation" to encompass all investigative records requiring such protection.

If it is determined that this enrolled bill should be vetoed, we strongly urge that the veto message avoid language which seems to pose burdensome interpretations of the bill that are not inevitable. Such language is likely to prove difficult to overcome in litigation where government agencies seek to justify the withholding of records under ambiguous language which lends itself to differing interpretations. For example, it is undesirable to suggest that a judge must rule on behalf of a requester in a situation in which he finds the government justification for security classification no more persuasive than the requesters

position that the classification is unjustified. As a practical matter such contingency seems unlikely, and we believe it is inadvisable to overemphasize in the veto message the extent of the Government's burden under the de novo review requirements.

We also urge that any veto message avoid raising issues not contained in President Ford's letter of August 20, 1974. To do so is likely to subject the Executive Branch to the accusation that it has shifted its ground after Congress attempted to meet it halfway. It would be preferable to argue that the concessions mentioned in the letter of September 23, 1974 from Subcommittee Chairmen Kennedy and Moorhead were inadequate to meet legitimate concerns and responsibilities of the President.

Finally, we recommend that if the President does not veto the enrolled bill that he issue a signing statement that emphasizes his continuing responsibility as Commander-in-Chief and Chief Executive under the Constitution to protect records in the interests of national defense and foreign policy. This is consistent with the action taken by President Johnson in signing the original Freedom of Information Act, P. L. 89-487, on July 4, 1966. In addition, a signing message should include language that will emphasize the responsibility of the agencies to issue regulations which will interpret these statutory amendments in a manner that makes them workable and consistent with the overall intent of Congress. Such a statement would lay the foundation for agency regulations designed, for example, to mitigate time limits by prescribing appropriate forms and recipient offices for requests, thereby avoiding some of the difficulties that may be encountered from misdirected and inadequately described requests.

We would welcome the opportunity to comment further on a proposed veto message or signing statement.

Sincerely,

Martin R. Hoffmann

Martin R. Hoffmann

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

October 10, 1974

Honorable Roy L. Ash
Director
Office of Management and Budget

Attention: Assistant Director for
Legislative Reference

Dear Mr. Ash:

This is in reply to your request for the views of the Civil Service Commission on enrolled bill H.R. 12471, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The enrolled bill makes a number of amendments to section 552 of title 5, the "Freedom of Information Act", to strengthen the requirements for access by the public to agency records. The bill strengthens the section's requirement for publication of agency indexes identifying information for the public, changes the present law requirement that a request for information from an agency be for "identifiable records" to a requirement that the request only "reasonably describe" the records, and requires that each agency issue regulations establishing for recovery of only the direct costs of search and duplication of records. The bill authorizes court review de novo of requests for records in camera, sets a 30-day time limitation for response by an agency to a complaint under the Freedom of Information law, and provides that court appeals should be expedited. The court is authorized to assess reasonable attorney fees and other litigation costs of complainants. The court is authorized to make a finding whether the circumstances surrounding the withholding of information raise questions whether agency personnel acted arbitrarily or capriciously. If the court so finds, the Civil Service Commission must promptly initiate a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The Commission's findings and recommendations are to be submitted to the appropriate administrative authority of the agency concerned and to the responsible official or employee, and the administrative authority shall promptly take the disciplinary action recommended by the Commission.

The bill establishes deadlines for agency determinations on requests, and revises the national defense and foreign policy exemption to require establishment of criteria. The exemption for investigatory records is also amended limiting the exemption to cases where their disclosure would interfere with enforcement proceedings, deprive a person of a fair trial, be an invasion of privacy, disclose the identity of a confidential source, disclose investigative techniques and procedures, or endanger law enforcement personnel.

The bill provides that any reasonably segregable portion of a record shall be made available to a requester when the other portions are exempt. Annual reports of actions under the legislation are required from all agencies and the definition of "agency" is expanded to include any executive agency, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch or any independent regulatory agency.

The Commission understands that the Department of Justice has drafted a veto message objecting to provisions of the bill relating to judicial review of classification of information, disclosure of investigatory law enforcement files, the administrative time limits established by the bill and the criteria for establishment of fee schedules. We concur in these objections and also submit the following comments.

Our primary concern is with protection of the privacy of Federal employees. While the bill purports to exempt from disclosure material which would "constitute an unwarranted invasion of personal privacy", (Paragraph (7)(C) on investigative records) the term "unwarranted" is undefined. Court cases under the Freedom of Information Act have construed the exemptions narrowly and we may thus assume that part of the exemption will be so construed. In addition the Committee report states (regarding another exemption in Paragraph (7)) "Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances." This language can be used to further narrow Paragraph (7)(C) and may be interpreted to imply that only the confidential source of such material may be protected but not the "confidential information" itself. In addition, the bill would require a paragraph-by-paragraph and perhaps, sentence-by-sentence determination of exemption of material including such clearly personal matters as medical reports.

Accordingly, the Commission recommends that the President veto enrolled bill H.R. 12471.

By direction of the Commission:

Sincerely yours,

Jayne B Spain

Acting
Chairman

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MEMORANDUM

AMENDMENTS TO FREEDOM OF INFORMATION ACT

DRAFT VETO MESSAGE

MODIFIED BY THE TREASURY DEPARTMENT

(LANGUAGE TO BE DELETED ENCLOSED IN BRACKETS; LANGUAGE ADDED UNDERLINED)

With great reluctance and regret, and with my earnest request that this legislation be promptly re-enacted with the changes discussed below, I am returning H.R. 12471 without my approval. With these changes, the legislation will significantly strengthen the Freedom of Information Act and the cause of openness in government to which I am committed. But without them, it will weaken needed safeguards of individual privacy, impede law enforcement, impair the national defense and our conduct of foreign relations, diminish the ability of federal agencies to process information requests fairly and intelligently, and impose substantial additional expenses upon the taxpayers that can neither be controlled nor accurately estimated.

None of the changes discussed below would alter the objective of this legislation, nor would they eliminate any of its basic features. Some of them will give users of the Act important rights not contained in the bill as it now stands. These minor but important revisions will eliminate serious constitutional difficulties and greatly enhance the practical workability of the legislation.

First, a limited change is needed in the judicial review provisions as they would apply to classified defense and foreign policy documents. I am prepared to accept those aspects of these provisions which are designed to

enable courts to inspect classified documents and review the justification for their classification. I am not, however, able to accord the courts what amounts to a power of initial decision rather than a power of review, in a most sensitive and complex area where they have no particular expertise. As the legislation now stands, a determination by [the Secretary of Defense] a responsible official of the Executive Branch that disclosure of a document would endanger our national security must be overturned by a district judge if, even though it is reasonable, the judge thinks the plaintiff's position just as reasonable. And if the district judge's decision of equal reasonableness is based upon a determination of fact, it cannot even be undone by a higher court unless "clearly erroneous." Such a provision not only violates constitutional norms, it offends common sense. It gives less weight to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters. I propose, therefore, the minor but vital change that where classified documents are requested the courts may review the classification but must uphold it if there is reasonable basis to support it.

The provisions amending the 7th exemption of the Act, covering investigatory files, would seriously jeopardize individual privacy and the ability of the FBI and other law enforcement agencies to combat crime, for example. Individual privacy demands that the second-hand, unevaluated assertions about individuals contained in investigative files not be released without careful evaluation of their impact; and effective law enforcement requires confidence on the part of those who are asked to provide information about possible violations of law that their identity will be preserved inviolate.

The present bill will assure these protections only in theory--not in practice. Confidentiality can simply not be maintained if many millions of pages of FBI and other investigatory law enforcement files become subject to compulsory disclosure at the behest of any person, except as the government may be able to prove to a court--separately for each paragraph of each document--that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and assuredly will not be able to obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination with respect to information requests that sometimes involve hundreds of thousands of documents. Similarly, the tax collection activities of the Internal Revenue Service could be impaired by a further liberalization of access to law enforcement files. Experience has shown that sophisticated taxpayers will utilize provisions such as those in the bill to supplement discovery in both criminal and civil proceedings with the potential of severely curtailing and delaying audit investigations and prosecutions in the tax area until the matter of access is finally resolved. This could result in a loss of tax revenues. In order to meet the Congress' legitimate concerns with the existing investigatory files exemption, I propose, instead of the unrealistic provisions contained in the present bill, the following new safeguards: (1) prohibition against placing in investigatory files records which are not investigatory records; (2) clear specification that the existing exemption does not apply to noninvestigatory records that are found in investigatory files, and (3) substitution of the tests proposed in the present bill for the investigatory files exemption when

the documents covered by the request are less than 50 pages in length, unless the agency specifically finds (subject to judicial review) that application of those tests is not feasible or not in furtherance of the purposes of the Act.

The administrative time limit provisions in the bill are aimed at a desirable goal, but are too rigid, considering the great variety in the nature, size, and difficulty of Freedom of Information requests. In their present form, they will require employees of agencies, particularly those, like the Internal Revenue Service, which have voluminous records in numerous locations, to make hasty judgments on the availability of requested records and thereby lead to unnecessary denials in some cases and to careless grants in others, sacrificing individual privacy, commercial confidentiality, and the proper performance of government functions. They make no allowance for consulting either individuals or business firms when records about them are sought; nor do they take into account the situation of an agency like the Immigration and Naturalization Service, which receives almost 100,000 requests a year for information contained in over 12,000,000 files kept at 67 locations, or the Internal Revenue Service, which maintains literally hundreds of millions of tax records at over 100 locations. I urge that the time limit provisions be changed [so as generally to reflect the recommendations of the Administrative Conference of the United States] to provide more realistic and practical limits. While it may not be essential for every agency, in my judgment, a minimum of 30 days for an initial, plus 30 days for an appellate, response is absolutely essential for agencies such as the Internal Revenue Service. The ability to extend such periods for an additional 30 days upon the personal determination of the head of the agency is also necessary. I would, moreover, propose that further extensions be

permitted for good cause shown. As safeguards against agency abuse of time extensions, I would agree to limiting any one extension to 10 working days and also giving a requester the right, which the bill does not now confer, to challenge in court an agency's justification for issuing extensions. I would also favor inclusion of a provision authorizing and encouraging specially expedited service for the news media and others with a special public interest in speed.

In many agencies, final decisions to deny information are made by presidential appointees. The bill contains provisions for disciplining those agency personnel who have acted arbitrarily and capriciously with respect to the withholding of documents. Those provisions would require a court to make written findings and the Civil Service Commission then to initiate proceedings to determine whether disciplinary action is warranted against the officer or employee who is primarily responsible for the withholding. The Civil Service Commission is to submit its findings and recommendations to the agency concerned and that agency is to take the corrective action that the Commission recommends. It is questionable whether the Civil Service Commission has jurisdiction over presidential appointees who may have made the decision to withhold. It is also questionable whether an agency may take disciplinary action against such officials. It would seem that only the President could clearly take such action. I recommend that the Congress give further consideration to this provision in light of these factors.

Finally, fairness to the taxpayer and to the persons who are the subjects of federal records calls for some changes in the closely related provisions which would prohibit any charge for examination of records regardless of the

amount of work involved, while compelling extensive editing in order to release "any reasonably segragable portion" of a record. Under the fee provision, corporate interests could require massive research in government records for their own gain at the taxpayer's expense; and that expense would be greatly inflated by the editing provision. Agencies would be under great pressure to reduce their editing work by releasing records without adequate consideration of the impact upon individuals or upon government functions. To correct these problems, I propose that fees for services other than search and duplication be permitted under the user charge statute where they exceed $100--with right to a quick and independent administrative review of the fees, and to court review. I also propose that the editing requirement be made a general but not a universal rule, that is, inapplicable in those situations in which it is found by the agency to be not reasonably practicable, not in furtherance of the goals of the Act, or not consistent with the nature and purpose of the exemption in question--again with the right to judicial review of this determination.

I again emphasize that the changes discussed above do not eliminate any of the basic features of this legislation, which I endorse. They can accurately be described as technical changes, which enable the same objectives to be achieved in a fashion which avoids adverse effects that would otherwise ensue. It is my firm belief that they would not weaken but would strengthen this legislation, because the predictable effect of the present bill's impracticable and undesirable demands upon administrators and judges will be

to diminish respect for, and reduce the careful observance of the Freedom of Information Act. I am submitting to the Congress, together with this veto message, an Administration bill which is identical to H.R. 12471, with the minor but important changes I have discussed above. I hope that bill will receive the wide support it deserves.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 663

Date: October 16, 1974 Time: 10:45 a.m.

FOR ACTION: Geoff Shepard ✓
Phil Buchen
Bill Timmons
NSC/Kennedy
Paul Theiss
FROM THE STAFF SECRETARY

cc (for information): Warren K. Hendriks
Jerry Jones

DUE: Date: October 16, 1974 Time: 3:00 p.m.

SUBJECT: Enrolled Bill H.R. 12471 - Freedom of Information Act Amendments

ACTION REQUESTED:

____ For Necessary Action
X For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
____ For Your Comments
____ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

OBE - file for me under FOI

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PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

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

OCT 16 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 12471 - Freedom of Information Act amendments
Sponsor - Rep. Morehead (D) Pennsylvania and 11 others

Last Day for Action

October 19, 1974 - Saturday

Purpose

To amend the Freedom of Information Act.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Justice	Disapproval (Draft veto message attached)
Central Intelligence Agency	Disapproval
Department of the Treasury	Disapproval
Department of Commerce	Disapproval (informally)
Department of Defense	Disapproval (informally)
Civil Service Commission	Disapproval
Department of State	Disapproval (informally)
General Services Administration	No objection (informally)
Department of Health, Education and Welfare	Defers (informally)

Discussion

In 1958 the Congress enacted an amendment to the 1789 "housekeeping" statute which had authorized Federal agencies to establish files and maintain records. The 1958 amendment provided that the housekeeping statute did not authorize withholding information from the public. In 1966 the Freedom of Information Act established procedures by which the public could acquire documents in order to know about the business of their government. That law

provided for de novo Federal court review of agency decisions to withhold information and placed on the government the burden to prove that the withholding was proper.

In 1971, a comprehensive review of the administration of the 1966 Act was undertaken culminating, after extensive studies and hearings, in H.R. 12471.

H.R. 12471 is intended to provide more prompt, efficient, and complete disclosure of information.

Specifically, H.R. 12471 would:

-- require that indexes be made available of information such as final opinions and orders in adjudication of cases, statements of policy not published in the Federal Register, staff manuals and instructions and other material. It further provides for an exception to the requirement for publication under prescribed circumstances.

-- require information be made available in response to a request which "reasonably describes" the information. This is essentially a codification of existing case law.

-- require agencies to promulgate a fee schedule for document search and duplication and for a waiver of charges where release of information would be of benefit to the general public.

-- authorize courts in their discretion to examine agency records in camera to determine whether the records can be properly withheld under the Act.

The enrolled bill would reverse the Supreme Court decision in Environmental Protection Agency v. Mink, et al., 410 U.S. 73 (1973), which held that judicial review of classified documents pursuant to Freedom of Information Act litigation was limited to ascertaining whether the document was in fact classified and precluded an in camera review to insure the reasonableness of the classification. The decision was based on the legislative history of the classified documents exemption to the Freedom of Information

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Act and therefore Constitutional issues were not addressed. Present law permits de novo review of Freedom of Information Act complaints. The enrolled bill would additionally authorize a review of the classified documents in camera to determine whether the documents were properly classified and to release them if the court found they were not properly classified. The burden of proof would be on the agency to sustain its action of classification.

Your August 20 letter to the Conferees stated that "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." The Conferees did not alter the language of the bill but urged in the Conference Report on the bill that courts give "substantial weight" to the "agency's affidavit concerning the details of the classified status of the disputed records."

The Justice Department believes that this provision is unconstitutional because of the degree of proof that agencies must demonstrate to a court to maintain the classification. All affected agencies strongly urge a veto as a result of this provision. Although some judicial review may well be permissible except for those documents with a direct Presidential nexus, documents classified in the interest of our national security should be disclosed only if the classification was unreasonable and in camera judicial review should be utilized only if the evidence presented does not indicate that the document was in fact reasonably classified pursuant to the standards of the Executive order.

Since this provision may be unconstitutional, the provision could be eliminated or altered by court decision. Signing the bill and litigating this provision would result in a judicially constructed review provision instead of a statutory procedure. Vetoing the bill and simultaneously submitting curative language would risk an override and criticism for vetoing a "truth and candor" bill.

-- provide for a limit of 10 days on determinations whether to comply with a request for documents and a limit of 20 days on determination of an appeal from any withholding. Treasury in its views letter on the enrolled bill states categorically that this limit would be impossible for them to meet in view of the nearly 100 million records in nearly 100 locations. Treasury would need at least 30 days for its initial determination. In your letter to Senator Kennedy you called the time limits "unnecessarily restrictive." In his response dated September 23, Senator Kennedy states that the Conference Committee adopted the Senate version which granted agencies additional time and provided for additional time by the court. Administratively, this provision could have the most significant cost and operational impact upon the agencies, and the time limits may be unworkable.

-- provide for a limit of 30 days on the time during which an agency must respond to a complaint and for priority treatment of these cases in the courts.

-- provide for court assessment, against the United States, of attorney fees and litigation costs incurred in any case in which the complainant has substantially prevailed.

-- provide for CSC action to determine whether an employee should be disciplined in any case where a court issues a finding that information has been arbitrarily or capriciously withheld. CSC would, after consideration, submit its findings and recommendations to the agency concerned and the agency must follow those recommendations. In your letter to Senator Kennedy you stated that personnel discipline should be left with the agency and judicial involvement them follow in the traditional form. Senator Kennedy replied that the Conference version was substantially modified to place disciplinary proceedings in CSC and then only after a "written finding by the court that circumstances raise questions whether agency personnel acted arbitrarily or capriciously."

-- amend the law enforcement investigatory files exemption to permit withholding of documents only if their disclosure would result in any one of the following six specific occurrences:

a. interfere with enforcement proceedings;

b. deprive a person of a right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential sources;

e. disclose investigative techniques and procedures; and

f. endanger the life or physical safety of law enforcement personnel.

The agency would have to bear the burden of proof in demonstrating to a court that the record would result in one of these events. Current law generally exempts all such files compiled for law enforcement purposes and has been given an expansive interpretation by the courts consistent with its legislative history.

Your August 20 letter urged deletion of the words "clearly unwarranted" from the personal privacy exemption to disclosure (item c above). The Conferees deleted the word "clearly" from the bill. The letter further expressed concern that this provision not "reduce our ability to effectively deal with crimes." The bill was altered following your letter to exempt material which would disclose a

confidential source. However, when combined with the provision of the bill which would permit disclosure of any reasonably segregable portion of a record, this provision would require a detailed review of a large number of records to identify each portion as disclosable or not. There are concerns with this provision which stem primarily not from the conditions for withholding, but from the sheer administrative burden of screening through each requested record and applying the provisions of this exemption to each reasonably segregable portion of the record. Although most other agencies screen records in the manner that law enforcement activities would be required to do under this provision, there are a tremendous number of these records and the cost of compliance would be significant. This administrative impact appears to be, however, the only credible objection to the provision. The only solution to this would be movement back towards the current provision.

-- provide for release to a claimant of any "reasonably segregable portion of a record..." This is essentially a codification of existing case law.

-- provide for annual reports and record keeping.

-- provide for an expanded definition of "agency" to include the Postal Service and the Postal Rate Commission, government corporations or government-controlled corporations, and the Executive Office of the President except for those units whose sole function is to advise and assist the President.

In view of the foregoing, we recommend disapproval and have prepared the attached draft of a veto message for your consideration.

Director

Enclosures

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TO THE HOUSE OF REPRESENTATIVES

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I was graciously afforded an opportunity to review this proposed legislation. On August 20, because I believe so strongly in the need for a more open Executive branch, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. I stated that I would go more than halfway to accommodate Congressional concerns with this legislation, and I am very pleased that Congress has also demonstrated a spirit of cooperation and accommodation.

In my letter, I stated that, notwithstanding my preferences, I would accept several provisions in the bill which would be burdensome. I am certain that Congress made similar adjustments. However, I am still deeply concerned with some provisions of the enrolled bill.

First, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents.

Second, as I previously stated "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." That provision remains unaltered in the enrolled bill.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. I am not, however, able to accord the courts what amounts to a power of initial decision rather than a power of review, in a most sensitive and complex area where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would have to be overturned by a district judge if, even though it was reasonable, the judge thought the plaintiff's position just as reasonable. And if the district judge's decision of equal reasonableness is based upon a determination of fact, it cannot even be undone by a higher court unless "clearly erroneous." Such a provision would violate constitutional principles and it would give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.

I propose, therefore, that where classified documents were requested the courts could review the classification but would have to uphold the classification if there is reasonable

basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

I shall shortly submit language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

THE WHITE HOUSE

October , 1974

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

October 15, 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Dear Sir:

Reference is made to the proposed veto message on H.R. 12471.

We have prepared and enclose herewith a modification of the draft veto message submitted by the Department of Justice. We have made those changes that we believe are indicated by the position taken in the Treasury Department letter of comment delivered to you last week. The language which would be deleted from the Justice Department draft is enclosed in brackets and the language which Treasury would add to that draft is underlined.

Very truly yours,

Richard R. Albrecht

Enclosure

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

OCT 9 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined the enrolled bill (H.R. 12471), to amend section 552 of Title 5, United States Code, known as the Freedom of Information Act. Since the facsimile of the enrolled bill is not yet available, the review has been made of the bill as it appears in the conference report (Senate Report No. 93-1200 of October 1, 1974).

The enrolled bill is designed to improve the administrative procedures for handling requests by the public under the Freedom of Information Act for access to government documents. The bill makes numerous substantial changes in the present Act. While there are many provisions with which we do not disagree, there are some points upon which we take strong exception.

The attached proposed memorandum of disapproval gives general support to the principle of strengthening the Freedom of Information Act and promoting the cause of openness in government, while at the same time highlighting the defects which we see in the bill and requesting their elimination.

It is recommended that the enrolled bill not receive Executive approval and that the substance of the attached proposed memorandum of disapproval be included in the veto message.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

26 SEP 1974

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

It appears that H.R. 12471, the Freedom of Information Act amendments now in conference in the Congress, may be approved by the Congress. In that event, I respectfully urge your veto of this bill.

I have serious concern over the interjection of the courts into the classification process. The courts are ill equipped to make the judgments of what matters are classified. The courts themselves have consistently so indicated and have pointed to the ability of the Executive branch to bring to bear all the necessary knowledge to make proper judgments on matters of classification. The courts have acknowledged that the Executive may have other highly classified information derived from numerous sources, including the results of intelligence efforts, which are not available to the courts.

I strongly support the position you took on court review in your letter to the House and Senate Conferees of 23 August 1974. I also agree that court review could be acceptable under certain circumstances if the court upon review determines that the classification had been arbitrary and capricious.

In urging a veto of this bill, I am mindful of the responsibility placed on me by the Congress in the National Security Act to protect "intelligence sources and methods from unauthorized disclosure." By law, therefore, that responsibility rests on me, and I do not believe that I can effectively and securely conduct intelligence activities if a court after a de novo review can substitute its judgment for mine as to what information requires protection. Our current difficulties in the courts with Mr. Victor Marchetti, an ex-employee, have clearly shown us the problems of acquainting courts with the subtleties and sensitivities of the intelligence process.

There are other provisions in this bill which I feel are most unsatisfactory. For example, the bill would require Agency responses within 10 days. Experience has shown that the scope of requests under the Freedom of Information Act generally requires far greater lengths of time to do a proper search and subsequent review. Also, the bill provides for sanctions to be administered by the Civil Service Commission where employees are charged with improperly withholding information. In my view this would be in derogation of the command responsibilities of the heads of departments and agencies.

While I am fully in agreement with the concept that the Executive branch should make available as much information as possible to the American public, I do not feel that this bill serves that objective in an appropriate fashion. Consequently, I urge your veto of this bill if it is approved by the Congress.

Respectfully,

/s/ W. E. Colby

W. E. Colby
Director

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

OCT 10 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Reference is made to your request for the views of this Department on the enrolled enactment of H.R. 12471, the Freedom of Information Act Amend ents.

The enrolled enactment would amend 5 U.S.C. 552, the so-called Freedom of Information Act, in several respects, each of which is designed to expedite or assure access by the public to information held by the Government.

While this Department is prepared to support the overall objectives and intent of the legislation, it is firmly of the opinion that certain of its provisions require refinement in order to be workable or constitutionally sound. We therefore believe the President should withhold his approval pending such refinements and hereby strongly so recommend. We have had the benefit of a copy of the draft veto message prepared by the Department of Justice. That draft message discusses the major areas in which the enrolled enactment requires refinement. This Department would support the substance of the Justice draft veto message. However, we would like to emphasize several matters which are of peculiar concern to this Department for possible incorporation into a veto message.

The relatively inflexible time limits of subparagraph (6) of 5 U.S.C. 552(a), as it would be amended by § 1(c) of the enrolled enactment, are, in our opinion, totally unworkable. The Internal Revenue Service has literally tens of millions of files in several hundred locations throughout the country. It may well require in excess of the permitted times to locate the record requested. Moreover, tax records are subject to a high degree of confidentiality. An employee of IRS cannot be expected to weigh carefully the taxpayer's right to the confidentiality of his records when he is faced with an inflexible short deadline and his failure to release the records may well result in disciplinary action against him.

Neither the best interests of the taxpayer nor the IRS are served by such a Hobson's choice. Essentially the same argument can be made for the Customs Service.

Because of these factors, the Department believes that at least 30 days should be allowed for a response to the initial request and that there should be a right to an extension of a further 30 days if required, with Court review only for any extension beyond this 60 day period.

While we believe such time limits may be generally warranted, we are firmly of the opinion that they are essential in the IRS and Customs context, if in no other.

We are also particularly concerned about the refinement of the investigatory file exemption contained in § 2(b) of the enrolled enactment. Our principal concern is expressed in the Justice draft veto message and relates to the word "would" which applies to clauses (A) through (F). More and more citizens are using 5 U.S.C. 552 as an alternative or an addition to discovery under Court rules. If the request for records is denied and the denial is appealed to the Courts, it would be necessary to prove, among other things, that production of the records would interfere with enforcement proceedings. This requirement could delay the investigation until the request for records suit is resolved. Such delays may have a significant impact on the collection of the revenue by the Internal Revenue and Customs Services and possibly even the Bureau of Alcohol, Tobacco and Firearms.

We also wish to raise one matter which is not discussed in the Justice draft veto message. Section (b)(2) of the enrolled enactment would add a new paragraph (4) to 5 U.S.C. 552(a), which in subparagraph (4)(F) would have a Court make written findings as to whether agency personnel acted arbitrarily or capriciously with respect to the withholding of documents. The Civil Service Commission is then directed to initiate proceedings to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Civil Service Commission is to submit its findings and recommendations to the agency concerned and that agency is to take the corrective action that the Commission recommends. However, in the Treasury Department final decisions to withhold may be made by Presidential appointees. It is questionable whether the Civil Service Commission has jurisdiction over such officials and whether the agency can take disciplinary action against them. It would seem inappropriate for such action to be taken by an officer other than the President.

In view of all of the foregoing, the Department would strongly support a recommendation that the enrolled enactment, H.R. 12471, not be approved by the President in its present form.

Sincerely yours,

Richard R. Albrecht
General Counsel

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

11 October 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Department of Defense on the enrolled enactment of H. R. 12471 of the 93d Congress, to amend Section 552 of Title 5, United States Code, known as the Freedom of Information Act.

This department cannot recommend that the President sign the enrolled H. R. 12471, 93d Congress, in view of the remaining technical deficiencies in some of the provisions. More specifically:

(1) The Department of Defense is opposed to the authority of district courts all over the country to review classified documents on a de novo basis for the purpose of determining whether they "in fact" meet the criteria of the executive order authorizing their classification. Under this provision no presumption in favor of the validity of the classification is specified and, therefore, judges without background in the subject matter of the questioned record will be asked to "second guess" the justification for the classification. This formidable burden on the courts, many of which have had little or no experience with such documents, will necessitate extensive effort by the Department of Defense to explain to deciding judges foreign policy and national security matters which are often of great sensitivity and complexity. To relieve this burden to some extent it would be appropriate to recommend to the Congress that they adopt the language proposed by the Senate Committee on the Judiciary in Report No. 93-854, 93d Congress, endorsing amendment of this Act. After carefully studying this difficult problem, the Judiciary Committee recommended language which, in effect, directed the courts to sustain the classification of a document unless "the withholding is without a reasonable basis." A further desirable qualification would be to restrict suits challenging classification determinations to the Seat of Government in order that there could be uniformity of treatment and development of an expertise in a single District Court.

(2) The proposed time limits for responding to Freedom of Information Act requests are unduly rigid and may promote litigation by requiring the agency to make negative determinations on requests for records when there has been inadequate opportunity to locate and evaluate them. Moreover, these time limits create priority for Freedom of Information Act requests that may be inconsistent with the public interest. Officials required to review and evaluate documents to determine their releasability will be diverted from other important government duties that may be far more significant to the public than a random request for a record by "any person", no matter what his purpose or motive.

(3) The potential sanction against personnel who appear to have arbitrarily and capriciously withheld records may create a climate in which records which should be withheld in the interest of privacy, national security, or agency efficiency will be released in order to avoid the possibility of punishment. Moreover, the Act might be interpreted to authorize Civil Service Commission determinations of whether disciplinary action is warranted against those responsible for withholding records, even when the responsible official is a member of the armed forces. This prospect is wholly inappropriate. Members of the armed forces are entitled to carefully prescribed procedures for the impositions of administrative sanctions, and these are not compatible with the sanction provision of the enrolled bill.

(4) The modification of subsection (b)(7) to prescribe the circumstances under which investigative records may be withheld from public requesters is inadequate in its protection of information contained in some investigative files that cannot qualify as involving criminal investigations or security intelligence investigations. Although the Conference Report alludes to background security investigations as coming within the area of protection, it is by no means clear that courts will interpret the term "national security intelligence investigation" to encompass all investigative records requiring such protection.

If it is determined that this enrolled bill should be vetoed, we strongly urge that the veto message avoid language which seems to pose burdensome interpretations of the bill that are not inevitable. Such language is likely to prove difficult to overcome in litigation where government agencies seek to justify the withholding of records under ambiguous language which lends itself to differing interpretations. For example, it is undesirable to suggest that a judge must rule on behalf of a requester in a situation in which he finds the government justification for security classification no more persuasive than the requesters

position that the classification is unjustified. As a practical matter such contingency seems unlikely, and we believe it is inadvisable to overemphasize in the veto message the extent of the Government's burden under the de novo review requirements.

We also urge that any veto message avoid raising issues not contained in President Ford's letter of August 20, 1974. To do so is likely to subject the Executive Branch to the accusation that it has shifted its ground after Congress attempted to meet it halfway. It would be preferable to argue that the concessions mentioned in the letter of September 23, 1974 from Subcommittee Chairmen Kennedy and Moorhead were inadequate to meet legitimate concerns and responsibilities of the President.

Finally, we recommend that if the President does not veto the enrolled bill that he issue a signing statement that emphasizes his continuing responsibility as Commander-in-Chief and Chief Executive under the Constitution to protect records in the interests of national defense and foreign policy. This is consistent with the action taken by President Johnson in signing the original Freedom of Information Act, P. L. 89-487, on July 4, 1966. In addition, a signing message should include language that will emphasize the responsibility of the agencies to issue regulations which will interpret these statutory amendments in a manner that makes them workable and consistent with the overall intent of Congress. Such a statement would lay the foundation for agency regulations designed, for example, to mitigate time limits by prescribing appropriate forms and recipient offices for requests, thereby avoiding some of the difficulties that may be encountered from misdirected and inadequately described requests.

We would welcome the opportunity to comment further on a proposed veto message or signing statement.

Sincerely,

Martin R. Hoffmann

Martin R. Hoffmann

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

October 10, 1974

Honorable Roy L. Ash
Director
Office of Management and Budget

Attention: Assistant Director for
Legislative Reference

Dear Mr. Ash:

This is in reply to your request for the views of the Civil Service Commission on enrolled bill H.R. 12471, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The enrolled bill makes a number of amendments to section 552 of title 5, the "Freedom of Information Act", to strengthen the requirements for access by the public to agency records. The bill strengthens the section's requirement for publication of agency indexes identifying information for the public, changes the present law requirement that a request for information from an agency be for "identifiable records" to a requirement that the request only "reasonably describe" the records, and requires that each agency issue regulations establishing for recovery of only the direct costs of search and duplication of records. The bill authorizes court review de novo of requests for records in camera, sets a 30-day time limitation for response by an agency to a complaint under the Freedom of Information law, and provides that court appeals should be expedited. The court is authorized to assess reasonable attorney fees and other litigation costs of complainants. The court is authorized to make a finding whether the circumstances surrounding the withholding of information raise questions whether agency personnel acted arbitrarily or capriciously. If the court so finds, the Civil Service Commission must promptly initiate a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The Commission's findings and recommendations are to be submitted to the appropriate administrative authority of the agency concerned and to the responsible official or employee, and the administrative authority shall promptly take the disciplinary action recommended by the Commission.

The bill establishes deadlines for agency determinations on requests, and revises the national defense and foreign policy exemption to require establishment of criteria. The exemption for investigatory records is also amended limiting the exemption to cases where their disclosure would interfere with enforcement proceedings, deprive a person of a fair trial, be an invasion of privacy, disclose the identity of a confidential source, disclose investigative techniques and procedures, or endanger law enforcement personnel.

The bill provides that any reasonably segregable portion of a record shall be made available to a requester when the other portions are exempt. Annual reports of actions under the legislation are required from all agencies and the definition of "agency" is expanded to include any executive agency, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch or any independent regulatory agency.

The Commission understands that the Department of Justice has drafted a veto message objecting to provisions of the bill relating to judicial review of classification of information, disclosure of investigatory law enforcement files, the administrative time limits established by the bill and the criteria for establishment of fee schedules. We concur in these objections and also submit the following comments.

Our primary concern is with protection of the privacy of Federal employees. While the bill purports to exempt from disclosure material which would "constitute an unwarranted invasion of personal privacy", (Paragraph (7)(C) on investigative records) the term "unwarranted" is undefined. Court cases under the Freedom of Information Act have construed the exemptions narrowly and we may thus assume that part of the exemption will be so construed. In addition the Committee report states (regarding another exemption in Paragraph (7)) "Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances." This language can be used to further narrow Paragraph (7)(C) and may be interpreted to imply that only the confidential source of such material may be protected but not the "confidential information" itself. In addition, the bill would require a paragraph-by-paragraph and perhaps, sentence-by-sentence determination of exemption of material including such clearly personal matters as medical reports.

Accordingly, the Commission recommends that the President veto enrolled bill H.R. 12471.

By direction of the Commission:

Sincerely yours,

Jayne B Spain

Acting
Chairman

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THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 663

Date: October 16, 1974 Time: 10:45 a.m.

FOR ACTION: Geoff Shepard
Phil Buchen - second memo
Bill Timmons
NSC/Kennedy
Paul Theis

cc (for information): Warren K. Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: October 16, 1974 Time: 3:00 p.m.

SUBJECT: Enrolled Bill H.R. 12471 - Freedom of Information Act Amendments

ACTION REQUESTED:

____ For Necessary Action

X For Your Recommendations

____ Prepare Agenda and Brief

____ Draft Reply

____ For Your Comments

____ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

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PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

To Warren Hartwick 10/16/74

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

OCT 16 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 12471 - Freedom of Information Act amendments
Sponsor - Rep. Morehead (D) Pennsylvania and 11 others

Last Day for Action

October 19, 1974 - Saturday

Purpose

To amend the Freedom of Information Act.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Justice	Disapproval (Draft veto message attached)
Central Intelligence Agency	Disapproval
Department of the Treasury	Disapproval
Department of Commerce	Disapproval (informally)
Department of Defense	Disapproval (informally)
Civil Service Commission	Disapproval
Department of State	Disapproval (informally)
General Services Administration	No objection (informally)
Department of Health, Education and Welfare	Defers (informally)

Discussion

In 1958 the Congress enacted an amendment to the 1789 "housekeeping" statute which had authorized Federal agencies to establish files and maintain records. The 1958 amendment provided that the housekeeping statute did not authorize withholding information from the public. In 1966 the Freedom of Information Act established procedures by which the public could acquire documents in order to know about the business of their government. That law

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93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1380

FREEDOM OF INFORMATION ACT AMENDMENTS

SEPTEMBER 25, 1974.—Ordered to be printed

Mr. MOORHEAD of Pennsylvania, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 12471]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fee

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(if any), and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority to the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any deter-

mination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request."

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;"

(b) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

And the Senate agree to the same.

CHET HOLIFIELD,
WILLIAM S. MOORHEAD,
JOHN E. MOSS,
BILL ALEXANDER,
FRANK HORTON
JOHN N. ERLENBORN,
PAUL MCCLOSKEY,
Managers on the Part of the House.

EDWARD KENNEDY,
PHILIP A. HART,
BIRCH BAYH,
QUENTIN BURDICK,
JOHN TUNNEY,
CHARLES MCC. MATHIAS, JR.,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

INDEX PUBLICATION

The House bill added language to the present Freedom of Information law to require the publication and distribution (by sale or otherwise) of agency indexes identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, which is required by 5 U.S.C. § 552(a)(2) to be made available or published. This includes final opinions, orders, agency statements of policy and interpretations not published in the *Federal Register*, and administrative staff manuals and agency staff instructions that affect the public unless they are otherwise published and copies offered for sale to the public. Such published indexes would be required for the July 4, 1967, period to date. Where agency indexes are now published by commercial firms, as they are in some instances, such publication would satisfy the requirements of this amendment so long as they are made readily available for public use by the agency.

The Senate amendment contained similar provisions, indicating that the publication of indexes should be on a quarterly or more frequent basis, but provided that if an agency determined by an order published in the *Federal Register* that its publication of any index would be "unnecessary and impracticable," it would not actually be required to publish the index. However, it would nonetheless be required to provide copies of such index on request at a cost comparable to that charged had the index been published.

The conference substitute follows the Senate amendment, except that if the agency determines not to publish its index, it shall provide copies on request to any person at a cost not to exceed the direct cost of duplication.

IDENTIFIABLE RECORDS

Present law requires that a request for information from an agency be for "identifiable records." The House bill provided that the request only "reasonably describe" the records being sought.

The Senate amendment contained similar language, but added a provision that when agency records furnished a person are demonstrated to be of "general public concern," the agency shall also make them available for public inspection and purchase, unless the agency can demonstrate that they could subsequently be denied to another individual under exemptions contained in subsection (b) of the Freedom of Information Act.

The conference substitute follows the House bill. With respect to the Senate proviso dealing with agency records of "general public interest," the conferees wish to make clear such language was eliminated only because they conclude that all agencies are presently obligated under the Freedom of Information Act to pursue such a policy and that all agencies should effect this policy through regulation.

SEARCH AND COPYING FEES

The Senate amendment contained a provision, not included in the House bill, directing the Director of the Office of Management and Budget to promulgate regulations establishing a uniform schedule of fees for agency search and copying of records made available to a person upon request under the law. It also provided that an agency could furnish the records requested without charge or at a reduced charge if it determined that such action would be in the public interest. It further provided that no fees should ordinarily be charged if the person requesting the records was an indigent, if such fees would amount to less than $3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.

The conference substitute follows the Senate amendment, except that each agency would be required to issue its own regulations for the recovery of only the direct costs of search and duplication—not including examination or review of records—instead of having such regulations promulgated by the Office of Management and Budget. In addition, the conference substitute retains the agency's discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged.

By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.

COURT REVIEW

The House bill clarifies the present Freedom of Information law with respect to *de novo* review requirements by Federal courts under

section 552(a)(3) by specifically authorizing the court to examine *in camera* any requested records in dispute to determine whether the records are—as claimed by an agency—exempt from mandatory disclosure under any of the nine categories of section 552(b) of the law.

The Senate amendment contained a similar provision authorizing *in camera* review by Federal courts and added another provision, not contained in the House bill, to authorize Freedom of Information suits to be brought in the Federal courts in the District of Columbia, even in cases where the agency records were located elsewhere.

The conference substitute follows the Senate amendment, providing that in determining *de novo* whether agency records have been properly withheld, the court may examine records *in camera* in making its determination under any of the nine categories of exemptions under section 552(b) of the law. In *Environmental Protection Agency* v. *Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

RESPONSE TO COMPLAINTS

The House bill required that the defendant to a complaint under the Freedom of Information law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.

The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.

The conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown.

EXPEDITED APPEALS

The Senate amendment included a provision, not contained in the House bill, to give precedence on appeal to cases brought under the Freedom of Information law, except as to cases on the docket which the court considers of greater importance.

The conference substitute follows the Senate amendment.

ASSESSMENT OF ATTORNEY FEES AND COSTS

The House bill provided that a Federal court may, in its discretion, assess reasonable attorney fees and other litigation costs reasonably incurred by the complainant in Freedom of Information cases in which the Federal Government had not prevailed.

The Senate amendment also contained a similar provision applying to cases in which the complainant had "substantially prevailed," but

added certain criteria for consideration by the court in making such awards, including the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the Government's withholding of the records sought had "a reasonable basis in law."

The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

SANCTION

The Senate amendment contained a provision, not included in the House bill, authorizing the court in Freedom of Information Act cases to impose a sanction of up to 60 days suspension from employment against a Federal employee or official who the court found to have been responsible for withholding the requested records without reasonable basis in law.

The conference substitute follows the Senate amendment, except that the court is authorized to make a finding whether the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding. If the court so finds, the Civil Service Commission must promptly initiate a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The Commission's findings and recommendations are to be submitted to the appropriate administrative authority of the agency concerned and to the responsible official or employee, and the administrative authority shall promptly take the disciplinary action recommended by the Commission. This section applies to all persons employed by agencies under this law.

ADMINISTRATIVE DEADLINES

The House bill required that an agency make a determination whether or not to comply with a request for records within 10 days (excepting Saturdays, Sundays, and legal public holidays) and to notify the person making the request of such determination and the reasons therefor, and the right of such person to appeal any adverse determination to the head of the agency. It also required that agencies make a final determination on any appeal of an adverse determination within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal by the agency. Further, any person would be deemed to have exhausted his administrative remedies if the agency fails to comply with either of the two time deadlines.

The Senate amendment contained similar provisions but authorized certain other administrative actions to extend these deadlines for another 30 working days under specified types of situations, if requested

by an agency head and approved by the Attorney General. It also would grant an agency, under specified "unusual circumstances," a 10-working-day extension upon notification to the person requesting the records. In addition, an agency could transfer part of the number of days from one category to another and authorize the court to allow still additional time for the agency to respond to the request. The Senate amendment also provided that any agency's notification of denial of any request for records set forth the names and titles or positions of each person responsible for the denial. It further allowed the court, in a Freedom of Information action, to allow the government additional time if "exceptional circumstances" were present and if the agency was exercising "due diligence in responding to the request."

The conference substitute generally adopts the 10- and 20-day administrative time deadlines of the House bill but also incorporates the 10-working-day extension of the Senate amendment for "unusual circumstances" in situations where the agency must search for and collect the requested records from field facilities separate from the office processing the request, where the agency must search for, collect, and examine a voluminous amount of separate and distinct records demanded in a single request, or where the agency has a need to consult with another agency or agency unit having a substantial interest in the determination because of the subject matter. This 10-day extension may be invoked by the agency only once—either during initial review of the request or during appellate review.

The 30-working-day certification provision of the Senate amendment has been eliminated, but the conference substitute retains the Senate language requiring that any agency's notification to a person of the denial of any request for records set forth the names and titles or positions of each person responsible for the denial. The conferees intend that this listing include those persons responsible for the original, as well as the appellate, determination to deny the information requested. The conferees intend that consultations between an agency unit and the agency's legal staff, the public information staff, or the Department of Justice should not be considered the basis for an extension under this subsection.

The conference substitute also retains the Senate language giving the court authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request and had been since the request was received.

NATIONAL DEFENSE AND FOREIGN POLICY EXEMPTION (B)(1)

The House bill amended subsection (b)(1) of the Freedom of Information law to permit the withholding of information "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy."

The Senate amendment contained similar language but added "statute" to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit the withholding of information where it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign

policy" and is "in fact, properly classified" pursuant to both procedural and substantive criteria contained in such Executive order.

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A.* v. *Mink, et al.*, supra, with respect to *in camera* review of classified documents.

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403 (d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law.

INVESTIGATORY RECORDS

The Senate amendment contained an amendment to subsection (b)(7) of the Freedom of Information law, not included in the House bill, that would clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain "investigatory files compiled for law enforcement purposes." The Senate amendment would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.

The conference substitute follows the Senate amendment except for the substitution of "confidential source" for "informer," the addition of language protecting information compiled by a criminal law enforcement authority from a confidential source in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, the deletion of the word "clearly" relating to avoidance of an "unwarranted invasion of personal privacy," and the addition of a category allowing withholding of information whose disclosure "would endanger the life or physical safety of law enforcement personnel."

The conferees wish to make clear that the scope of this exception against disclosure of "investigative techniques and procedures" should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques. Nor is this

exemption intended to include records falling within the scope of subsection 552(a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public.

The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, *all* of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld. The conferees intend the term "criminal law enforcement authority" to be narrowly construed to include the Federal Bureau of Investigation and similar investigative authorities. Likewise, "national security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. By "an agency" the conferees intend to include criminal law enforcement authorities as well as other agencies. Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances.

The conferees also wish to make clear that disclosure of information about a person to that person does not constitute an invasion of his privacy. Finally, the conferees express approval of the present Justice Department policy waiving legal exemptions for withholding historic investigatory records over 15 years old, and they encourage its continuation.

SEGREGABLE PORTIONS OF RECORDS

The Senate amendment contained a provision, not included in the House bill, providing that any reasonably segregable portion of a record shall be provided to any person requesting such record after the deletion of portions which may be exempted under subsection (b) of the Freedom of Information law.

The conference substitute follows the Senate amendment.

ANNUAL REPORTS BY AGENCIES

The House bill provided that each agency submit an annual report, on or before March 1 of each calendar year, to the Speaker of the House

and the President of the Senate, for referral to the appropriate committees of the Congress. Such report shall include statistical information on the number of agency determinations to withhold information requested under the Freedom of Information law; the reasons for such withholding; the number of appeals of such adverse determinations with the result and reasons for each; a copy of every rule made by the agency in connection with this law; a copy of the agency fee schedule with the total amount of fees collected by the agency during the year; and other information indicating efforts to properly administer the Freedom of Information law.

The Senate amendment contained similar provisions and added two requirements not contained in the House bill, (1) that each agency report list those officials responsible for each denial of records and the numbers of cases in which each participated during the year and (2) that the Attorney General also submit a separate annual report on or before March 1 of each calendar year listing the number of cases arising under the Freedom of Information law, the exemption involved in each such case, the disposition of the case, and the costs, fees, and penalties assessed under the law. The Attorney General's report shall also include a description of Justice Department efforts to encourage agency compliance with the law.

The conference substitute incorporates the major provisions of the House bill and two Senate amendments. With respect to the annual reporting by each agency of the names and titles or positions of each person responsible for the denial of records requested under the Freedom of Information law and the number of instances of participation for each, the conferees wish to make clear that such listing include those persons responsible for the original determination to deny the information requested in each case as well as all other agency employees or officials who were responsible for determinations at subsequent stages in the decision.

EXPANSION OF AGENCY DEFINITION

The House bill extends the applicability of the Freedom of Information law to include any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency.

The Senate amendment provided that for purposes of the Freedom of Information law the term agency included any agency defined in section 551(1) of title 5, United States Code, and in addition included the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

The conference substitute follows the House bill. The conferees state that they intend to include within the definition of "agency" those entities encompassed by 5 U.S.C. 551 and other entities including the United States Postal Service, the Postal Rate Commission, and government corporations or government-controlled corporations now in existence or which may be created in the future. They do not intend to include corporations which receive appropriated funds but

are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting. Expansion of the definition of "agency" in this subsection is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices or units within an agency.

With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie* v. *David*, 448 F. 2d. 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

EFFECTIVE DATE

Both the House bill and the Senate amendment provided for an effective date of 90 days after the date of enactment of these amendments to the Freedom of Information law.

The conference substitute adopts the language of the Senate amendment.

CHET HOLIFIELD,
WILLIAM S. MOORHEAD,
JOHN E. MOSS,
BILL ALEXANDER,
FRANK HORTON,
JOHN N. ERLENBORN,
PAUL MCCLOSKEY,
Managers on the Part of the House.

EDWARD KENNEDY,
PHILIP A. HART,
BIRCH BAYH,
QUENTIN N. BURDICK,
JOHN TUNNEY,
CHARLES MCC. MATHIAS,
Managers on the Part of the Senate.

○

H. R. 12471

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the fourth sentence of section 552(a) (2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

(b) (1) Section 552(a) (3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.".

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.".

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;".

(b) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;".

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.".

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-876

AMENDING SECTION 552 OF TITLE 5, UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT

MARCH 5, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HOLIFIELD, from the Committee on Government Operations, submitted the following

REPORT

[To accompany H.R. 12471]

The Committee on Government Operations, to whom was referred the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

DIVISIONS OF THE REPORT

99-006—74——1

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Introduction

H.R. 12471 seeks to strengthen the procedural aspects of the Freedom of Information Act by several amendments which clarify certain provisions of the Act, improve its administration, and expedite the handling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.

The amendments to section 552(a), title 5, United States Code contained in H.R. 12471 seek to overcome certain major deficiencies in the administration of the Freedom of Information Act as disclosed by investigative hearings held in 1972 by the Foreign Operations and Government Information Subcommittee. These amendments deal with the inadequacy of agency indexes of pertinent information, difficulties in procedures required for the requisite identification of records, Federal agency delays in responses to requests for information by the public, and the cost burden of litigation in Federal courts to persons requesting information.

An additional amendment to section 552(a) clarifies language in the Freedom of Information Act regarding the authority of the courts, as part of their *de novo* determination of the matter, to examine the content of records alleged to be exempt from disclosure under any of the exemptions in section 552(b) of the Act.

An amendment is made to section 552(b)(1)—pertaining to national defense and foreign policy matters—in order to bring that exemption within the scope of matters subject to *in camera* review as provided under the amended language of section 552(a)(2). The language of the other eight exemptions would not be amended by this bill.

H.R. 12471 adds a new subsection (d) to the Act which provides a mechanism for strengthening Congressional oversight in the administration of the Act by requiring annual reports to House and Senate committees. Such reports, required from every agency, would include several types of statistical data and other information necessary for Congressional oversight. Included, for instance, are data on denials of requests under the Act, administrative appeals of denials, rules made, and fee schedules and funds collected for searches and reproduction of requested information.

H.R. 12471 also adds a new subsection (e) to the Act which broadens the definition of "agency" for the purposes of the Act.

Committee Vote

The committee considered H.R. 12471 on February 21, 1974, and ordered the bill reported by a unanimous voice vote.

Summary and Background

This committee's concern with information policies and practices of the executive branch of the Federal Government has a long history. On June 9, 1955, the Special Subcommittee on Government Information was created by the late chairman of the Government Operations

Committee, Representative William L. Dawson. In his letter appointing Representative John E. Moss as chairman of this subcommittee,[1] he observed:

> An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.[2]

The chartering letter requested the subcommittee:

> * * * to study the operation of the agencies and officials in the executive branch of the Government at all levels with a view to determining the efficiency and economy of such operation in the field of information both intragovernmental and extragovernmental.
>
> With this guiding purpose your Subcommittee will ascertain the trend in the availability of Government information and will scrutinize the information practices of executive agencies and officials in the light of their propriety, fitness, and legality.
>
> * * * * * *
>
> You will seek practicable solutions for such shortcomings, and remedies for such derelictions, as you may find and report your findings to the full Committee with recommendations for action.

Over the next decade, the Special Subcommittee on Government Information and its successor standing subcommittees [3] conducted extensive investigative hearings into all aspects of Government information activities; investigated numerous complaints of information withholding; compiled vast amounts of data; and prepared periodic progress reports, numerous substantive reports proposing administrative and legislative actions to improve the efficiency and economy of Government information activities, and other publications. In addition, it carried out other related types of oversight functions in this field.

In 1958, the Congress enacted the first legislative proposal reported by this committee aimed at reducing the authority of executive agencies to withhold information (H.R. 2767—P.L. 85–619). This amendment to the 1789 "housekeeping" statute, which gave Federal agencies the authority to regulate their business, set up filing systems, and keep records, provided that this authority "does not authorize withholding information from the public or limiting the availability of records to the public." [4]

Extensive investigative and legislative hearings by the subcommittee over the next eight years resulted in the enactment of P.L. 89–487—the Freedom of Information Act of 1966—which became

[1] The other two charter members were Representatives Dante B. Fascell and Clare E. Hoffman.
[2] Hearings, "Availability of Information from Federal Departments and Agencies," Special Subcommittee on Government Information, House Government Operations Committee, November 7, 1955, part 1, p. 2.
[3] 84th–87th Congress—1955–62—Special Government Information Subcommittee: Mr. Moss (chairman); 88th Congress—1963–64—Foreign Operations and Government Information Subcommittee: Mr. Moss (chairman). The subcommittee was formed from the jurisdiction of the former Special Government Information Subcommittee and part of the jurisdiction of the former Foreign Operations and Monetary Affairs Subcommittee. (Representative William S. Moorhead became subcommittee chairman at the beginning of the 92d Congress.)
[4] Previously, 5 U.S. Code, Sec. 22; now codified as section 301, title 5, U.S. Code.

effective on July 4, 1967. As originally enacted, it was in the form of an amendment to section 3 ("Public Information") of the Administrative Procedure Act of 1946. [5] This milestone law guarantees the right of persons to know about the business of their government. Subject to nine categories of exemptions, whose invocation in most cases is optional, the law provides that anyone may obtain reasonably identifiable records or other information from Federal agencies. Decisions by Government officials to withhold may be challenged in Federal court, and in such cases the burden of proof for withholding is placed on the Government. Also, the 1966 Act broadened the scope of the types of materials previously required to be available under the original language of section 3 of the Administrative Procedure Act.

In 1967, the Foreign Operations and Government Information Subcommittee undertook, as part of its general oversight responsibility, review of the Act's implementation and administration. In May 1968, a committee print was issued, compiling and analyzing the implementing regulations issued by the various Federal agencies pursuant to the new law. [6]

During the summer of 1971, the subcommittee began the first comprehensive study of Federal agencies' administration of the Act in preparation for public investigatory hearings which took place in March and April of 1972.[7] Fourteen days of hearings were held and testimony was received from more than 50 witnesses. Included were spokesmen for the Federal agencies and the media, attorneys having direct experience in Freedom of Information cases, academicians, spokesmen for interested organizations, and other informed persons. Government witnesses included representatives from the Departments of Justice, Defense, State, Transportation, Health, Education, and Welfare, Agriculture, Treasury, Interior, Labor, and Housing and Urban Development. Also, there were witnesses from the Internal Revenue Service, Environmental Protection Agency, Civil Service Commission, Selective Service System, Federal Power Commission, Federal Communications Commission, Federal Trade Commission, Navy, Air Force, and Army, and the Administrative Conference of the United States.

On September 20, 1972, this committee issued a unanimously approved investigative report based on these hearings.[8] It contained findings, conclusions, and recommendations to strengthen the operation of the Freedom of Information Act. A series of administrative recommendations to Federal agencies urged correction of certain deficiencies in their day-to-day operation. The report also set forth a list of specific legislative objectives to improve the administration of the Act. They deal with problem areas that could not be adequately remedied by administrative action.

The administrative recommendations were subsequently transmitted to each Federal department and agency head. Formal responses to the subcommittee indicate that many of them have been implemented. Bills to carry out the legislative objectives were sub-

[5] Codified as section 552, title 5, United States Code by the subsequent enactment of P.L. 90-23.
[6] "Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552)," Committee Print, House Government Operations Committee, November. 1968. 314 pp.
[7] Hearings, "U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act," Foreign Operations and Government Information Subcommittee, House Government Operations Committee, March and April, 1972, parts 4, 5, and 6.
[8] H. Rept. 92-1419, "Administration of the Freedom of Information Act," House Government Operations Committee.

sequently introduced by Subcommittee Chairman Moorhead, with 47 co-sponsors. Similar measures were introduced by the ranking Republican members of the full committee and the subcommittee, Mr. Horton and Mr. Erlenborn, respectively, with 27 additional co-sponsors.

Legislative hearings were held by the Foreign Operations and Government Information Subcommittee on H.R. 5425 and H.R. 4960 on May 2, 7, 8, 10, and 16, 1973. The administration's position on the legislation was presented by the Justice and Defense Departments. Other executive branch witnesses invited to testify declined and deferred to the Justice Department. Testimony and written statements on the bills were presented by Members of Congress, representatives of the news media, the Chairman of the Administrative Conference of the United States, the chairman of the Administrative Law Section, American Bar Association, and other witnesses.

The Foreign Operations and Government Information Subcommittee adopted a number of amendments to H.R. 5425. Several were suggested by Government and outside witnesses during the hearings. The resulting measure was reintroduced as H.R. 12471.

Discussion

This bill seeks to reach the goal of more efficient, prompt, and full disclosure of information by effecting changes in major areas discussed below: Indexes, identifiable records, time limits, attorney fees, court costs, court review, reports to Congress, and the definition of "agency."

INDEXES

The first area of change deals with the relationship of the agencies to the public. The amendment is designed to produce wider availability of Federal agency indexes which list specific types of information available such as: Final opinions and orders made in the adjudication of cases, statements of policy not published in the *Federal Register*, and administrative staff manuals.

This amendment does not envision the necessity for bound and printed indexes by every agency, recognizing that there has been little public demand for the indexes of many agencies. However, it would require that such indexes be readily available for public access in a usable and concise form suitable for distribution to requestors. Any agency index in brochure form available for distribution would be an appropriate way to meet this requirement.

The Committee recognizes that some agency indexes are now published by commercial firms. Such publications would also be able to satisfy the requirement of this proposed amendment.

Concurrent with the additional obligation to publish and distribute such indexes is a series of amendments requiring expedited consideration of requests for information by the public.

IDENTIFIABLE RECORDS

Section (1)(b) of the bill is designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. A "description" of a

requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

TIME LIMITS

As the subcommittee's hearings clearly demonstrated, information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits. The testimony also indicated the ability of some Federal agencies to respond to inquiries within the time specified in the bill—ten days for original requests and twenty days for administrative appeals of denials.

It is recognized, however, that there may be exceptional circumstances where the requested information is stored in a remote location outside the country and cannot be retrieved by the agency for examination within the 10-day time period even with the most diligent effort. In such unusual cases, the committee expects that the requestor will accept the good faith assurances of the agency that the information requested will be retrieved and the request itself acted upon in the most expeditious manner possible.

It is thus the intent of this provision that the agency have a sufficient flexibility which will enable it to meet its requirement in an orderly and efficient manner.

Though the subcommittee heard reports of efforts by district courts to docket freedom of information complaints in an expeditious manner, it was found that the defendant Federal agencies as a general rule were slow in filing responses to complaints, thus inhibiting the rapid disposition of freedom of information suits.

Under the amendments in this bill, the defendant agency would be required to respond to complaints within 20 days—the same time limits specified for private litigants under the Federal Rules of Civil Procedure, rather than the present 60-day time period for Federal agency response specified in the Federal Rules of Civil Procedure. Failure to meet the new mandatory time limits would constitute exhaustion of remedies, permitting court review.

The committee believes that shorter mandatory response time need not be a burden on the agencies. Under procedures established by the Justice Department, all agencies presently are to consult with the Department's Office of Legal Counsel prior to a final denial of a request which might result in litigation.[9] This consultation takes the form of an analysis of the legal and policy implications involved in a prospective denial. Accordingly, should a denial result in litigation, the defendant agency and the Department of Justice should already know the basis of their defense, and the necessity for a 60-day response period is lessened thereby.

ATTORNEY FEES AND COURT COSTS

Together with expedition of litigation, the bill provides for a recovery of attorney fees and costs at the discretion of the courts. The allowance of a reasonable attorney's fee out of Government funds to

[9] See 38 F.R. 19123 (July 18, 1973); codified as 28 CFR 50.9.

prevailing parties in litigation has been considered desirable when the suit advances a strong congressional policy. Similar provisions have been recognized in legislation in the past.[10]

COURT REVIEW

Although the present Freedom of Information Act requires *de novo* determination of agency actions by the Federal courts, the language is ambiguous as to the extent to which courts may engage in *in camera* inspection of withheld records.

A recent Supreme Court decision held that under the present language of the Act, the content of documents withheld under section 552(b)(1)—pertaining to national defense or foreign policy information—is not reviewable by the courts under the *de novo* requirement in section 552(a)(3).[11] The Court decided that the limit of judicial inquiry is the determination whether or not the information was, in fact, marked with a classification under specific requirements of an Executive order, and that this determination was satisfied by an affidavit from the agency controlling the information. *In camera* inspection of the documents by the Court to determine if the information actually falls within the criteria of the Executive order was specifically rejected by the Court in its interpretation of section 552(b)(1) of the Act. However, in his concurring opinion in the *Mink* case, Mr. Justice Stewart invited Congress to clarify its intent in this regard.[12]

Two amendments to the Act included in this bill are aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense and other agencies under Executive order authority.

In camera review

The first of these amendments would insert an additional clause in section 552(a)(3) to make it clear that court review *may* include examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in section 552(b). This language authorizes the court to go behind the official notice of classification and examine the contents of the records themselves.

National defense and foreign policy exemption

The second amendment aimed at court review is a rewording of section 552(b)(1) to provide that the exemption for information involving national defense or foreign policy will pertain to records which are "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy." The change from the language pertaining to information "required" to be classified by Executive order to information which is "authorized" to be classified under the "criteria" of an Executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.

[10] See Civil Rights Act of 1964, title II: 42 U.S.C. sec. 2000a-3(b); Civil Rights Act of 1964, title VII: 42 U.S.C. sec. 2000e-5(k); Education Amendments of 1972, P.L. 93-318, title VII, "Emergency School Aid Act," sec. 718 (20 U.S.C. sec. 1617).

[11] *Environmental Protection Agency et al.* v. *Patsy T. Mink et al.*, 410 U.S. 73 (1973).

[12] Ibid., at p. 94.

Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data.

The *in camera* provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities.

REPORTS TO CONGRESS

A new provision is added to the Freedom of Information Act, setting forth requirements for annual reports by the affected agencies to the Committees on Government Operations of the House and Senate, and to the Senate Judiciary Committee, which has jurisdiction over the Freedom of Information Act.

These annual reports should detail the information necessary for adequate Congressional oversight of freedom of information activities. They would also include the number of each agency's determinations to deny information, the number of appeals, the action on appeals with the reasons for each determination, and a copy of all rules and regulations affecting this section. Also to be included is a statement of fees collected under this section, plus other matter regarding information activities indicative of the agency's efforts under this Act.

DEFINITION OF "AGENCY"

For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of "agency" for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

The term "Government corporation," as used in this subsection, would include a corporation that is a wholly Government-owned enterprise, established by Congress through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation.

The term "Government controlled corporation," as used in this subsection, would include a corporation which is *not* owned by the

Federal Government, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB).

INFORMATION TO CONGRESS

As stated above, the purpose of these amendments to section 552 is to facilitate increased availability of information to the public. In no sense should any of the amendments be interpreted as affecting the availability of information to Congress under section 552(c), since H.R. 12471 makes no change in that subsection.

That this bill amends subsections (a) and (b), but not (c), of section 552 should in no way be construed as approval by this committee of the Justice Department's or any other agency's regulations or practices of withholding information from Congress. (See, for example, H. Rept. 92–1333, pp. 30–42.)

COST ESTIMATE

In accordance with rule XIII, clause 7 of the Rules of the House of Representatives, the committee finds with respect to fiscal year 1974 and each of the five fiscal years following that potential costs directly attributable to this bill should, for the most part, be absorbed within the operating budgets of the agencies.

This legislation merely revises information procedures under the Freedom of Information Act but does not create costly new administrative functions. Thus, activities required by this bill should be carried out by Federal agencies with existing staff, so that significant amounts of additional funds will not be required. It may be necessary, however, for some agencies to reassign personnel, shift administrative responsibilities, or otherwise restructure certain offices to achieve a higher level of efficiency.

In accordance with section 483a of title 31, U.S. Code and Office of Management and Budget Circular A–25, user fees are applicable to requests for information and may be assessed for production of copies and time spent by agency employees in search of requested information. Agency regulations currently provide for such fees, and this legislation does not change the status of those existing provisions.

The possible assessment of attorney fees and court costs authorized under section (1)(e) of this bill is at the discretion of the court. The cost to the Government of such assessments must depend upon the amount of litigation, the character of the litigants, the issues involved, and action of the courts. While no precise estimate of such possible assessments can be made in view of these variables, a subcommittee staff investigation has indicated that a typical freedom of information case requires about 40 hours of billable time, including initial conference, preparation of pleadings and briefs, and court arguments. At an average rate of $35 per hour, it is estimated that fees in the amount of $1,400 per case would not be unreasonable.

The provision added by this bill to subsection 552(a) of the Act, requiring that such agency indexes be published and distributed should not represent an appreciable added cost to the Government. Present commercial publications will be able to meet this requirement for some agencies, and those agencies having to develop in-house publications can, by the provisions of the bill, sell the indexes at prices consistent with cost recovery.

Although expenditures for these purposes may be minimal, the committee estimates that additional costs that may be required by this legislation should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five fiscal years.

Agency Views

Witnesses representing the Departments of Defense and Justice who testified at the subcommittee's hearings on Freedom of Information Act amendments contained in the original bills (H.R. 5425 and H.R. 4960) uniformly opposed virtually every proposal to strengthen and clarify the present law, just as Federal agency witnesses had opposed the legislation which created the Freedom of Information Act during subcommittee hearings almost a decade earlier.

The views of those departments on H.R. 12471 are set forth in letters to the committee included in appendix 1.

Section-by-Section Analysis

Section (1)(a) amends section 552(a)(2) of the Freedom of Information Act by adding a provision that the presently required indexes be promptly published and distributed by sale or otherwise.

Section (1)(b) substitutes for the term "identifiable records" a new requirement that a request be one which "reasonably describes" the records requested.

Section (1)(c) sets definitive time limits for agency action on original requests and on appeals. A limit of 10 working days is set for a determination on original requests, and a limit of 20 days is set for a determination on appeals. In the case of a determination to deny an original request, the denial must include the reasons therefor and notice of the right of appeal.

This section also states that failure to meet the specified time limitations constitutes an exhaustion of administrative remedies by the requestor.

Section (1)(d) clarifies the requirement for *de novo* court determination under the Freedom of Information Act by stating that the court may conduct an *in camera* investigation of any record withheld from disclosure by an agency under any of the exemptions in section 552(b).

Section (1)(e) provides that the United States agency or officer against whom a Freedom of Information Act complaint is filed must respond within 20 days. This response need not necessarily be affirmative in nature; it may be a motion other than an answer.

This is in furtherance of the policy in the original Act for expediting action by giving cases under the Act precedence on the court docket.

Section (1)(e) also allows the assessment of attorney fees and costs against the agency on behalf of a litigant. The assessment of fees and costs is at the option of the court.

Section 2 amends section 552(b)(1) to provide that the exemption for information involving national defense or foreign policy will pertain to records which are "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy." The intent is that the court may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.

Section 3 adds a new provision to the Act requiring a range of information in annual reports to specified committees of Congress.

Another provision in section 3 of the bill expands the definition of "agency" for purposes of section 552, title 5, United States Code, to insure inclusion of Government corporations, Government controlled corporations, or other establishments within the executive branch.

Section 4 provides that these amendments will become effective 90 days after enactment of the bill.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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Chapter 5—Administrative Procedure

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

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§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to

resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain [and make available for public inspection and copying], *promptly publish, and distribute (by sale or otherwise) copies of* a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, [on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,] *upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,* shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, *and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b)*, and the burden is on the agency to sustain

its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. *Notwithstanding any other provision of law, the United States or the officer or agency thereof against whom the complaint was filed shall serve a responsive pleading to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed.*

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(5) Each agency, upon receipt of any request for records made under this subsection, shall—

(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the date of such receipt whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(B) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of such appeal.

Any person making a request to an agency for records under this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the person making such request.

(b) This section does not apply to matters that are—

(1) [specifically required by] *authorized under criteria established by an* Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations and the Committee on the Judiciary of the Senate. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(5)(B), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) a copy of every rule made by such agency regarding this section;

(4) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(5) such other information as indicates efforts to administer fully this section.

(e) Notwithstanding section 551(1) of this title, for purposes of this section, the term "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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APPENDIXES

Appendix 1.—Agency Views

Department of Justice,
Washington, D.C., February 20, 1974.

Hon. Chet Holifield,
Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on H.R. 12471, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

H.R. 12471 is designed to improve the administrative procedures for handling requests by the public under the Freedom of Information Act for access to government documents, sets rigid time limits upon the agencies for responding to information requests, shortens substantially the time for the government to file its pleadings in Information Act suits, and authorizes the award of attorneys' fees to successful plaintiffs in such suits. In addition, each agency is required to submit an annual report to Congress evaluating its performance in administering the Act and "agency" is defined to include the Executive Office of the President.

Department spokesmen have repeatedly agreed that administrative compliance with the Act's present provisions needs improvement. It is our view, however, that H.R. 12471 as now drafted is far too inflexible in application to be of significant use in solving many of these administrative problems. Equally important, certain aspects of the bill present serious questions of constitutionality. Before turning to our specific objections, detailed below, we believe it is also important to note that our Department has recently initiated a comprehensive study of ways to improve administrative compliance with the Act. One of the principal purposes of the study is to analyze the costs of implementing the various methods suggested for improving administration. At the present time, concrete cost evaluations do not exist and only the roughest estimates of the varying cost factors can be made.

Since results of the study, from which constructive and concrete proposals can be developed, are expected next year, the Department of Justice suggests delay of extensive amendment of the Act until that evaluation is completed. At that time, we would be in a better position to advise Congress on the feasibility, cost, and desirability of proposals to amend the Act.

Apart from these general observations on the utility of enacting legislation such as H.R. 12471 at this time, the Department has the following specific comments and recommendations concerning the provisions of the bill.

1. Section 1(a) of H.R. 12471 would amend the indexing provisions in subsection (a)(2) of the Act. This provision now requires every agency to maintain and make available for public inspection and copying indexes of those documents having precedential significance. The proposed amendment would go further and compel all agencies to publish and distribute such indexes. We believe that imposition of this requirement on a government-wide basis would be unduly expensive and essentially unnecessary.

Under the existing indexing scheme, persons who ask to use the indexes are permitted to do so. However, a large segment of the public may never have the interest or the need to use them. Thus, the considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be unjustified. Even where an index does meet a need, such as a card catalogue in a library, it does not appear that the expense of publishing would be warranted.

In these cases, it is generally more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and information, rather than referring him to some index which may be largely incomprehensible because it was compiled by specialists for their own use, or to tell him to buy a published index. Moreover, private concerns publish agency materials and indexes in substantial quantities. For example, Commerce Clearing House and Prentice-Hall publish fully indexed tax services. To require the government to index and publish the same material would be an inefficient and expensive duplication of function.

In this respect, two additional points warrant discussion. First, compliance with this provision will in all likelihood require agencies to hire indexing specialists not only to index the voluminous existing records, but also to establish indexing systems for future use. All of this will cost the taxpayers money. Second, before the indexing process can begin it is essential that agencies know exactly the types of records the Act requires to be indexed. A number of recent court decisions have thrown this whole area of indexing into great confusion.

We recommend that this amendment not be adopted until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, or until possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date and less costly have been considered.

2. Section 1(b) of the bill would amend Subsection a(3) of the Act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." We view this change to be essentially a matter of semantics and thus unnecessary. The Senate Report in explaining the use of the term "identifiable" in the present Act, stated: "records must be identifiable by the person requesting them, *i.e.*, a reasonable description enabling the Government employee to locate the requested records."

Because it does alter the wording of the statute, this amendment might lead to confusion as well as to unwarranted withholding of requested records. An unsympathetic official might reject a request which would have to be processed today, on the new ground that the

request is not reasonably descriptive. Also, this amendment could subject agencies to severe harassment, as where a requester adequately described the Patent Office records he sought, but his request was for about 5 million records scattered through over 3 million files. A court, presumably unable to accept anything so unreasonable, held that the request was not for "identifiable records." *Irons* v. *Schuyler*, 465 F. 2d 608 (D.C. Cir. 1972). Accordingly, we conclude that this change would not be desirable at this time.

3. Section 1(c) of the bill would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request for records, and 20 working days to decide an appeal from any denial. The purpose of imposing these deadlines is to expedite agency action on requests for information. The time limits are exact and no extensions are permitted. Certainly, agencies should respond to such requests as expeditiously as possible; however, this amendment is too rigid for permanent and government-wide application and is likely to be counter-productive to the ultimate goal of optimizing disclosure by discouraging the careful and sympathetic processing of requests. Accordingly, we strongly oppose enactment of this amendment.

Often files cannot be obtained within ten days either because the filing systems are impervious to the description of the information requested or because the files are located in centers distantly located from the office receiving the request. Occasionally it is even necessary for an agency to consult other agencies, organizations, or foreign governments in order to determine the propriety of releasing or withholding information. Also, many requests are complex and unique. Inflexible deadlines encourage, indeed compel, hasty denials in such cases. No agency should be required to adhere to a rigid 10 to 20 day limit at the cost of denying requests, in a spirit of caution, that might with more study and time be granted in whole or part. Finally, there is the very real problem of spreading available resources too thin. For example, to meet the deadlines imposed by this amendment, it may frequently be necessary to pull personnel off matters within the primary mission of the agency to handle an Information Act request. Strict time limits ignore considerations of priority. For example, FBI personnel should not be required to process every request within the prescribed time limits when their attention is urgently needed for such things as investigating hi-jackings or bombings of public buildings or other emergencies.

To avoid these and other problems inherent in rigid time constraints, yet provide for expeditious treatment of information requests, we suggest that our revised departmental regulations, which follow the recommendations of the Administrative Conference, serve as a more practical working model. Our regulations provide for 10 and 20 day deadlines but permit extension of time under prescribed circumstances. We use the term "working model" advisedly, for even within our own Department an exception from these regulations was created for the Immigration and Naturalization Service because of the voluminous nature of its records, and we are rarely able to process an appeal within 20 days. Similar exceptions may need to be created, or some may be eliminated as more experience in administering the Act is gained. In any event, rigid time limits for all agencies would be impracticable and would serve only to frustrate the purposes of the Act.

4. Section 1(d) of H.R. 12471 deals with *in camera* inspection by the courts of agency records. It provides that a court "*may* examine *in camera* the contents of any agency records to determine whether such records should be withheld in whole or in part under any of the exemptions set forth in the Act." With respect to exemptions 2 through 9 of the Act, this amendment appears only to codify the rule relating to *in camera* inspections announced by the Supreme Court in *Environmental Protection Agency* v. *Mink*, 93 S.Ct. 827 (1973). There, the Court construed the Act as vesting in the courts, in cases other than those in which the documents are classified, the *discretion* to determine whether an *in camera* inspection is necessary to the resolution of the case. Accordingly, we have no objection to the enactment of this measure as it relates to cases where one or more of exemptions 2 through 9 are involved. However, we oppose any legislative attempt to overrule the Supreme Court's decision in *Mink* with respect to classified (exemption 1) documents.

In *Mink*, the Supreme Court found that judicial review did not extend to "Executive security classifications . . . at the insistence of anyone who might seek to question them." 93 S.Ct. at 833. We oppose this overruling attempt simply because the courts, as they themselves have recognized, are not equipped to subject to judicial scrutiny Executive determinations that certain documents if disclosed would injure our foreign relations or national defense. As the Court of Appeals said in *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), "the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with." In *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948), the Supreme Court was more explicit:

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

5. Section 1(e) would reduce the present 60-day period which the Government normally has to answer complaints against it in federal court to 20 days for all suits under the Act. It would also provide for an award of attorneys' fees to the plaintiff in any such suit in which the government "has not prevailed," leaving it unclear what might happen in cases where the government prevails on part of the records in issue but does not prevail on the rest.

We oppose both features of this section. When a suit is filed under the Act, the local U.S. Attorney ordinarily consults the Department of Justice. The Department in turn must consult the agencies whose records are involved, and frequently that agency must coordinate internally among its headquarters components or its field offices, and sometimes externally with other agencies. Because the federal government is larger and more complex, and bears more crucial public interest responsibilities than any other litigant, it needs more time to develop and evaluate its positions, especially if they may affect

agencies other than the one sued. A 20-day rule would require that decisions be made without ample time for inquiry, consultation, and study, and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for the parties on both sides and for the courts.

Furthermore, in a type of litigation which can be initiated by anyone without the customary legal requirements of standing or interest or injury, the award of attorneys' fees is particularly inappropriate. It is difficult to understand why there should be departure in this area of law from the traditional rule, applied in virtually every other field of Government litigation that attorneys' fees may not be recovered against the Government.

Although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well be a businessman using the Act to gain information about a competitor's plans or operations. Or he may be someone seeking a list of names for a commercial mailing list venture. In all such cases, the obvious end result if attorneys' fees were awarded would be that the taxpayers would pay for litigating both sides of the dispute. This expense could become quite substantial considering that well over 200 suits have been filed to date and that number is ever increasing.

6. Section 2 of the bill would amend section 552(b)(1) of the Act to exempt from disclosure material "authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy". Section (b)(1) presently excepts material specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy. This provision is intended to be read in conjunction with the *in camera* provisions of section 1(d). It would, in effect, transfer the decision as to whether a document should be protected in the interests of foreign policy or national defense from the Executive Branch to the courts. While we firmly share the view that classification abuses cannot be tolerated, and in this respect it is important to note that the existing classification order provides for sanctions in such cases, we are constrained to oppose this amendment for the same reasons noted in our comments on section 1(d).

7. Section 3 of H.R. 12471 is divided into two parts. The first part would require each agency to submit an annual report to Congress containing a statistical evaluation of the duties executed in administering the Act. Congress certainly has an interest and responsibility to keep informed on how the Act is being administered. Accordingly, we support the general objectives of this amendment. Nevertheless, we do not believe that legislation is necessary to accomplish this end. In the past, agencies have appeared before committees of both houses of Congress on numerous occasions and discussed their administrative operations. Statements, complete with statistical information, have been submitted on those occasions for congressional review. Similar information as that proposed to be included in the annual reports was obtained by the House Committee on Government Operations in 1971 by means of a questionnaire. These methods have the obvious advantage of flexibility and enable Congress to receive the information it needs without being locked into a fixed system of reporting requirements. For this reason, this provision seems undesirable.

The second part of section 3 redefines an agency for purposes of the Act to include executive and military departments, Government owned or controlled corporations, any independent regulatory agency, or other establishment in the Executive Branch including the Executive Office of the President. We cannot determine from this language whether or not the Act would be extended to include groups such as: the American National Red Cross, the Girl Scouts of America, National Academy of Sciences, the Veterans of Foreign Wars, or the Daughters of the American Revolution. Some clarification would seem appropriate.

Moreover, in our opinion, the last provision involves a direct attack on the separation of powers system established by the Constitution and is therefore unconstitutional. The Executive Office of the President has traditionally included elements that are a mere extension of the President himself. Persons performing such functions are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious. Of course, the principle of separation of powers does not preclude the promulgation of freedom of information regulations applicable to particular units within the Executive Office. But, just as Congress has seen fit not to extend the Freedom of Information Act to itself or its staff on the ground that to do so would violate its constitutional prerogatives, neither can it be imposed on the President's staff.

In view of the foregoing, the Department of Justice recommends against the enactment of this legislation in its present form.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

MALCOLM D. HAWK,
Acting Assistant Attorney General.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., February 20, 1974.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your recent request for the views of the Department of Defense on H.R. 12471, 93d Congress, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act (FOIA)."

The purpose of the bill is to require Federal agencies to adhere to several new administrative requirements devised to enhance responsiveness to FOIA requests. More specifically, the bill provides for the following:

1. That the current index of opinions, statements of policy, and administrative staff manuals be published and distributed, rather than simply made available for public inspection and copying.
2. That the requirement for "identifiable records" be modified to a requirement for a reasonable description of the records requested.
3. That agencies determine the availability of a record within 10 days after receipt of an initial request, and make determinations for initially denied records within 20 days after receipt of an appeal.

4. That courts be given authority to examine *in camera* any records which the agencies have denied a requester who has brought legal action to force their release.
5. That the United States file a responsive pleading in litigation initiated by the requester of a record within 20 days after service upon the United States Attorney of the pleading in which the complaint is made, rather than the current 60-day period for responding to such pleadings.
6. That the Court may assess against the United States reasonable attorney fees and other litigation costs where the Court has found against the United States in its efforts to withhold the record.
7. That the exemption of classified information shall be evaluated on the basis of the criteria established by the Executive Order.
8. That each agency shall file with the Committee on Government Operations of the House of Representatives and the Committees on Government Operations and on the Judiciary in the Senate, a detailed annual report concerning denials of requests for agency records, appeals of those denials, regulations governing FOIA requests, fee schedules imposed when requesters are charged for records provided, and other information concerning administration of the FOIA.
9. That the term "agency" be specifically defined in section 552 of title 5, United States Code, by indicating the kinds of organizations that come within its scope.

First, it should be noted that H.R. 12471 is a vast improvement over some of the earlier bills to amend the FOIA considered by the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations. On May 8, 1973, the former General Counsel of the Department of Defense, Mr. J. Fred Buzhardt, testified on H.R. 5425 and H.R. 4960, both of which contained a number of provisions which he found highly objectionable to the Department of Defense. We are pleased that a number of these problems have been overcome in H.R. 12471. Although there are other provisions of H.R. 12471 that we do not consider particularly desirable, these comments are confined to those aspects of the bill which we believe will create serious difficulties for the Department of Defense.

Our single greatest problem in implementing this bill, if it should pass, would relate to the time limitations imposed for responding to requests for records and in providing the necessary information for responding to complaints filed in court as a result of the denial of records. Although it may be possible in the vast majority of cases to respond within 10 days to an initial request for a simple record that can be easily located and readily evaluated, it will not be possible in the case of so-called "categorical requests" for voluminous records, or for individual records which cannot be located and evaluated readily. In an agency the size of the Department of Defense, records are located all over the world, and old records are stored in warehouses where their exact location is often difficult to determine in a short time. Until a requested record is located, no determination can be made of its availability to the requester, or whether it comes within an exemption that should be invoked to serve a legitimate public interest.

Although 20 working days may seem an adequate time for evaluating appeals of denied records, this may not be true in cases in which voluminous or complicated records must be forwarded for evaluation by high-level or technically specialized officials whose time must be divided between a multitude of competing priorities. If additional staff must be added for the purpose of creating a capability to respond within the time limit, the cost of this provision alone may go into the millions of dollars. Even additional staff, however, cannot eliminate demands upon the time of expert officials who must respond to other priorities.

Even more important, however, is our view that such rigid time limitations may prove counterproductive from the standpoint of public access. It is often true that records which technically fall within one of the exemptions of the Act are released after careful evaluation by responsible officials who find that no substantial legitimate purpose will be served by their withholding. If there is inadequate time for these evaluations, denials are likely to be more frequent and requesters will be forced to resort to judicial action at great expense to themselves and to the United States. Moreover, it should be noted that the court's role in evaluating a complaint based on the denial of a record is to determine whether an exemption applies. If so, the record is properly denied. Thus, records that might otherwise be released on a discretionary basis may be denied to the public because of artificial time constraints that make careful agency evaluation impossible.

In this regard, we would commend to the Committee's attention the views of the Administrative Conference of the United States with respect to time limitations as they are found in Recommendation 71–2 (formerly designated Recommendation Number 24), dated May 7, 1971. After painstaking study and evaluation by the distinguished members of the Administrative Conference, guidelines were prepared for agency implementation to set forth several carefully circumscribed bases for delaying the response to requests for agency records beyond the normal 10 days for the initial determination and 20 days for an appeal. Such delays are authorized for the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: (a) exempt from disclosure under the Freedom of Information Act and (b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When extensions are permitted under these criteria, the agency is required to acknowledge the request in writing within a 10-day period following initial request explaining the reasons for the delay. Further, on appeal from an initial denial failure to make a response within 20 days can be justified only under extraordinary circumstances.

We believe that the Administrative Conference recommendation offers a realistic approach to dealing with the problem of undue delay by agencies in responding to requests for records under the FOIA. Either the adoption of this recommendation in legislative form, or better yet, a simple amendment of section 552 requires that agencies include time limitations in their regulations would be far preferable to the present inflexible language of H.R. 12471. A comment in the report on a bill that the Administrative Conference model should be followed, would seem to be sufficient direction to the agencies if a simple requirement for time limitations in the agency regulations was imposed by the statute.

Under the language of H.R. 12471, failure by an agency to meet the time limit for response to a request for a record is deemed an exhaustion by the requester of his administrative remedies. This language can be read as meaning that an agency's failure to answer the initial inquiry within 10 days lays sufficient foundation for initiating litigation even though no appeal is taken. It will, therefore, behoove an agency to automatically respond with a letter of denial for any initial request it has not had adequate time to evaluate and thereby preserve its right to consider further the request at an appellate level within the 20 working days available. This will cause an undue escalation of the request in many cases, and may actually delay a response to the requester. If, on the other hand, the actual intent of the bill is simply to permit the requester to have the option of making a final appeal when his initial request has not been answered within 10 days, the language of the bill requires clarification.

From the standpoint of the Department of Defense the 20-day limit on the Justice Department for answering complaints is extremely disturbing. Learning of the existence of litigation in the large number of district courts in which such litigation may be initiated under the FOIA is often a problem that consumes a good portion of the 20 days. Present experience indicates that obtaining expert views from competent sources is often difficult to achieve within the 60-day period now available. By reducing that time by two-thirds, the task of supplying necessary information to Justice Department representatives attempting to respond intelligently to a complaint filed under the authority of 5 United States Code 552 will prove almost impossible. Yet, there is no assurance that despite this inadequate time for preparing an answer to the complaint that the plaintiff will receive prompt consideration of that complaint by the court. We, therefore, strongly recommend that this requirement for the filing of a responsive pleading within 20 days be deleted from the bill.

We view with some concern the effort in section (d) of this bill to authorize the court to examine *in camera* the contents of any agency records to determine whether an exemption has been properly applied. This could prove particularly troublesome if it is interpreted as an encouragement to the courts to second-guess security classification decisions made pursuant to an Executive Order. We urge that the report on this bill make it clear that it is the intention of Congress to simply permit the court, where it has some reason to doubt the validity of an affidavit supporting a security classification, to examine the classified record solely for the purpose of determining that the

authorized official of the Executive Branch has exercised his classification authority in good faith and in basic conformity with the criteria of the Executive Order. No system of security classification can work satisfactorily if judges are going to substitute their interpretations of what should be given a security classification for those of the Government officials responsible for the program requiring classification.

The Office of Management and Budget advised that from the standpoint of the administrative program, there is no objection of the presentation of this report for the consideration of the Committee.

Sincerely yours,

L. NIEDERLEHNER,
Acting General Counsel.

APPENDIX 2.—TEXT OF BILL

93D CONGRESS
2D SESSION

H. R. 12471

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1974

Mr. MOORHEAD of Pennsylvania (for himself, Ms. ABZUG, Mr. ALEXANDER, Mr. ERLENBORN, Mr. GUDE, Mr. HORTON, Mr. MCCLOSKEY, Mr. MOSS, Mr. REGULA, Mr. JAMES V. STANTON, Mr. THONE, and Mr. WRIGHT) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) The fourth sentence of section 522 (a) (2) of title 5, United States Code, is amended by striking out "and make available for public inspection and copying" and inserting in lieu thereof ", promptly publish, and distribute (by sale or otherwise) copies of".

(b) Section 552 (a) (3) of title 5, United States Code, is amended by striking out "on request for identifiable records made in accordance with published rules stating the time,

place, fees to the extent authorized by statute, and procedure to be followed," and inserting in lieu thereof the following: "upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,".

(c) Section 552 (a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(5) Each agency, upon receipt of any request for records made under this subsection, shall—

"(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the date of such receipt whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(B) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of such appeal.

"Any person making a request to an agency for records under this subsection shall be deemed to have exhausted his

administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the person making such request."

(d) The third sentence of section 552 (a) (3) of title 5, United States Code, is amended by inserting immediately after "the court shall determine the matter de novo" the following: ", and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b),".

(e) Section 552 (a) (3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "Notwithstanding any other provision of law, the United States or the officer or agency thereof against whom the complaint was filed shall serve a responsive pleading to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed."

SEC. 2. Section 552 (b) (1) of title 5, United States Code, is amended to read as follows:

"(1) authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy;".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations and the Committee on the Judiciary of the Senate. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a) (5) (B), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) a copy of every rule made by such agency regarding this section;

"(4) a copy of the fee schedule and the total

amount of fees collected by the agency for making records available under this section; and

"(5) such other information as indicates efforts to administer fully this section.

"(e) Notwithstanding section 551 (1) of this title, for purposes of this section, the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after enactment of this Act.

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93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1380

FREEDOM OF INFORMATION ACT AMENDMENTS

SEPTEMBER 25, 1974.—Ordered to be printed

Mr. MOORHEAD of Pennsylvania, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 12471]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place,

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October 17, 1974

Received from the White House a sealed envelope said to contain H.R. 12471, An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, and a veto message thereon.

W. Pat Jennings
Clerk of the House of Representatives

5:38 P.M.
Time received

TO THE HOUSE OF REPRESENTATIVES

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. Although I am gratified by the Congressional response in amending several of these provisions, significant problems have not been resolved.

First, I remain concerned that our military or intelligence secrets and diplomatic relations could be adversely affected by this bill. This provision remains unaltered following my earlier letter.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. However, the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles, and give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.

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I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

Second, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

Finally, the ten days afforded an agency to determine whether to furnish a requested document and the twenty days afforded for determinations on appeal are, despite the

provision concerning unusual circumstances, simply unrealistic in some cases. It is essential that additional latitude be provided.

I shall submit shortly language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation, which has come so far toward realizing its laudable goals, will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

Gerald R. Ford

THE WHITE HOUSE

October 17, 1974

FOR IMMEDIATE RELEASE October 17, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

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GERALD R. FORD

THE WHITE HOUSE,

October 17, 1974.

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October 8, 1974

Dear Mr. Director:

The following bills were received at the White House on October 8th:

S. 283	H.R. 6202
S. 634	H.R. 6477
S. 2001	H.R. 7135
H.R. 3532	H.R. 12471
H.R. 5641	

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D. C.

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