The original documents are located in Box 9, folder "1974/10/17 HR 12471 Freedom of Information Act Amendments (vetoed) (1)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

THE PRESIDENT HAS SEEN...

ACTION

THE WHITE HOUSE

WASHINGTON

October 16, 1974

MEMORANDUM FOR: THE PRESIDENT

FROM: KEN COLE

SUBJECT: FREEDOM OF INFORMATION ACT AMENDMENTS

The last day for action on H. R. 12471 is Saturday, October 19, 1974.

Background:

The Conference bill passed the Senate by voice vote October 1 and the House on October 7, 347 to 2. As your legal staff have indicated, the bill contains:

(1) a severely objectionable provision providing for judicial review of document classification (Tab I);

(2) overly strict administrative time limit provisions (Tab II); and,

(3) a section permitting search and disclosure of law enforcement agency investigatory files (Tab III).

A full description of the legislation with these three problem areas numbered in red is contained in the enrolled bill memorandum from OMB at Tab A.

Options:

1. Sign the legislation. Recognize the political difficulties of opposing "Freedom of Information"; have a signing ceremony; and issue a signing statement which reinforces your Administration's interpretations of the judicial review of classified documents provision and expresses your intention to seek resolution of the constitutional issue in the courts.

2. Veto the legislation and simultaneously transmit with your proposed changes. This should be preceded by a discussion with the senior

Conferees where you endorse all aspects of their bill but three, and ask that they work toward immediate passage of your virtually identical bill instead of attempting to override your veto. A draft veto message is attached for your consideration in this regard (Tab B).

Recommendation:

Sign legislation.

JRF. Veto legislation (Ash, Areeda, Buchen, Burch, Cole, Hartmann, Marsh, Timmons, NSC, CIA, State, Justice, Defense, Treasury).

Approve draft veto statement at Tab B. The Domestic Council, OMB, Bill Timmons, and the Counsel's office have approved. Theis is making final editting changes. OMB is preparing the draft legislation mentioned in the veto statement. _____

Disapprove draft veto statement. _____

VETOED 10/7/74 Delivered to the Clerk of the House: 10/7/74 5:38 P.M.

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.

(1)

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

Tab I

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.

(2)

-- 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."

(3) 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

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

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.

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

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

provision concerning unusual circumstances, simply ~~too restrictive and unnecessarily burdensome~~ unrealistic in some cases. I propose instead that twenty days be afforded for the initial decision and thirty days for a determination on appeal. It is essential that additional flexibility 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.

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THE WHITE HOUSE,

October 17, 1974.

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I am submitting herewith 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

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Date: 10/17/74

TO: Mr. Scalia

FROM: General Counsel

Attached is a revised draft veto message on the Freedom of Information Act amendments. It has been modified per conversations with Phil Areeda, Geoff Shepard, and Antonin Scalia of Justice.

RECEIVED
OCT 17 11 01 AM '74
OFFICE OF LEGAL COUNSEL

Stan Ebner

Thanks
Scalia

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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 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.

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 ~~too restrictive and unnecessarily burdensome. I propose instead that twenty days be afforded for the initial decision and fifty days for a determination on appeal.~~ additional flexibility

I ~~am~~ shall submit shortly ~~herewith~~ 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.

THE WHITE HOUSE

October , 1974

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

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.

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

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

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

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE
Washington, D.C. 20230

OCT 15 1974

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

Attention: Assistant Director for Legislative Reference

Dear Mr. Ash:

This is in reply to your request for the views of this Department concerning H. R. 12471, an enrolled enactment

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

This Department has reviewed the proposed veto message with respect to H. R. 12471, transmitted by Assistant Attorney General Scalia to Assistant Director Shepard of the Domestic Council on October 3, 1974, and concurs in the views set forth therein.

Enactment of H. R. 12471 would involve additional expenditures to this Department, the amount of which would depend upon the number of requests for records received and the nonrecoverable costs to review and edit the materials which this legislation would require.

Sincerely,

Karl E. Bakke

General Counsel

DEPARTMENT OF STATE

Washington, D.C. 20520

OCT 15 1974

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

Dear Mr. Ash:

Mr. Rommel's enrolled bill request of October 9, 1974, asked for the views of the Department of State on H.R. 12471, to amend the Freedom of Information Act, Title 5 United States Code, section 552.

For the reasons specified in the enclosed memorandum of October 9, 1974, from the Acting Legal Adviser, and the enclosed memorandum of October 3, 1974, from Assistant Attorney General Scalia, the Department of State recommends veto of H.R. 12471 and supports the veto message proposed by Mr. Scalia modified as suggested in the memorandum from the Acting Legal Adviser.

Cordially,

Linwood Holton
Assistant Secretary
for Congressional Relations

Enclosures:

1. October 9 memo
2. October 3 memo

October 9, 1974

MEMORANDUM FOR GEOFFREY SHEPARD
Assistant Director, Domestic Council

SUBJECT: Veto of Freedom of Information Act Amendments

The Department of State wishes to confirm its previous recommendation that the President veto H.R. 12471, a bill to amend the Freedom of Information Act.

The reason for this recommendation is stated on the first page of the proposed veto message transmitted to you on October 3 by Assistant Attorney General Scalia. The Department of State could support legislation authorizing judicial review of security classifications established by the Executive Branch to determine whether the Executive Branch has acted arbitrarily or whether its determination lacks reasonable basis. However, in our view it would be unsound and of doubtful constitutionality to authorize the courts to determine whether the disclosure of foreign relations information would adversely affect the national security. Classification should remain the responsibility of the Executive Branch.

We agree that the positive tone of the draft veto message is the correct approach and believe that the message could be strengthened further if it identified more specifically the purposes of the amendments supported by the Administration. It might be helpful, for example, to emphasize that the Administration is prepared to support judicial review of classified material in camera as necessary to insure that the classification system is not used to conceal illegal or other improper actions not involving national security. While we would wish to retain and improve the legislative history indicating that courts may rely on affidavits and need not examine classified documents unless clearly necessary, we do not believe this point needs to be addressed in the veto message.

We also believe that it would serve the public interest and demonstrate the Administration's commitment to the purposes of the Freedom of Information Act if the President were to balance a veto of these amendments with an announcement of affirmative steps to strengthen Executive Branch action in this area. Such possible steps could include:

(i) Designation of a respected person of national stature as permanent chairman of the Interagency Classification Review Committee with a mandate and resources to strengthen that agency's ability to carry out its responsibilities under E.O. 11652. Such proposals are in an advanced stage of study in the ICRC;

(ii) A commitment to work with the responsible committees of Congress on legislation establishing a new agency within the Executive Branch to supervise and report on the operation of the classification system to provide continuing assurance that the system is functioning effectively and is not abused. Assistant Attorney General Rakestraw made a proposal on these lines to Congressman Moorhead's Subcommittee on Government Operations in July.

The Department of State is prepared to work with other agencies in developing specific wording on these points for the veto message.

George H. Aldrich
Acting Legal Adviser

Drafted:
L/M:KEMalmborg:L:MBFeldman:lhs
x22350 x22001 10/9/74

cc: OMB - Mr. Stan Ebner
Justice - Mr. Scalia
H - Mrs. Waskewich

Clearances:
PA - Mr. Blair
H - Mr. Goldberg

OCT 3 1974

MEMORANDUM FOR GEOFFREY SHEPARD
Assistant Director, Domestic Council

Re: Proposed Veto Message to the Freedom of Information Act Amendments

Attached is a proposed veto message that could be applied to the Freedom of Information Act amendments. I think it makes a strong case, and one that should be readily understandable by the public. I hope serious consideration will be given to what a veto message might look like before a veto is ruled out as entirely impracticable.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

MEMORANDUM

AMENDMENTS TO FREEDOM OF INFORMATION ACT

DRAFT VETO MESSAGE

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 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. 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. 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 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. I urge that the time limit provisions be changed so as generally to reflect the recommendations of the Administrative Conference of the United States. 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.

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 segregable 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.

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405

OCT 16 1974

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

Dear Mr. Ash:

This letter is to confirm the fact, conveyed to a member of your staff by telephone on October 9, 1974, that the General Services Administration interposes no objection to Presidential approval of enrolled bill H.R. 12471, an act "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

While we are aware of objections which have been raised by other agencies to the bill, and share their concern, the bill presents no problems unique to the operations of the General Services Administration.

Sincerely,

Arthur F. Sampson
Administrator

VETERANS ADMINISTRATION
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS
WASHINGTON, D.C. 20420

OCTOBER 1 8 1974

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

Dear Mr. Ash:

The Veterans Administration would like to volunteer its views with respect to the enrolled enactment of H.R. 12471, 93d Congress, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The bill proposes to make a number of amendments of the Freedom of Information Act, so as to clarify, strengthen, and improve its operations. Among other things, it proposes to require publication of indexes of information affecting the public, such as final opinions, statements of policy, staff manuals and instructions, etc.; require the establishment of a uniform schedule of fees for the recovery of the direct costs of searching for, and duplication of, records, with a waiver of fees where the public interest dictates; authorize in camera examination of records by Federal courts to determine whether they come within one of the exemptions to the Act set out in 5 U.S.C. 552(b); establish limited periods within which agencies must respond to administrative requests for records and to pleadings filed under the Act; grant courts discretionary authority to award attorney fees and litigation costs incurred by the claimant in cases in which the Government does not prevail; authorize the courts to find that the action of agency personnel in withholding records raised questions of arbitrary and capricious action, in which case the Civil Service Commission would be required to initiate proceedings to determine if disciplinary action is warranted; and revise the provisions of 5 U.S.C. 552(b)(7) to permit an agency to withhold investigatory records only under certain limited conditions.

As the President noted in his letter of August 20, 1974, to the Chairmen of the Conference Committee then considering H.R. 12471, the Freedom of Information Act--in just over eight years--has proven to be a most worthwhile law in making the Government more responsive to the Nation's citizens. Perhaps some of the provisions of this bill would strengthen and improve that Act. However, the then pending bill also contained other, very objectionable provisions that were discussed in the President's letter. While the Conference Committee has revised these provisions, apparently in an effort to overcome the President's objections, we believe that the measure continues to have seriously objectionable aspects.

The bill would no longer require courts to direct suspension of employees of the Government who are found to have withheld records without a "reasonable basis in law", but it would require the Civil Service Commission to initiate disciplinary proceedings with respect to all responsible agency employees in any instance in which a Federal court determines that the withholding of the records raises questions of arbitrary and capricious action. As the President noted with respect to the earlier provisions, this provision would also have an "inhibiting" effect upon the vigorous and effective conduct of official duties.

The extremely limited periods within which agencies of the Government would be required to respond to both original requests for records and to pleadings filed under the Act would, we think, prove burdensome to departments and agencies, even to the point of being impossible to meet in many instances. We feel this is the case even with the "unusual circumstances" extension incorporated in the current version of H.R. 12471. While there can be no objection to the obvious intention of the Congress in this provision, i.e., to preclude delays in the release of requested information, we think it is quite obvious that there will be situations in which either the size of the workload confronting the agency or in which a difficult, less than clear-cut question is presented, will make the

mandatory periods quite impossible to meet. The Veterans Administration has encountered situations where the search for records in a large number of our field stations and the collection of those records in the office responding to the request has utilized a period considerably in excess of that which would be permitted under this amendment. Certainly, just the transmittal of papers between the agency involved, the Department of Justice, and the United States Attorney's office in a litigated matter would consume nearly all of the 30-day period this measure would allow for response.

We have been advised that the Department of Justice has recommended the disapproval of H.R. 12471 and has furnished a suggested veto message to your office. The Veterans Administration strongly endorses the position of the Department of Justice and urges the disapproval of the bill by the President.

Sincerely,

RICHARD L. ROUDEBUSH
Administrator