

94th Congress }
1st Session }

JOINT COMMITTEE PRINT

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FREEDOM OF INFORMATION ACT
AND AMENDMENTS OF 1974 (P.L. 93-502)

SOURCE BOOK : LEGISLATIVE HISTORY, TEXTS,
AND OTHER DOCUMENTS

COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS

COMMITTEE ON THE JUDICIARY
U.S. SENATE
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE



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PREFACE

This compilation of materials relating to the legislative history of Public Law 93-502, the 1974 Amendments to the Freedom of Information Act (5 U.S.C. 552), summarizes the 3-year investigative and legislative efforts to strengthen and improve the operation of the Act.

These efforts were undertaken by the two subcommittees having jurisdiction over the Freedom of Information Act—the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations and the Administrative Practice and Procedure Subcommittee of the Senate Judiciary Committee.

With invaluable assistance from Dr. Harold C. Relyea, of the Government and General Research Division, Congressional Research Service, the Library of Congress, the staffs of the House and Senate subcommittees have prepared the attached material, which consolidates the various reports, debates, and other documents relating to the 1974 amendments, the first substantive changes to the law since its original enactment in 1966.

During the investigative and legislative efforts of the House subcommittee, Dr. Relyea assisted in the analysis of Federal agency data on the administration of the Freedom of Information Act, attended hearings, staff meetings, mark-up sessions, and the conference proceedings. His significant contribution is gratefully acknowledged.

It is hoped that this material will be useful to the many thousands of Americans interested in the Freedom of Information law—journalism students, law students, public interest groups, governmental officials, and others who are concerned with advancing the public's right to know under our representative system of government.

CHAPTER I
H. Rept. 92-1419
ADMINISTRATION OF THE FREEDOM OF
INFORMATION ACT

ADMINISTRATION OF THE FREEDOM OF
INFORMATION ACT

TWENTY-FIRST REPORT

BY THE

COMMITTEE ON GOVERNMENT
OPERATIONS

TOGETHER WITH

ADDITIONAL VIEWS



SEPTEMBER 20, 1972.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1972

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., September 20, 1972.

HON. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-first report to the 92d Congress. The committee's report is based on a study made by its Foreign Operations and Government Information Subcommittee.

CHET HOLIFIELD, Chairman.

(III)

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Union Calendar No. 738

92^D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
 2d Session } { No. 92-1419

ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

SEPTEMBER 20, 1972.—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

TWENTY-FIRST REPORT

TOGETHER WITH
 ADDITIONAL VIEWS

BASED ON A STUDY BY THE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE

On September 14, 1972, the Committee on Government Operations approved and adopted a report entitled "Administration of the Freedom of Information Act." The chairman was directed to transmit a copy to the Speaker of the House.

I. BACKGROUND

The Freedom of Information Act (FOI Act) was signed into law by President Lyndon B. Johnson on July 4, 1966, as Public Law 89-487.¹ It went into effect on July 4, 1967.

In his bill-signing statement President Johnson said:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. * * * I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

The new law followed more than a decade of effort by the Foreign Operations and Government Information Subcommittee and its predecessor, the Special Subcommittee on Government Information,

¹ As result of Public Law 90-23, approved June 5, 1967, Public Law 89-487 was codified as 5 U.S.C. 552.

established on June 9, 1955, under the chairmanship of Representative John E. Moss of California. Similar efforts were focused in the Senate Subcommittee on Administrative Practice and Procedure, under the chairmanship of Senator Edward V. Long of Missouri, and its parent Committee on the Judiciary. Volumes of hearings, investigations, and studies of information policies of the Federal Government over this 11-year period produced many reports, committee prints, and analyses of the withholding of information by the Executive bureaucracy.²

1958 Amendment to 1789 "Housekeeping" Statute

In 1958, near the end of the 85th Congress, the House and Senate enacted, without a dissenting vote, the first statute devoted solely to freedom of information. The Moss bill (H.R. 2767) was a one sentence amendment to the 1789 "housekeeping" law which gave Federal agencies the authority to regulate the business of the agencies and to set up filing systems and keep records. The language of the amendment added to section 22 of title 5 of the United States Code was:³

This section does not authorize withholding information from the public or limiting the availability of records to the public.

Yet hearings before the subcommittee in 1972 indicate that some agencies are still relying on the original 1789 "housekeeping" statute as authority to withhold certain types of information from the public, despite the enactment of Public Law 85-619 fourteen years ago. It is expected that this subject will be dealt with in a subsequent report. The subcommittee's hearings, parts 4, 5, and 6, entitled "U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act," are hereinafter referred to as "hearings."

Freedom of Information Act

[The Freedom of Information Act was enacted as an amendment of section 3 of the Administrative Procedure Act of 1946 and emerged from the functional inadequacy of the prior section 3, which contained the first general statutory provision for public disclosure of executive branch rules, opinions, and orders, and public records. Some of its provisions, however, were vague and contained disabling loopholes which made the section as much a basis for withholding information as one for disclosing. Section 3 as originally enacted was the target of many legislative attempts to close the loopholes and make the language more specific, but all failed of final approval until the 1966 amendment.

The Freedom of Information Act was milestone legislation that reversed long-standing Government information policies and customs.⁴ Previously, most agencies operated on the basis of the original provisions of section 3 of the Administrative Procedure Act of 1946 which stated that unless otherwise required by statute, "matters of official record shall in accordance with published rule be made available to

² Such documents are too numerous to list, but file copies are in the subcommittee's office. An Index and Bibliography of hearings, reports, prints and studies was published in January 1964 as a Committee Print entitled "Availability of Information From Federal Departments and Agencies."

³ Public Law 85-619. The 1958 amendment to the 1789 "housekeeping" law has been subsequently codified as 5 U.S.C. 301.

⁴ For a legislative history of the FOI Act, prepared by the American Law Division, Library of Congress, see Hearings, pt. 4, pp. 1367-1373.

persons properly and directly concerned except information held confidential for good cause found." Moreover, the original section 3 contained a blanket exclusion from its applicability of any function of the United States requiring secrecy in the "public interest" and "any matter relating solely to the internal management of an agency."

The Freedom of Information Act replaced this general language relating to secrecy, indicating that Congress, in enacting the act, has adopted a policy that "any person" should have clear access to identifiable agency records without having to state a reason for wanting the information and that the burden of proving withholding to be necessary is placed on the Federal agency.]

Withholding of Information by Government

Withholding of information by government under the act is permissive, not mandatory, and must be justified on the basis of one of the specific nine exemptions permitted in the act. These relate to matters that are ⁶—

- (1) Specifically required by 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 report 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.

The act makes it clear in section 552(c) that the exemptions have absolutely no effect upon congressional access to information:

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.

Continuous Oversight

General oversight into the administration of the Freedom of Information Act has been exercised by the Foreign Operations and Government Information Subcommittee and the Senate Subcommittee on

⁶ Sec. 552(b) of title 5, United States Code.

Administrative Practice and Procedure since the act took effect on July 4, 1967. The House subcommittee has provided informal assistance service in hundreds of cases involving the act that have been referred by Members of Congress and their staffs or called to the subcommittee's attention by newsmen, radio-television broadcasters, researchers, attorneys, historians and scholars, and by individual citizens. It has provided information about the act and informal suggestions involving the procedural handling of FOI cases. The hearings undertaken by the subcommittee in March 1972 are the first in-depth review of the extent to which executive departments and agencies have complied with the law and the implementing guidelines contained in the Attorney General's Memorandum.⁸

⁸ See "The Freedom of Information Act (10 Months Review)," Committee Print, May 1968, published by the Administrative Practice and Procedure Subcommittee, Senate Judiciary Committee. Also see Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5, U.S.C. 552)," Committee Print, November 1968, published by House Government Operations Committee.

II. INTRODUCTION, FINDINGS, AND CONCLUSIONS

Our concern in this report and those which will follow is the protection, preservation and enlargement of the American people's "right to know".

The overall guidance to executive agencies for their administration of the Freedom of Information Act was clearly stated by Attorney General Ramsey Clark in the foreword to his memorandum of June 1967:⁷

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments

⁷ "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act," U.S. Department of Justice, June 1967, pp. iii-iv. The full text of the memorandum, which is now out of print, is contained in pt. 4 of the hearings, pp. 1079-1131.

in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

That disclosure be the general rule, not the exception;

That all individuals have equal rights of access;

That the burden be on the Government to justify the withholding of a document, not on the person who requests it;

That individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

That there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself—in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility. * * *

Freedom of Information Not a Partisan Matter

There are some who would like to make freedom of information a partisan issue, claiming it is they or their party who represent the one true champion of this particular devotion to liberty. But, in fact, years of study by this committee show each new administration develops its own special secrecy techniques which, as time passes, become more and more sophisticated. The factor of credibility, together with the inclination of government to invade the privacy of our citizens, poses an ominous threat to our democratic system which must be opposed at every turn despite the agony it might create. We believe it is better to have too much freedom than too little.

Comprehensive Hearings on Broad Government Information Policies

The subcommittee received sworn testimony from 142 witnesses at 41 days of public hearings by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations during June and July 1971 and March 1972 through June 1972. The hearings were an intensive study of the effectiveness of the Freedom of Information Act and related matters involving information policies and practices of the Federal Government. The FOI Act has been the law of the land 5 years, as of July 4, 1972, appropriately enough the anniversary of American independence—the day 196 years ago when the “many” revolted against the despotic monarch. This committee has both legislative and oversight investigative jurisdiction over the Freedom of Information Act.

The hearings on U.S. Government information policies and practices began June 23, 1971, and cover many months of intensive testimony, interrogation, analysis of questionnaires, and research studies provided by the Congressional Research Service, Library of Congress.⁸ The subcommittee sought not only to examine those departments and agencies with poor records of compliance with the Freedom of Information Act but also those governmental units which tried to implement congressional FOI mandate with dedication and enthusiasm. There were such but the overall picture which emerges was encrusted with bureaucratic dust and grime which need to be vigorously scrubbed away.

When Congress passed the Freedom of Information Act, it issued a rule of government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital defense and state secrets, personal privacy, trade secrets and the like—were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people—the people are not their servants. This report is another reminder to our Government of that fact. Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from “We, the people. * * *”

Series of Reports Based on Hearings

This report is the first of a series to cover virtually all major aspects of freedom of information as it relates to our Government. Those areas of concern include the administration of the Freedom of Information Act, the subject of this first report; the security classification system which has long impeded the free flow of information on national defense and foreign policy; the so-called doctrine of “executive privilege” used by Presidents to deny vitally needed information to Congress; the information policies of governmental advisory committees; legislative proposals to close loopholes and narrow, if not eliminate, certain exemptions in the Freedom of Information Act; and other related subjects.

⁸ A complete listing of the hearing dates is printed in the legislative calendar of the House Committee on Government Operations.

The ultimate objective is to strengthen and clarify the Freedom of Information Act to make it more effective and responsive to an open society. Action on legislation to accomplish this objective, based partially on these in-depth hearings and studies, will be sought by this committee.

Major Problem Areas

Some of the major problem areas pinpointed during the hearings are:

1. The bureaucratic delay in responding to an individual's request for information—major Federal agencies took an average of 33 days with such responses; and when acting upon an appeal from a decision to deny the information, major agencies took an average of 50 additional days;

2. The abuses in fee schedules by some agencies for searching and copying of documents or records requested by individuals; excessive charges for such services have been an effective bureaucratic tool in denying information to individual requestors;

3. The cumbersome and costly legal remedy under the act when persons denied information by an agency choose to invoke the injunctive procedures to obtain access; although the private person has prevailed over the Government bureaucracy a majority of the important cases under the act that have gone to the Federal courts, the time it takes, the investment of many thousands of dollars in attorney fees and court costs, and the advantages to the Government in such cases makes litigation under the act less than feasible in many situations;

4. The lack of involvement in the decisionmaking process by public information officials when information is denied to an individual making a request under the act; most agencies provide for little or no input from public information specialists and the key decisions are made by political appointees—general counsels, assistant secretaries, or other top-echelon officials;

5. The relative lack of utilization of the act by the news media, which had been among the strongest backers of the freedom of information legislation prior to its enactment; the time factor is a significant reason because of the more urgent need for information by the media to meet news deadlines. The delaying tactics of the Federal bureaucrats are a major deterrent to more widespread use of the act, although the subcommittee did receive testimony from several reporters and editors who have taken cases to court and eventually won out over the secrecy-minded Government bureaucracy; and

6. The lack of priority given by top-level administrators to the full implementation and proper enforcement of Freedom of Information Act policies and regulations; a more positive attitude in support of "open access" from the top administrative officials is needed throughout the executive branch. In too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment.

Findings and Conclusions

The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure

from appointed officials at the policymaking level and in some other agencies through public hearings and other oversight activities by the Congress. However, it has been clearly demonstrated during these hearings that much information of the type previously denied to the public has been made available under the act.

Part of the gap between the promise of access to public records which the FOI Act held out 5 years ago when it became law and the practice of the Federal agencies which administer the law can be closed by improvements in the rules and regulations adopted by the agencies to implement the law. Additional narrowing of the gap is taking place through court decisions that clarify the law. Some of the gap can be closed by legislative changes to clarify the intent of Congress or to correct shortcomings apparent in the first 5 years of the law's operation.

But no changes in law and no directives from agency heads will necessarily convince any secrecy-minded bureaucrat that public records are public property. Only day-to-day watchfulness by the Congress and the administration leaders can guarantee the freedom of government information which is the keystone of a democratic society.

In general, the committee finds that the Freedom of Information Act has helped thousands of citizens gain access to the information, when they have been able to overcome Government roadblocks. The information media, which serve as the major conduit of knowledge between the public and their government, have been helped by the FOI Act. But administrative delays and obfuscation have been a particular problem for the press, for news is a perishable commodity. In the few cases when the press has taken a case to court, government secrecy usually has been overcome. In other cases, the likelihood of court action has persuaded Federal agencies to grant access to public records.

While there have been too few landmark cases decided by the courts to indicate a pattern of interpretation of every part of the FOI Act, it is clear that, by and large, the courts are effectively exercising their authority under the act to judge the Government's stewardship of the people's right to know. The courts' judgment has usually been against needless Government secrecy.

Finally, it is apparent that a clearly defined role for essential public information activities and personnel in the Federal Government is necessary if such activity is to be afforded its proper status within the bureaucracy. The public information role in Government is becoming even more important as Federal programs expand and become decentralized. Public information experts should serve as a "bridge" between an impersonal government and the individual citizen, to make certain that he is sufficiently informed about Federal programs that may affect him and his family.

Following are findings and conclusions on the specific administrative and legislative problems apparent after 5 years of experience with the Freedom of Information Act. (See ch. X of this report for recommendations.)

1. *Administrative Problems*

- Some agency regulations are confusing, inadequate, or deficient, adhering neither to the guidelines in the 1967 Attorney General's memorandum nor the intent of Congress.

- The Office of Legal Counsel, Department of Justice, has undertaken an advisory role to assist other agencies in the administration of the FOI Act, but the office needs to exercise a greater leadership function, for example, by advising other agencies of significant court interpretations of the act and by preparing a pamphlet for the general public to explain the rights of individual citizens to obtain public records from Federal agencies.
- Some Federal agencies have not kept adequate records of requests for public information under the act to properly evaluate their performance; some have not informed an individual of the precise exemption under the act being exercised to deny a requested record; others have not advised individuals of the administrative right to appeal the denial to a higher agency authority, nor of ultimate rights to legal remedy in the courts.
- Very few agencies have involved public information officials in administrative decisions on requests for public records under the act; very few agencies have issued clear policy statements on commitment to the principles of the FOI Act, nor have they issued directives to place appropriate priority on compliance with the provisions of the act.
- Many agencies have failed to provide suitable training or orientation of employees on the meaning, intent, and proper administration of the FOI Act, even those directly affected by responsibilities that involve public requests under the act.
- Excessive fees for search and reproduction of public records in some agencies have deterred individuals desiring access to such records; moreover, there is a wide disparity among agencies in fees charged for the same types of records.

2. *Legislative Problems*

- The delay by most Federal agencies in responding to an individual's request for public records under the FOI Act, or delay in acting on an administrative appeal frequently has negated the basic purpose of the act; while reforms might be initiated at the administrative level, amendments to incorporate recommendations of the Administrative Conference of the United States into the act are a way to achieve the prompt handling of requests by individuals under the act.
- Many Federal agencies have used the "identifiable record" requirement of the FOI Act as an excuse to withhold public records; thus, legislative clarification is necessary.
- The delay by Government attorneys in filing responsive pleadings in suits brought by individuals to obtain public records and the high costs to an individual in pursuing litigation under the act have often been serious deterrents in obtaining public records, giving unfair advantage to the Government.

- Federal agencies have not been required to report to Congress on their activities under the FOI Act, and an annual evaluation would not only improve administration of the act but also permit more effective and systematic legislative oversight.
- The nine exemptions in the act which permit withholding of information have been misused by Federal agencies. Confused interpretations of agency regulations, the desire to withhold records which might embarrass an agency, and misunderstanding of court decisions affecting these exemptions, all have contributed to the problem. These deficiencies can only be corrected by amendments to the FOI Act itself.

III. FREEDOM OF INFORMATION REGULATIONS AND ADMINISTRATIVE REQUIREMENTS

Hearings on the administration of the Freedom of Information Act were first announced on January 24, 1972; they began on March 6, and extended through April 19. Immediately prior to, or during the course of these hearings, 14 Federal departments and agencies indicated they were revising their regulations regarding FOI Act matters.⁹ Two of these departments released their new regulations within the 24-hour period immediately prior to their appearance before the subcommittee.¹⁰

In early May, the Food and Drug Administration (FDA) published new regulations to make most of its voluminous files, which have always been kept confidential, available to the public under the provisions of the FOI Act. Earlier in the hearings, FDA had been singled out by HEW's witness, Mr. Robert O. Beatty, Assistant Secretary for Public Affairs, for special criticism:¹¹

* * * I am well aware of the less than salutary performances of the Food and Drug Administration under the act and the interest of this committee in why. A part of the answer, I think, lies in the inherent characteristics of the Food and Drug Administration as a regulatory agency—the only such regulatory agency in the Department.

Another I think is simple bureaucracy. FDA has documented for me since March of 1969, they have received a total of 96 inquiries under the act, have given 79 approvals, 11 denials, and three withdrawals, with an average response time, however, of about 2 months. Certainly that is far too long. I think the committee would agree and we all agree within the Department and within the FDA that is too long. I am sure the committee will be happy to know, however, that the entire question of the release of information by the Food and Drug Administration has been under intensive review by this agency during the last 6 months and a major change in the agencies' policy and resulting performance should result from that review. We had hoped to be able to present to the committee today for discussion as it saw fit these new regulations but we were not quite able to make it.

It would appear that the subcommittee's hearings on the administration of the FOI Act had some direct influence in prompting the revision of agency regulations during the time period of these hearings. As part of its oversight responsibility, the subcommittee had exercised an early and continuous concern over agency regulations to implement the act.¹²

⁹ They are American Revolution Bicentennial Commission, Department of Commerce, Department of the Army, Environmental Protection Agency, Food and Drug Administration, Department of Health, Education, and Welfare, Department of Housing and Urban Development, Department of Interior, Inter-American Foundation, Department of Labor, Selective Service System, Department of Transportation, Department of State, and Department of the Treasury.

¹⁰ Departments of Labor and Transportation.

¹¹ Hearings, pt. 5, p. 1660.

¹² See Committee Print issued by this Committee in November 1968, "Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552)".

Mr. David Maxwell, General Counsel of the Department of Housing and Urban Development, commented during his appearance before the subcommittee that the hearings "had a great deal to do" with HUD's review of its regulations. Speaking of the net effect of the proceedings, he said:¹³

I think these [hearings] are very desirable, not only for us, but for all of the other agencies. We are most appreciative of having our attention called to these [FOI Act] matters in this way.

Mr. Frank M. Wozencraft, a principal drafter of the June 1967 Attorney General's memorandum on the FOI Act's administration recommended:¹⁴

I would hope that each chairman when he comes before a committee, be it this committee or his substantive committee, would be asked: "What have you done to see to it that all of the general policies and guidelines in your agency are published?"

Wozencraft suggested that agencies be continuously urged to revise their regulations to conform with the FOI Act, amendments to it, landmark court decisions, and be required to make such regulations better known to both the public and to those responsible for administering the act.

Legally Questionable Regulations

The chief reason the committee urges better regulations is to remove bureaucratic roadblocks to the extent possible, short of actual statutory amendments. Such impediments in administering the FOI Act may result from unclear regulations, undisclosed guidelines, portions of regulations which are not in conformity with statutory or case law, the failure to make regulations known to agency operating personnel involved in the administration of the FOI Act, or the failure to provide adequate training in the act for such persons.

Among the legally questionable regulations included in the subcommittee's review is a Federal Power Commission (FPC) stipulation that "Records not made part of the public record * * * may be disclosed if requested, *upon showing it is in the public interest that they be disclosed* * * *."¹⁵ Chairman Moorhead questioned this language, noting:¹⁶

* * * the overall philosophy stated in the Attorney General's memorandum is that the burden be on the Government to justify the withholding of the document, not on the person who requested it.

It seems to me, in section (d), you try to shift the burden back to the requestor, that the Government must say this is why we are not going to give you this other record * * *.

Thus, Congress said everything should be public unless—so that the burden is on the Government to defend its non-disclosure of public business, rather than saying that this person has to show "good cause" and prove his case.

¹³ Hearings, pt. 6, p. 1916.

¹⁴ Hearings, pt. 4, p. 1074.

¹⁵ For a further discussion of this problem, see p. 28 of this report.

¹⁶ Hearings, pt. 6, pp. 1966-1967.

The 28 divisions or units of the Department of Agriculture (USDA) all publish separate regulations, exemplifying the fact that there is no centralized administration of the FOI Act at this huge agency.¹⁷ There is no USDA regulation which expressly refers to the Attorney General's memorandum as a guideline for information that is being subject to the claim under exemption (b)(5) of the FOI Act (inter-agency or intra-agency memorandums or letters). The memorandum quotes H. Rept. 1497, 89th Congress, and states: "Accordingly, any internal memorandum which would 'routinely be disclosed to a private party through the discovery process in litigation with the agency' is intended by the clause in exemption (5) to be 'available to the general public,' unless protected by some other exemption."¹⁸ No mention is made in the USDA regulations of the discovery test outlined in the memorandum of "routine" availability. It is not surprising, therefore, that USDA has been one of the major "problem" agencies showing a spotty record in administration of the act.

As a matter of practice, USDA commonly utilizes multiple exemptions for a requested document. While this practice is not specifically sanctioned by the regulations, it might be prohibited by a requirement that a "specific and pertinent exemption" be cited.¹⁹

The Cost of Living Council (CLC) and its two subsidiary units—the Pay Board and the Price Commission—issued its regulations under the FOI Act on February 1, 1972.²⁰ The parts of the regulations dealing with "exempt information" were in conflict among the three issuing agencies.

In their regulations the CLC restated the provisions of subsection (b) of Section 552—exemptions (1) through (9)—but specifically referred to Section 1905 of Title 18, U.S. Code in the third exemption. This criminal statute imposes a fine and imprisonment on any Government employee who unlawfully discloses specified data or information coming to him in the course of his employment, and is highly questionable in regulations relating to the FOI Act.²¹

Although it is clear that the exemptions set forth in subsection (b) of the Freedom of Information Act are permissive and not mandatory, the CLC originally made no provision for disclosure of "exempt information" if such disclosure is in the public interest. The CLC regulations were subsequently amended on August 15, 1972, to reflect those regulations originally adopted by the Price Commission.

The amendment adds a new subsection 102.3(c) which reads as follows:

(c) The Chairman of the Council or his delegate is authorized at his discretion to make any record enumerated in sec. 102.4 available for inspection when he deems disclosure to be in the public interest and disclosure is not otherwise prohibited by law.

¹⁷ Hearings, pt. 5, pp. 1556-1593.

¹⁸ Attorney General's memorandum, op. cit., p. 35, hearings, pt. 4, p. 1119.

¹⁹ See "Note, Freedom of Information: The Statute and the Regulations," *Georgetown Law Journal*, LVI (November 1967), p. 42.

²⁰ 37 F.R. 2478; 6 C.F.R. pt. 102.

²¹ See *Schapiro v. Securities and Exchange Commission* (DC, D.C., 1972). The court said in part in the Schapiro case ". . . The Securities and Exchange Commission alleges that 18 U.S.C. 1905 prevents the disclosure of this information. That statute, however, does not prevent the disclosure of information that is authorized to be disclosed under other laws. There is nothing in sec. 1905 of title 18 that prevents the operation of the Freedom of Information Act. Moreover, the provision for documents specifically exempted by statute (5 U.S.C. 552(b)(3)) relates to those other laws that restrict public access to specific government records. It does not, as defendants allege, relate to a statute that generally prohibits all disclosures of confidential information."

The Pay Board in its regulations has incorporated by reference the provisions of subsection (b) of the FOI Act without any changes.²² It has, however, made provision for the release of "exempt information" to a complainant at the discretion of the Chairman of the Pay Board.²³ As in the case of the CLC, the Pay Board originally made no provision for disclosure of exempt information in the public interest. However, on Sept. 7, 1972, the Pay Board announced its intention to amend its regulations so as to bring them into conformity with the spirit of the Freedom of Information Act.

Paragraph (a) of section 200.20 was revised as follows:

(a) In general. All documents and exhibits filed by any party with the Pay Board in the course of its proceedings are part of the records of the Board, available for inspection and copying by members of the public, except to the extent and in the manner specified in this subpart, and except to the extent such information is of the nature specified in 5 U.S.C. 552(b)(1)-(9). However, the Chairman of the Pay Board or his delegate, is authorized at his discretion to make any record enumerated in 5 U.S.C. 552(b)(1)-(9) available for inspection if he deems disclosure to be in the public interest, and disclosure is not otherwise prohibited by law.

The Price Commission regulation affecting "exempt information" is similar to the CLC regulations, restating the provisions of subsection (b) of the act with minor procedural changes.²⁴ However, the Commission makes specific provision for the release of "exempt information" at the discretion of the Chairman of the Commission:²⁵

(b) The Chairman of the Commission, or his delegate, at his discretion may make any record enumerated in paragraph (a) of this section available for inspection when he deems disclosure to be in the public interest, if disclosure is not otherwise prohibited by law.

One of the more flagrant abuses of the FOI Act uncovered by the subcommittee involved the Price Commission. In its printed form PC-1, "Request (Report) For Price Increase For Manufacturing, Service Industries and the Professions," the Commission actually solicits confidentiality from the companies who are applying for price increases under the Economic Stabilization Act of 1970. The printed form PC-1 reads in part:²⁶

It is requested that the information submitted herewith be considered as confidential within the meaning of section 205 of the Economic Stabilization Act of 1970 (as amended), Title 5, U.S. Code, 552 and Title 18, U.S. Code, section 1905.

Such solicitation of confidentiality by the Price Commission was entirely inconsistent with the FOI Act. This language adopted by the Price Commission in 1971 was ordered removed from subsequent press runs of form PC-1 in August 1972 although current supplies of the old form are still in use.

²² Title 5 U.S.C., sec. 552.

²³ Pt. 2000, sec. 200.20 (Pay Board regulations).

²⁴ Pt. 311, sec. 311.5(a) (Price Commission regulations).

²⁵ Pt. 311, sec. 311.5(b).

²⁶ A copy of form PC-1 is on file in the subcommittee office.

As was stressed over and over during the hearings, the exemptions contained in subsection (b) of the act are permissive and not mandatory and the committee knows of no agency that has specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality. It is the duty of each agency to determine on an individual basis whether or not specific information fits the test of confidentiality as provided in subsection (b)(4) of the FOI Act.

Moreover, it would seem that the degree of public confidence in the integrity of the administrative processes which regulate wages and prices under our economic stabilization program can only be earned by actions which convince the American public that requests for increases are judged in an equitable manner in the cold light of public scrutiny—not hidden behind the closed door of blanket confidentiality that is contrary to the law.

Few of the departments and agencies specified in their regulations any limitations on action time for responding to requests brought under the FOI Act. We have noted elsewhere in this report that the problem of "foot-dragging" delays is one of the most common problems encountered.²⁷

In analysing the agency's responses to the subcommittee's questionnaire on their operations under the FOI Act, a study conducted for the subcommittee by the Congressional Research Service (CRS) of the Library of Congress provided a revealing picture of agency behavior on the matter of response delays. Assessing the case load of FOI denials for the 1967-71 period, CRS analysts computed the average number of days required for each agency to respond to both initial requests for information and appealed requests. According to this study:²⁸

These time spans ranged from an average of 8 days (Small Business Administration) to 69 days (Federal Trade Commission) for responses to initial requests and from 13 days (Department of the Air Force) to 127 days (Department of Labor) for responses to appeals. For those agencies listed in the analytical chart, the average number of days taken to respond to initial requests was 33 (for 27 agencies); the average number of days to respond to appeals was 50 (for 20 agencies). In terms of the average time lapse on initial requests for agencies listed in the analytical chart, 11 agencies exceeded this average; 9 agencies exceeded this average for time on acting on appeals. The Department of Health, Education, and Welfare, Interior, Justice and the Renegotiation Board exceeded the total average for both stages of the administrative process. Statistically, four agencies seem to be in no hurry to expedite requests for information under the Freedom of Information Act.

Such delays, even for a few days or a week, can make requested information of little or no value to someone attempting to meet a deadline on any research project or news story where the requested information is needed on a timely basis. We have noted elsewhere in this report that working journalists have made little use of the FOI Act

²⁷ See pp. 19-42 of this report.

²⁸ The full text of the study is in the hearings, pt. 4, pp. 1333-1343; the quotation appears on p. 1337.

because of this problem of bureaucratic delay in obtaining responses to requests for information. Such excessive delays also can frustrate efforts by researchers, scholars, and other types of professional writers who seek information from their government.

Lack of Top-Level Consideration of FOI Problems

One indication of the importance of the FOI Act in terms of agency priorities is the record keeping of the agency. In response to the subcommittee's questionnaire in the summer of 1971 regarding the administration of the FOI Act, the Department of the Army, Navy, the Department of Labor, the Civil Service Commission, and subunits of the Transportation Department all indicated they could not provide certain requested statistics because they had failed to keep any records on these matters.²⁹ Certain agencies frankly stated they had no records.

RECORDKEEPING

The Library of Congress analysis noted these and other problems concerning the quality of agency data, stating:³⁰

Responses to the subcommittee's questionnaire were generally complete and detailed for most agencies, but in certain cases the agencies seemed to misunderstand the questions or they provided otherwise unusable information. The Department of Defense for example, acknowledged incomplete records to answer some questions. The Civil Aeronautics Board supplied aggregate information for fiscal year 1968 only. The Federal Highway Administration and the Federal Railroad Administration reported they kept no records on Freedom of Information Act requests.

In a number of instances details were omitted from agency responses. The number of requests for public records was not provided, for example, by the Department of the Army, the Department of Health, Education, and Welfare, the Coast Guard, the Federal Maritime Administration, and the Civil Service Commission, though those agencies did provide information on individual denials. Often no initial request dates were supplied for individual cases or no dates on appeals were given, thus making the computation of time intervals impossible or limited to a few cases. In many responses the titles and citations of relevant court cases were garbled or missing. The Department of the Army, the Department of the Navy, the Department of State, and the Securities and Exchange Commission failed to cite appropriate sections of the Freedom of Information Act as a basis for refusing information.

The uneven quality of such data received in response to the questionnaire raises serious questions concerning the interest of some Federal departments and agencies in how the act is administered, since they do not even maintain sufficient records to evaluate their performance under the statute.

Even details on court actions under the FOI Act were sorely lacking. The Library of Congress analysis commented:³¹

²⁹ The text of the subcommittee questionnaire is on pp. 1334-1335 of the hearings, pt. 4.

³⁰ *Ibid.*, p. 1336.

³¹ *Ibid.*, p. 1336.

* * * Frequently, the responding agencies cited court cases which resulted from their refusals to provide materials but they failed to provide details on the administrative procedure which preceded judicial action. * * *

The problems of administration and inadequate recordkeeping become compounded when it is realized that the agencies do not always keep their personnel responsible for administering the FOI Act abreast of recent precedent-making court decisions. The Agriculture Department's Assistant General Counsel, for example, told the subcommittee:³²

* * * In the court cases the Department was involved in, where they gave information as a result of the court cases, a press release was then issued by the agencies informing them of the information that was being made available and it would be made available upon request to anyone else and this press release is then summarized by the information office of Mr. Gifford's office and that is circulated to all of the agencies, so through that they get advice as to the type of action under court cases where the Department is a party to the case.

Thus, personnel of the USDA handling FOI requests receive only a summary of a press release regarding a court case involving released documents under the FOI Act within their agency. They do not normally have an opportunity to read the decision in the case; they may not even see the full press release about the case; and they are given summaries involving only those cases in which their own Department was a litigant.

This problem of disseminating decisions of the courts involving FOI Act cases among all executive branch personnel who deal with Government information requests was discussed during the hearings with then Assistant Attorney General Ralph E. Erickson, Office of Legal Counsel, whose office is responsible for the operations of the Freedom of Information Committee.³³

Mr. MOORHEAD. Would it not be advisable to rewrite and bring up to date the Attorney General's memorandum and establish a procedure for ongoing distribution of advisory opinions as new case law is developed?

Mr. ERICKSON. When I first became involved in freedom of information matter(s) I looked at that book and I said, "My God, this thing should be brought up to date."

Since that time I have come to recognize that it may not be quite that easy to bring it up to date, because we do have a number of, I think, rather important questions to be answered, and maybe answered in the foreseeable future. I think it is something that should be brought up to date at some point in time. I am not sure that this is the exact time. I would certainly prefer to have some pronouncement by the Supreme Court before we do this. But, I do think it is—it would be helpful, and it is something that should be done in due course.

³² Hearings, pt. 5, p. 1694.

³³ Hearings, pt. 4, p. 1190.

Chairman Moorhead went on to ask Mr. Erickson if thought had been given to some other method of keeping agencies up to date on legal developments under the FOI Act, such as seminars for public information officers and lawyers having such duties.

Erickson responded:³⁴

It is one of the questions. I feel something should be, something should be done. I have not formulated, really, any plan as to how it might be done. I mentioned the increase in our consultations, and it seems to me that that, in and of itself, serves to inform and keep other agencies advised.

But, I certainly would not be adverse to some more concentrated effort, more expansive effort to keep other agencies advised, because I think the law is evolving, is developing, and certainly it would be a help.

Chairman Moorhead asked if general counsels of Federal agencies were advised when a significant court decision under the FOI Act is rendered. Erickson said that "we have developed no automatic procedures for doing so, but that certainly would be one of the alternatives to be considered."

Summary

It is obvious to the committee from its study of the problems of effective administration of the FOI Act that clearcut, easily understood regulations that adhere closely to the philosophy of the public's right to know the business of its Government, as expressed in the law enacted by Congress and the guidelines issued in 1967 by the Attorney General can go a long way toward making the act truly meaningful under our representative system of government. Yet, we have learned that the regulations, themselves, regardless of how positive or how precise, do not necessarily guarantee effective operation of the FOI Act in any agency. A constructive attitude toward the act by the top leadership of the agency and a genuine desire to make more information available to the public are essential ingredients.

The committee believes that there are many positive actions that can be taken at the administrative level to make the act more workable and more effective. Such actions must, however, be considered in the context of recommended statutory amendments. Administrative recommendations are therefore discussed in chapter X of this report, along with the proposed objectives of amendments to the FOI Act itself.³⁵

³⁴ Ibid.

³⁵ See pp. 83-86 of this report.

IV. GOVERNMENT ROADBLOCKS PREVENTING EFFECTIVE USE OF THE FREEDOM OF INFORMATION ACT

During the hearings on bills which became the Freedom of Information law, no witnesses testifying for Government agencies supported the legislation. A few expressed approval of the people's right to know, but each favorable comment on the general principle was hedged by specific objections to the legislative language proposed to enforce the right to know. Since there was general opposition to the legislation throughout the Federal bureaucracy, the agencies would not be expected to administer the law so that public access to public records is a simple process.

And they have not. In the great majority of the agencies, administration of the Freedom of Information Act has been turned over to the lawyers and the administrators, not to the Government information experts whose job is to inform the public.

Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to denial.

Dozens of agencies have set up complicated procedures for requesting public records.

Many will respond only to repeated demands for information, filed formally and in writing. Others require detailed identification of the records sought, so that only those who have complete knowledge of an agency's filing system can identify properly the records sought.

Some agencies have harassed citizens who had the temerity to press their demands for public records; others, when forced to provide copies of Government documents, have given out illegible copies.³⁶

The "Renting" of the Pentagon

Even before the Columbia Broadcasting System produced its controversial exposé of the Defense Department propaganda machine—a program titled "The Selling of the Pentagon"—the Freedom of Information Act was twisted almost out of shape by Defense Department officials trying to hide the facts about the "renting" of the Pentagon. Repeated delays and insistence on bureaucratic formalities were almost successful in hiding from the public how much money the Department collects in concession payments from private companies which have stores in the Pentagon concourse.

In 1970, Roy McGhee, a reporter for United Press International, asked for the financial details on the leasing of store space in the bowels of the Pentagon where thousands of employees pass daily on their way to the bus stops inside the building. He found, after repeated telephone calls, that the Defense Department collected almost \$1 million in proceeds from private companies doing business on the

³⁶ As an example, see hearings, pt. 4, p. 1308.

Pentagon concourse. He said that about half of this income was turned over to the Treasury and the rest was contributed to a Defense Department "Concessions Committee", which used about \$250,000 of the fund to finance social clubs, dinner dances and tennis tournaments for Pentagon employees.³⁷

But he said he could not get an exact accounting of the use of such funds, nor could he discover how much each private company was paying the Pentagon to lease space in the concourse and sell wares to thousands of captive customers. He asked the Department's public information office and he asked the Department's general counsel how much each private company was paying to lease space in the public building, but the information was refused. McGhee testified:

That is where the instance stands. I have not pursued it further. I do not have the time. My company did not file a lawsuit to get the information.³⁸

McGhee wrote a news story based on the information he could find, reporting the refusal to disclose the income from the leasing of the Pentagon concourse space, and the University of Missouri Freedom of Information Center took up the battle from there. The Center telephoned to try to get the information and then put a formal request in writing, threatening to go to court under the Freedom of Information Act if the information was refused. The Defense Concessions Committee agreed to make public the contracts entered into with private companies leasing space in the Pentagon, but only if a records search charge of \$3.45 an hour was paid for a 4-hour search job.

Since the Defense Concessions Committee was responsible for only 16 contracts, all filed in the committee's office, the FOI Center pointed out that 4 hours for searching the files to find the contracts seemed an unnecessary waste of time. In response, more than 1 year after McGhee first began his investigation of the "renting" of the Pentagon, the Defense Department Concessions Committee finally agreed to make the information on the contracts available to anyone who came into the committee's Pentagon office—if given at least 1 day advance notice.

"Catch-22" at the Agriculture Department

The Freedom of Information Act requires Government agencies to make available "identifiable" public records, but the Attorney General's Memorandum explaining the new law warns that the identification requirement should not be used as a method of withholding records. Yet some agencies make identification requirements so strict that they must be taken to court to force cooperation.³⁹

Harrison Wellford of the Center for the Study of Responsive Law asked the Department of Agriculture for research reports on the safety of handling certain pesticides. His request was refused because the Government records he sought were not clearly identified.⁴⁰

³⁷ Hearings, pt. 4, p. 1291; a fact sheet provided by the Department of Defense on the operation of the Concessions Committee, including criteria affecting receipts and disbursements may be found in the appendix of part 6 of the hearings; the fact sheet states that the division of funds by the Concessions Committee among (1) payments to GSA on the basis of rental square footage, (2) payments to the Pentagon Employees Welfare and Recreation Fund, (3) investments in cafeteria property, and (4) other disposition of excess funds is in accordance with Treasury Department, GSA, and DOD rules and regulations for receipts of this type; see also colloquy on this case with DOD General Counsel Buzhardt, pt. 6, p. 2120.

³⁸ Hearings, pt. 4, p. 1289.

³⁹ *Bristol-Myers Co. v. Federal Trade Commission*, 283 F. Supp. 745; *Wellford v. Hardin*, 315 F. Supp. 768; hearings, pt. 4, pp. 1344 to 1367.

⁴⁰ Hearings, pt. 4, p. 1263.

Wellford then asked for the indexes the Department maintained so the specific files could be identified, but he was told that the indexes were interagency memoranda and would not be made available. He testified:

So, it was a Catch-22 situation. We were told our request was not specific, and we were not given access to the indexes which would have allowed us to make our request specific.⁴¹

So Wellford took his case to court and won access to the information. He went back to the Agriculture Department, looked at the indexes, and found that the information he sought was kept in individual pesticide folders called jackets. He was told that the jackets also contained company confidential information and that the confidential information had not been separated from technical information he sought. He testified:

We requested this information 2 years before and there was plenty of time to reorganize their filing systems so they would not have this commingling problem. * * * The final straw was when USDA stated that if the information were made available, it would cost \$91,840 to prepare the registration files for public viewing. At that point we decided to try to find other means to get the information.⁴²

Secrecy Through Delay and Obfuscation

Nothing in the Freedom of Information Act requires expeditious handling of requests for access to public records, nor would fast and efficient response to requests be expected from agencies which uniformly opposed the legislation.

Most agencies take about a month to answer the initial request for access to public records. They delay even longer in answering appeals against the initial refusal, with the average time for a decision on an administrative appeal being about 2 months.⁴³

Very few of the agencies make an effort to inform requestors that they can appeal the initial decision. While the Freedom of Information Act does not require an administrative appeal system, the necessity for such a system was spelled out in the Attorney General's Memorandum explaining the act to the agencies.⁴⁴ Thus, in most agencies the regulations state that an initial refusal may be appealed to a top official in the agency, but the agencies seldom make a point of its appellate procedure in the letters denying the initial request. This may help explain the small number of administrative appeals. Of nearly 2,200 instances in which access to public records was refused in the first 4 years of the act's operation, fewer than 300 denials were appealed administratively within the agencies, and in about 100 cases, the individual refused information went to court to enforce the right to know.⁴⁵ Agencies continued to block legitimate public access in some cases even after courts ordered documents made public.

⁴¹ Hearings, pt. 4, p. 1254.

⁴² Hearings, pt. 4, pp. 1254-1255. This amount includes both search fees and copying costs.

⁴³ Hearings, pt. 4, pp. 1333-1343.

⁴⁴ Attorney General's Memorandum, June 1967, pp. 28-29.

⁴⁵ Subcommittee questionnaire analysis, op. cit., pt. 4, pp. 1333-1343.

Nashville *Tennessean* Case

The editor of the Nashville *Tennessean*, Mr. John Seigenthaler, testified on one such case.⁴⁶ His newspaper suspected that a blind homeowner may have been swindled on the basis of an FHA appraisal of his property. The homeowner and, later, the newspaper asked the Department of Housing and Urban Development for a copy of the FHA appraisal, but they were refused. The Nashville *Tennessean* took the case to court. The judge set a hearing in 2 weeks, but the Government lawyers demanded the full 60 days permitted under the Federal Rules of Civil Procedure to answer the newspaper's request for access to a public record.

Following the hearing, the court ordered the Government agency to make public a copy of the FHA appraisal, but the copy turned over to the newspaper was totally and completely illegible.

Once more, the newspaper went to court and the judge ordered the Government to produce a legible copy of the FHA appraisal report. The district court did agree with the Government's contention that it could censor the FHA appraisal report, deleting the name of the appraiser. The newspaper took that issue to the circuit court of appeals, and once more, over the opposition and delaying tactics of the Government agency, won a court order granting access to a legible public record—including the identity of the FHA appraiser.⁴⁷

The Longs and the Internal Revenue Service

The delays and frustrations faced by citizens trying to use the Freedom of Information Act are nowhere more apparent than in the attempt by a Seattle, Wash., couple to get information from the Internal Revenue Service (IRS). Among the documents requested by Philip H. and Susan B. Long are those with simple statistical information showing how the IRS carries out its tax collecting duties. They also requested the blank forms which IRS agents fill out as a basis for an annual activities report.⁴⁸ After repeated trips to IRS headquarters in Washington, D.C., and to a number of regional and field operations, the Longs got some of the public records they requested. More of the material was made available by IRS after the Longs filed suit under the Freedom of Information Act.

Because of the continued prodding by the Longs, IRS prepared a dossier on the couple, listing every letter sent by them and every interview they held with IRS officials. When faced with the Longs' request for the blank IRS forms, Donald Virdin, chief of the IRS Disclosure Staff, testified that the agency convened 18 top officials to discuss the disclosure problem. The top officials decided the Longs could not have the blank forms because there were too many of them.⁴⁹

As a result of handling the Longs' request for public records, Virdin testified that the Treasury Department discovered some IRS documents in its public library which, he said, should not have been made public. The documents were merely quarterly statistical reports on the audit work of IRS, but upon the recommendation of Virdin, the IRS disclosure expert, the reports were taken out of the public library, no longer to be disclosed.⁵⁰

⁴⁶ Hearings, pt. 4, pp. 1302-1310.

⁴⁷ Hearings, pt. 4, pp. 1302-1309.

⁴⁸ Hearings, pt. 6, p. 2025.

⁴⁹ Hearings, pt. 6, p. 2025.

⁵⁰ Hearings, pt. 6, p. 1994.

Mr. Virdin's staff of disclosure experts also prepared a digest of the IRS experience with requests for public records under the Freedom of Information Act. The digest was requested by a taxpayer, but was refused. It was classified "for national office official internal use only." Later the document was made public with the secrecy label removed.⁵¹

USDA Hides Meat Inspection Reports

Another witness, attorney Peter H. Schuck of the Center for the Study of Responsive Law, described his experience with the Agriculture Department (USDA) and their "Delay-until-the-information-becomes-stale" routine, which involved efforts to obtain information on meat inspection plants in Missouri under the Wholesome Meat Act of 1967. He testified:

I have been engaged since mid-October (1971) in a vain effort to gain access to three categories of information: (1) Compliance surveys conducted by USDA with respect to the meat inspection programs of Missouri, Nebraska, and several other States; (2) USDA's correspondence with State officials concerning their findings; and (3) the surveys required by USDA to be conducted in these states and submitted to USDA as part of its compliance review program.⁵²

By mid-December (1971), he continued, "USDA had reneged on several oral promises to produce the information." Schuck then filed administrative appeals and on May 2, 1972—some 5 months after his original request—his appeal was denied by Mr. G. R. Grange, Acting Administrator of the Consumer and Marketing Service, despite the fact that the Department of Justice's Freedom of Information Committee had strongly urged USDA to make the information public.⁵³

Schuck also testified that a Missouri State senator and a Springfield, Mo. radio station had made similar requests to USDA for the information about the Missouri meat inspection program and its conformity with Federal standards and had likewise been turned down.

Several months after his testimony, Schuck filed suit against the department under the Freedom of Information Act to obtain the information. The case is now pending in the courts.⁵⁴

Federal Communications Commission's "Blacklist"

Mr. R. Peter Straus, publisher of Straus Editor's Report, told the subcommittee of its efforts to obtain permission from the Federal Communications Commission to inspect the list of some 10,900 individuals and organizations whose names and addresses are on a so-called blacklist. FCC claims that they possess qualifications that are believed to require close examination in the event they apply for a license.⁵⁵

The request by Mr. Straus was denied by Mr. John M. Torbet, Executive Director of the FCC. The "blacklist" problem was discussed later in hearings with the FCC.

⁵¹ Hearings, pt. 6, p. 2027.

⁵² Hearings, pt. 4, pp. 1261-1262.

⁵³ This case was also discussed with USDA witnesses later in the hearings. See pt. 5, pp. 1605-1609.

⁵⁴ *Schuck v. Butz*, D.C. Docket No. 897-72.

⁵⁵ Hearings, pt. 4, pp. 1284-1287; see FCC testimony, pt. 5, pp. 1789-1792 and 1810-1816.

Philadelphia Inquirer Case

An urban affairs writer for the Philadelphia Inquirer, Mr. James B. Steele, told the subcommittee of the efforts which he and his associate, Mr. Donald L. Barlett, made to obtain information under the FOI Act from the Department of Housing and Urban Development. The information first requested in August 1971 was the names of FHA staff and fee appraisers connected with the appraisal of rundown houses which were bought by real estate speculators and sold at inflated prices, FHA-insured, to hundreds of low-income families.⁶⁶ The information was needed in connection with a series of exposé articles on housing frauds in Philadelphia.

The information that would link specific appraisers to inflated appraisals of individual dwellings was denied by Theodore Robb, HUD's regional administrator in September 1971. The newspaper's appeal of the denial to HUD Secretary George Romney was rejected on November 11, 1971. Steele testified:

In a four-page letter, he asked us to blame him for any slip-ups that might have been made by FHA, but don't blame the appraisers. He said it was not relevant to criticize an employee of HUD. He wrote:

No enterprise, public or private, can expect its employees to contribute as openly and honestly to the formulation of its policy if those employees believe that their opinions (such as appraisals) are to be subject to public second-guessing.⁶⁷

But the official national organization of appraisers, The Society of Real Estate Appraisers, in a letter to the subcommittee said:

This letter is for the record of the subcommittee's present hearings on possible Government abuses of "The Freedom of Information Act." It refers particularly to the recent controversy over HUD's withholding of the names of appraisers involved in FHA 235-236-237 programs.

We understand an intended Justice Department appeal of the court decision ordering release has not been entered and HUD has now released the names. While this settles this particular incident, the future may see similar attempts to withhold information by other agencies for varying reasons. The Society of Real Estate Appraisers is opposed to any such Government agency action.

The function of the appraiser as related to Government is to protect the interests of the people and the Government. There is no alchemy nor mystery to the appraisal process. The appraiser should not be cloaked in secrecy as to imply there is. His function is to estimate fair market value, which involves just compensation of the public and the fiscally sound operation of the Government. The steps taken to estimate value involve reason and judgment. Public and Government must realize professionally the appraiser should be an impartial observer. The best way to keep him that way is to let both sides know who he is and what he's doing.

⁶⁶ Ibid., p. 1294. The case is similar to the Nashville *Tennessean* case mentioned above.

⁶⁷ Ibid., p. 1295.

Private appraisers who do work for the Government make no secret of it; indeed, they list such work proudly in their qualifications. It is often impressive to their other clients. It cannot do much for a Government's image to impose secrecy upon a subject that is being legitimately boasted about outside that government. * * *⁵⁸

The Inquirer filed suit in the U.S. district court in Philadelphia. Oral arguments were held during December 1971 and on March 9, 1972, the court held in favor of the Inquirer and ordered the names of the appraisers released.⁵⁹

Freedom of Information Suit Sometimes Brings Action

Washington attorney Benny L. Kass told the subcommittee that "the mere threat of the act * * * has often released documents that have been earlier withheld." He said:

One specific instance I might cite is that for 6 months, I was getting an absolute run-around between the Civil Aeronautics Board and the Federal Reserve Board. I wanted to get a copy of the Civil Aeronautics Board response to the Federal Reserve on their implementation of the Truth-in-Lending Act. The CAB said, we have no objection, but that is from the FRB, because we wrote it to them, and the FRB said that we have no objection, but get it from the CAB because they sent it to us, and finally, I went through this run-around and filed an action under the Freedom of Information Act, and about 3 days later the CAB hand-carried this to my office, and disclaimed all knowledge of my action. And so, I think, in some instances the filing of a suit gives rise to a level where somebody, at least, starts to worry about it.⁶⁰

Health Hazards in Industrial Plants

The close relationship between the FOI Act and the administration of the law affecting the health and safety of workers is illustrated by the testimony of Mr. Anthony Mazzocchi of the Oil, Chemical & Atomic Workers International Union, (OCAW) AFL-CIO.⁶¹

Mr. Mazzocchi described the problems that his union encountered in attempts to obtain information based on inspector's reports of health and safety hazards under the Occupational Safety and Health Act of 1970 (OSHA), administered in the Department of Labor. The information problem also involves the National Institute for Occupational Safety and Health (NIOSH) of the Department of Health, Education, and Welfare, which conducts implant hazard evaluations.

The union official testified:

The one court fight in which this union has been involved under the Freedom of Information Act centered on the same kind of inspector's reports that were written by OSHA's

⁵⁸ Hearings, pt. 6, p. 1910.

⁵⁹ *Philadelphia Newspapers v. HUD*, D.C. E.D. Pa., 1971. A related class action suit involving the interests of low-income homeowners in Philadelphia, brought by a subsequent witness, Mr. George D. Gould, an attorney with the Community Legal Services, Inc., is described in pt. 5 of the hearings, pp. 1402-1405.

⁶⁰ Hearings, pt. 5, p. 1414. A similar view was expressed by another witness, Mr. Reuben B. Robertson, III, a Washington attorney; see hearings, pt. 4, p. 1252.

⁶¹ Hearings, pt. 6, pp. 1499-1514. Allegations by this witness were subsequently taken up with witnesses from the Labor Department and HEW. See pt. 6, pp. 1626-1628; 1682-1684. Additional correspondence on this matter may be found in pt. 6, pp. 1646-1654.

predecessor, the Walsh-Healey Administration. On February 1, 1971, the U.S. District Court ruled in the case of *Wecksler et al. v. Shultz* that the inspector's reports were to be made public. As late as August 1971, high officials of the Labor Department were ignorant of the results of the case and still denied us access that the court had granted us 6 months earlier. Anyhow, the Wecksler case should be enough precedent for OSHA. If not, we will have to go to court again."⁶²

Mazzocchi also charged that the "trade secrets" exemption of the FOI Act was being abused, causing serious health hazards to workers:

The last public information problem in the OSHA inspection-citation process inevitably involves trade secrets. Under OSHA regulations, an employer can declare any part of his manufacturing process to be a trade secret. Once the declaration is made, the inspector will abide by the wishes of the employer. Employees are not given an opportunity to challenge management's contention. This kind of *carte blanche* for employers will lead to arbitrary and capricious actions. For years, the industrial water wastes inventory was delayed because industry contended that trade secrets would be revealed if they had to describe the nature of the poisons being dumped into American rivers and streams. This same position can be fostered today under OSHA. An employer can declare the toxic air contaminants inside a plant to be a trade secret. The Labor Department will support him as the Office of Management and Budget supported the water polluters. Workers will never know what they are breathing until it is much too late.⁶³

Information in such cases is also denied to the union under the "investigatory files" exemption of the FOI Act (552(b)(7)), according to the OCAW union witness:

* * * The figure 40 deaths a day is very conservative because it includes only reportable deaths from injuries, and omits those stemming from damage which may show up years after the onset of exposure to a substance or group of substances.

Our inability to secure the type of information that is lifesaving information, really, in our opinion, is just contrary to the intent of the Freedom of Information Act, and the Department is hanging its hat for the most part on No. 7, investigatory files compiled for law enforcement purposes—holding that anything occurring under the Occupational Health and Safety Act is for investigatory and law enforcement purposes, which means that we would be consistently denied information, the crucial information.

Mr. MOORHEAD. That was just the point I was going to ask you. Going back to the top of page 4, you say:

"Up to this point, the public and the affected workers have been generally denied access to this information."

On what basis?

Is that the investigatory claim?

⁶² *Ibid.*, p. 1509.

⁶³ *Ibid.*, pp. 1509-1510.

Mr. MAZZOCCHI. Yes; that is what the Department claims, and when information is finally divulged, sometimes it is really too late.

You see, timeliness is also very important to the disclosure of some information, and to disclose it at a point after the confrontation has passed, rather than at a point when people can do something about the particular condition, is still frustrating the intent of the Freedom of Information Act, in our opinion.

Mr. MOORHEAD. In the third paragraph on page 4, you also refer to being denied the access to various reports of inspectors.

Is that the same exemption cited there?

Mr. MAZZOCCHI. Right.⁶⁴

The language of exemption (b)(7) of the FOI Act, as it has been interpreted, thus makes it difficult, if not impossible, for workers in hazardous plants to be informed about specific health or safety problems that exist in an interim period while inspectors' reports are slowly making their way through the bureaucracy toward eventual enforcement proceedings, fines, and correction action. This use of the exemption "investigatory files compiled for law enforcement purposes" in such situations involving occupational safety and health, even the lives of millions of American workers is contrary to sound public policy. This case and other abuses of the investigatory file exemption have prompted a reexamination of the language of subsection (b)(7), dealt with later in this report.

Consumers' Stake in Freedom of Information

A graphic and timely case of the withholding of information by the Federal Power Commission (FPC) on natural gas reserves was called to the attention of the subcommittee in testimony by Mr. Charles F. Wheatley, Jr., general manager and general counsel of the American Public Gas Association.⁶⁵ This information affects natural gas rate case decisions of the FPC involving billions of dollars in higher gas rates for many millions of consumers.

Data on natural gas reserves, compiled by a committee of the American Gas Association (AGA), used by the FPC in making their rate increase determination in the southern Louisiana rate case,⁶⁶ was withheld from consumer-oriented groups who sought to make an independent evaluation of the data. Stung by public and congressional criticism of their dependence on industry-furnished gas reserves studies, the Commission in December 1971 ordered a limited check of certain gas reserve data supplied by the American Gas Association. The Commission, however, ordered that the data involved be kept confidential and withheld from the public. It is in the context of this FPC study of gas reserves that the FOI Act became an issue.⁶⁷

Wheatley testified:

The American Public Gas Association, American Public Power Association, and Consumer Federation of America filed a petition for rehearing with the Commission on Janu-

⁶⁴ *Ibid.*, p. 1515.

⁶⁵ *Hearings*, pt. 5, pp. 1522-1533.

⁶⁶ *Ibid.*, p. 1523.

⁶⁷ *Ibid.*, p. 1526.

ary 20, 1972 challenging, inter alia, the provisions for secrecy of the National Gas Survey reserve study. In rejecting this, the FPC relied upon the Natural Gas Act and the Freedom of Information Act as justification for its imposition of secrecy of all the underlying figures reported to its agents by the AGA and the producers. They quoted the language of section 8(b) of the Natural Gas Act which appears at the top of page 9 of my statement and with respect to the Freedom of Information Act they quoted section 552(b) of title 5, which is also quoted at the top of page 9, and in that section, subsection 4 which refers to trade secrets and commercial or financial information obtained from a person and privileged or confidential * * * and (9) which concerns geological and geophysical information and data, including maps concerning wells.⁶⁸

In his testimony Mr. Wheatley carefully analyzed the FPC interpretations of the exemptions of the FOI Act relied on and presented a strong case that the use of exemptions (b)(4) and (9) are not properly claimed by FPC.⁶⁹ He asserted that "the FPC appears to be giving a broad unwarranted interpretation to section 552(b) of the Freedom of Information Act to bar all public inquiry into its asserted investigation of the AGA gas reserve estimates under the National Gas Survey. This is a matter of fundamental importance to the consumers of the country * * *."⁷⁰

Wheatley went on to point out:

The survey as conducted by the FPC appears designed merely to give the AGA industry figures a coating of respectability which they do not deserve in the absence of cold hard proof under public scrutiny. In testimony on March 2, 1972, before the Senate Commerce Committee, Alan S. Ward, Director of the Bureau of Competition of the Federal Trade Commission also reported that the National Gas Survey as now being conducted would not satisfy the public's and the Government's need and right to know the facts—he concluded in this statement:

As with the existing AGA procedures, too much concern about confidentiality of proprietary data seems likely to interfere unduly with the public's and the Government's need and right to know the facts about our Nation's current energy resources.

Several weeks later, FPC General Counsel Gordon Gooch vigorously defended the Commission's position in testimony before the subcommittee, also discussing the provisions of the FPC regulations.⁷¹ Section 1.36(d) of title 18 code of Federal Regulations states that records "not made a part of the public records by this section may be requested in writing, accompanied by a showing in support of filed with the Secretary and will be made available for public reference upon good cause shown."

Subcommittee Chairman Moorhead and others questioned the "good cause" requirement as being inconsistent with the intent of

⁶⁸ Ibid., p. 1528. Witnesses from the FPC were subsequently questioned concerning their interpretation of the FOI Act. See pt. 6, pp. 1951-1954.

⁶⁹ Ibid., pp. 1527-1528.

⁷⁰ Ibid., pp. 1528.

⁷¹ Hearings, pt. 5, p. 1528.

the FOI Act. In subsequent colloquy and in response to questioning by Representative Wright, General Counsel Gooch stated that the "good cause" language of the regulation applied to matters "expressly exempt by the Freedom of Information Act."⁷²

Affirmative Action Plan Information

One of the most controversial problem areas under the FOI Act described by witnesses testifying before the subcommittee was that involving affirmative action plans to bar discrimination by Federal contractors. The subcommittee also received a considerable number of letters, mostly from college and university faculty members, expressing displeasure over the way in which the Department of Labor and the Department of Health, Education, and Welfare was handling alleged discriminatory complaints and the withholding of information contained in the institution's affirmative action plan.

Executive Order 11246, as amended, prohibits all Federal contractors from discriminating on the basis of race, color, creed, sex, or national origin. Hundreds of complaints alleging sex discrimination against women by educational institutions have been filed, but governmental handling of complaint investigations has been often criticized.⁷³ Until the recent enactment of the Equal Employment Opportunities Enforcement Act of 1972, there was no other legal recourse to complainants of alleged violations of the Executive order.

The Executive order also requires that all Federal contractors, except State and local governments, who have contracts for more than \$50,000 and who employ 50 or more people, must have a written affirmative action plan. The plan must include a policy of commitment to the principles of equal employment opportunity, an analysis of the workforce with regard to the utilization of women and minorities, goals, and timetables for correcting deficiencies and a plan of action by which the contractor can demonstrate a good faith effort to comply.

Miss Gates described in her testimony of her organization in its attempts to obtain detailed information contained in contractors' affirmative action plans:⁷⁴

WEAL members have usually been unsuccessful in attempts to secure these plans from contractors. We suspect that in most cases the employer has no plan and is therefore in violation of the Executive order, although occasionally a plan exists but the employer knows it will not withstand scrutiny and so will not release it.

When plans have not been made available by the employer, we have sought them from the Government through communications with the Office of Civil Rights, Department of Health, Education, and Welfare and with the Office of Contract Compliance, Department of Labor.

We have been told that Peter Nash, when he was Solicitor of Labor, decided that the plans were exempt under the Freedom of Information Act because they contained trade secrets and commercial or financial information obtained from a person and privileged or confidential.

⁷² Hearings, pt. 6, pp. 1958-1959. The FPC subsequently informed the subcommittee that the "good cause" language was added to section 1.36(d) after the FOI Act was passed. They could give "no indication" why this was done. See hearings, pt. 6, p. 1960.

⁷³ See testimony of Miss Margaret Gates, Woman's Equity Action League, hearings, pt. 6, pp. 2146-2149.

⁷⁴ Ibid, pp. 2147.

She went on to outline a strong argument against the use of the FOI Act exemptions claimed by the Labor Department, including (b) (4) and (7). The argument against use of the FOI Act exemptions to withhold affirmative action plan information was clearly summarized in Miss Gates' testimony:⁷⁵

We maintain that an affirmative action plan is a condition of a Federal contract and as part of the contract must be as accessible to the public as any other Government document not specifically exempted under the act * * *.

To deny disclosure of the plans is to destroy what appears to be the only method by which the Executive order can be enforced. The compliance agencies lack the resources to do adequate reviews and investigations and the contractors know that their chances of losing valuable contracts are virtually nil. Affirmative action plans are not even requested from the contractors unless a compliance review is anticipated because the Government lacks the personnel necessary to determine whether all of the programs are adequate.

If the Government does not have the resources to review and evaluate the plans that is the more reason to permit the public to do so.

The intention of the Department of Labor now seems to be to make available the approved plans but to deny access to the inadequate or uninspected proposals which are the very ones which minorities and women could benefit most from seeing. This practice also permits employers to conceal the fact that they have no plan at all, which usually means they have given no thought whatsoever to equal employment opportunity * * *.

If the affected classes know what their employer's commitment is, they can protect their own interests by monitoring the implementation of the plan.

They can bring union and community pressure to bear upon the contractor to meet his obligations. By comparing the original plan of the contractor with an improved version accepted by HEW they can also assess how well the Government is negotiating on their behalf.

Of course, one cannot but suspect that these are precisely the reasons why neither the contractor nor the Government is willing to disclose the plans.

The Women's Equity Action League witness concluded her statement with this blunt charge:⁷⁶

I am asserting that the Department of Labor is unwilling to release affirmative action programs because if it chose to make them available it certainly could do so. The Freedom of Information Act never forbids disclosure, but only permits nondisclosure * * *.

I think that what is lacking is an acknowledgment on the part of both the Government and its contractor that the spirit of the Freedom of Information Act requires that the public have access to the kind of information we seek.

⁷⁵ Ibid., pp. 2147-2148.

⁷⁶ Ibid., pp. 2148-2149.

Contractors who are making a good faith effort to correct deficiencies in their employment patterns have nothing to fear from disclosure.

One compliance officer told me that an example of why plans are considered "competitive" information and shouldn't be made public is the case of a major city bank which published its plan, which was a good one, and received so much favorable publicity that it hurt its competitor's business.

Earlier in the hearings, Labor Department Solicitor Schubert was asked about the disclosure policies of compliance agencies under Executive Order No. 11246 affecting affirmative action plans. He described a policy review that was then underway and stated that "the odds clearly are that we will go for broader disclosure in respect of affirmative action programs and perhaps compliance reviews."⁷⁷

Questions were also raised on this subject with Mr. Manuel B. Hiller, Assistant General Counsel, Business and Administrative Law Division, HEW. He told the subcommittee that it was the view of HEW's legal counsel that "affirmative action plans are subject to publication disclosure under the Freedom of Information Act * * * and (they) cannot justify a refusal to make public affirmative action plans when they are requested." Hiller also quoted a December 22, 1971, instruction of HEW's Office of Civil Rights:⁷⁸

Once the plan has been accepted and is subject to no more negotiations it is OCR policy to release the plan to anyone who requests it. In negotiating, staff members should notify school authorities or Federal contractor(s) of this policy.

Thus, despite assurances from these two Departments, it appears that many of the objections to disclosure policies in cases involving affirmative action plans are still unresolved. There is little, if any, opportunity for input by those employees currently affected by a plan during the critical negotiating stages. Moreover, there is a serious question about the time period when an affirmative action plan is actually considered by a Department to be actually "accepted," so that it would fall under the requirement of public release.

The subcommittee is continuing its study of the broad freedom of information ramifications of this controversial problem.

Information on Employment of Women in Government

A similar problem involving the difficulties encountered by a publisher in obtaining information from governmental offices about Federal employment practices affecting women was described by Mrs. Myra E. Barrer of Today Publications and News Service.⁷⁹

The problem of obtaining details concerning the implementation of President Nixon's directive of April 21, 1971 regarding agency plans to make greater use of women's skills in high level governmental positions began last September when Mr. and Mrs. Barrer wrote to affected departments for details of these governmental affirmative action plans. Only a handful of Government agencies responded, and then not until April 1972—some 7 months later.⁸⁰ Some agencies refused to provide the information, citing exemption (b)(5) "inter-

⁷⁷ Hearings, pt. 5, p. 1643.

⁷⁸ *Ibid.*, p. 1688.

⁷⁹ Hearings, pt. 6, pp. 2176-2179.

⁸⁰ *Ibid.*, p. 2178.

agency or intra-agency memoranda" of the FOI Act. This denial was asserted in a letter to the Barrers dated September 3, 1971, and signed by Mr. Frederic V. Malek, Special Assistant to the President.⁸¹ Of the 63 plans requested, only 15 had been made available by April 19, 1972, the date of Mrs. Barrer's testimony.

Broad Range of Government Activities Covered

The types of cases involving the Freedom of Information Act among Federal departments and agencies who testified before the subcommittee during the 14 days of hearings touched upon a broad range of the activities of government both at home and abroad.

For example, the Interior Department presented correspondence with individual citizens and groups that dealt with denials of information concerning financial data on concessionaires in national parks; deaths and disabling injuries in national parks; regulations of the Fish and Wildlife Service; documents relative to water pollution control; a report on a wilderness area, and the Treleaven report on the department's public information function, discussed elsewhere in this report.⁸²

Department of Transportation (DOT) General Counsel John W. Barnum's testimony discussed the so-called Garwin report on the supersonic transport (SST), which had been the subject of considerable controversy over funding in the Congress and also involved a suit under the FOI Act.⁸³ It also included such diverse areas as Coast Guard information practices; access of the public to information contained in research and development contracts; and the heavy caseload of requests under the act involving the Federal Aviation Administration.⁸⁴

Mr. Ronald M. Dietrich, General Counsel of the Federal Trade Commission (FTC), described the details of its information policies under the FOI Act as they relate to the regulatory functions of the Commission.⁸⁵ His testimony described problems involving the types of proprietary data provided to the FTC by companies subject to Commission jurisdiction and regulations that have been established to protect the competitive position of such companies.

An interesting listing of requests for information to the FTC which have involved exemption (b)(4) of the FOI Act (trade secrets) was provided for the hearing record. This list of typical cases provides a good insight into the day-to-day types of cases which the Commission receives under the act.⁸⁶

The Environmental Protection Agency's (EPA) witness, general counsel John R. Quarles, Jr., described the positive approach that agency takes to the Freedom of Information Act:⁸⁷

At the Environmental Protection Agency, we attempt to comply with the spirit, as well as the letter, of the Freedom of Information Act.

The philosophy of open disclosure which that act embodies is, we believe, a necessary part of modern government. The

⁸¹ *Ibid.*, p. 2183. The term "working documents" was used in connection with (b)(5) a term that is not even in the language of the exemption subsection of the act.

⁸² Hearings, pt. 4, pp. 1280-1281; 1313-1314; 1323; pt. 5, pp. 1737-1751; and pt. 6, appendix.

⁸³ Hearings, pt. 5, pp. 1761-1763. See *Soucie v. David*, 448 F. 3d 1067, 2 ERC 1626 (D.C. Cir. 1971).

⁸⁴ *Ibid.*, pp. 1763; 1766-1782. An affirmative step was taken by DOT in holding a FOI seminar in Washington on May 17, 1972 for departmental operating personnel. Experts from the Justice Department, the Civil Service Commission, and the subcommittee staff participated in a panel discussion of FOI Act principles and administration. The committee feels that all Federal agencies should follow DOT's lead in holding such seminars on the act at both the Washington and regional levels.

⁸⁵ Hearings, pt. 6, pp. 1846-1853.

⁸⁶ See listing in pt. 6 of hearings, pp. 1868-1870.

⁸⁷ Hearings, pt. 6, p. 1876.

public will not tolerate a government that is conducted in secret. A Federal agency that wishes to have any credibility with the public must be frank and open in its conduct of affairs. This is especially important for the Environmental Protection Agency * * *.

As a new agency, it has benefited from the experiences of many other older departments and agencies in administering the FOI Act and, consequently, has promulgated one of the most enlightened and positive sets of regulations to implement the act.⁸⁸ Of particular importance is EPA's procedure involving the handling of "trade secrets" under exemption (b)(4) of the FOI Act. The burden of justification of the trade secret claim is placed on the individual company or individual involved.⁸⁹

General counsel David Maxwell, of the Department of Housing and Urban Development (HUD), unveiled a new set of regulations under the FOI Act, promulgated on the eve of his appearance before the subcommittee.⁹⁰ He announced a policy change with respect to the release of the names of appraisers involved in housing projects, discussed earlier in this report.⁹¹ The difficulty of departmental implementation of basic policy at the area or regional office levels is illustrated by the fact that several months after the assurance given by Mr. Maxwell, similar types of information were still being denied under the FOI Act by HUD officials outside Washington.⁹²

The importance of providing training and indoctrination of regional and local office personnel of all Federal agencies as to the intent of the Freedom of Information Act and how it should be administered in the public interest was stressed in a colloquy with HUD witness Maxwell.⁹³ The decentralized administration of vast numbers of important Federal programs makes such action imperative if the FOI Act is to be an effective instrument in safeguarding the "public's right to know."

Testimony by Mr. Donald O. Virdin, Chief, Disclosure Staff, Office of the Assistant Commissioner (Compliance), Internal Revenue Service (IRS) and that of Mrs. Charlotte T. Lloyd, Assistant General Counsel, Treasury Department covered some of the most serious cases of bureaucratic abuses uncovered during the subcommittee's investigation of the administration of the Freedom of Information Act.⁹⁴ This subject is also dealt with earlier in this report. It should be noted that much tax data is exempt from disclosure by law.

The list provided by IRS for the hearing record which summarizes the types of requests received under the FOI Act since July 1967, is a revealing insight into the impact which the act has on day-to-day activities of a Federal agency.⁹⁵ Almost half of the requests to IRS were denied. In addition, many of the requests recorded in the list were for copies of printed handbooks or manuals available in the public reading room, so that the denial record on substantive requests under the act is even higher than the percentages show.

⁸⁸ *Ibid.*, pp. 1894-2001.

⁸⁹ *Ibid.*, pp. 1878-1880.

⁹⁰ *Ibid.*, p. 1911.

⁹¹ *Ibid.*, p. 1911. See p. 13 of this report.

⁹² Staff meeting with news staff of the St. Louis Globe-Democrat and conversations with Washington bureau staff, Gannett Newspapers.

⁹³ Hearings, pt. 6, p. 1931.

⁹⁴ *Ibid.*, pp. 1983-2022; 2026-2027; 2030-2033. For examples see p. 23 of this report.

⁹⁵ Hearings, pt. 6, p. 1996.

The Department of State's witness, Mr. William D. Blair, Jr., Deputy Assistant Secretary for Public Affairs, described the broad range of activities involving international relations that are covered by the department's administration of the FOI Act.⁹⁶

One of the few Federal agencies not providing for an appeals process under the act, the State Department witness explained such rationale, but indicated that "we are presently preparing to amend these regulations to provide for an administrative appeal to a higher level within the department from an initial denial of a request."⁹⁷ Changes to liberalize its copying fee schedule were also promised.

Mr. Blair also discussed a case involving a request under the act by a Cornell University professor, Mr. D. Gareth Porter, for information concerning the list of Vietnamese landlords who rent villas, hotels, and apartments to the U.S. AID Mission in Saigon.⁹⁸ The information was withheld under exemptions (b)(2), (3), and (6) of the FOI Act and title 18, section 1905 of the U.S. Code. The justification of such action appears to the committee to be without merit, based on the fact situation, and is typical of the types of abuses uncovered during this investigation.

He also discussed the Passport Office "lookout list," similar in some respects to the FCC "blacklist" mentioned previously in this report, and the rationale behind the secrecy policy attached to such computerized list. The Agency for International Development's (AID) "watch list" of suspended or debarred importers and suppliers under the Vietnam commodity import program was also explored as part of the department's information policies.⁹⁹ Unlike the FCC and Passport Office lists, the AID list is published quarterly.

Testimony by Mr. J. Fred Buzhardt, General Counsel of the Department of Defense, and statements from witnesses from each of the three military services covered a wide scope of activities involving the FOI Act.¹⁰⁰

Each component part of the department has established its own regulations based on the DOD policies set forth in their directive 5400.7. Each military department and defense agency has its own procedures for handling requests under the FOI Act. The general philosophy as expressed by Mr. Buzhardt is:¹⁰¹

I assume that any request for a record made by a member of the public constitutes a valid request within the purview of the Freedom of Information Act.

It should not be necessary for an individual requesting a record to cite the Freedom of Information Act before his request is evaluated in accordance with the intentions of Congress expressed in the act. Such a restriction would obviously favor the sophisticated and work to the disadvantage of those average citizens who may have little technical knowledge about the Freedom of Information Act, yet are the very persons for whom the "right to know" is most important.

It is, therefore, our policy to treat each request for a record as though it was made by the most knowledgeable law firm

⁹⁶ *Ibid.*, pp. 2076-2081.

⁹⁷ *Ibid.*, p. 2078.

⁹⁸ *Ibid.*, pp. 2035-2087.

⁹⁹ *Ibid.*, pp. 2096-2098.

¹⁰⁰ *Ibid.*, pp. 2101-2112.

¹⁰¹ *Ibid.*, p. 2107.

in Washington, with all the proper citations and references to Freedom of Information Act provisions and case interpretations. The only requests which may be denied are those involving records which clearly come within one of the exemptions of section 552(b), title 5, U.S.C.

Even then, all officials of the Department of Defense are instructed that a record exempted under the Freedom of Information Act should be released whenever it is determined that no significant purpose would be served by withholding it. Thus, for example, many records which technically might fall within the second exemption of the Freedom of Information Act as "internal personnel rules or practices" of the department or agency, would routinely be released on request because no significant purpose would be served by refusing them; although the second exemption serves a very practical purpose in excusing the Department of Defense from publishing in the Federal Register its parking regulations, for example. We would, of course, provide a copy on request because no significant purpose would be served in withholding it.

Mr. Buzhardt's testimony also clarified another matter which had been the subject of considerable confusion—the basis for use of the legend "For official use only." He said:¹⁰²

* * * the marking "For official use only" does not relieve an official of his responsibility to review a request for a record for the purpose of determining whether an exemption (under the FOI Act) is applicable and whether any significant purpose will be served by denying that record to the requester. The reviewer may discover that the legend was improperly applied or that the passage of time makes it possible to release the document.

I might add that the term "For official use only" is not properly denominated a "classification." There are only three categories of security classification: "Top Secret," "Secret," and "Confidential," and these all have to do with the interest of the national security or foreign relations of the United States.

I repeat for emphasis that "For official use only" documents can be withheld from the public only when they come within one of the express exemptions provided by the Congress in the Freedom of Information Act, and only when their release would be inconsistent with a significant responsibility of the Department of Defense.

Since the DOD information directive did not require keeping statistical records on requests received by the Department or its component services or agencies, only the Air Force could provide the type of data on requests under the FOI Act.¹⁰³ Mr. Buzhardt noted, however, that a February 18, 1970, memorandum from the General Counsel's office directed "all components * * * to keep records on denials" of information under the act.¹⁰⁴

¹⁰² *Ibid.*, p. 2110.

¹⁰³ See subcommittee questionnaire analysis, *op. cit.*, pp. 1333-1343.

¹⁰⁴ Hearings, pt. 6, p. 2127.

A colloquy with Mr. Bert Z. Goodwin, Assistant General Counsel of the Air Force, brought out other diverse matters involving the act such as the denial of Air Force Academy records dealing with honor board hearings.¹⁰⁵ Another colloquy with Mr. R. Kenly Webster, Principal Deputy General Counsel of the Army, dealt with the Army's information policies in the handling of the case involving Lt. Col. Anthony B. Herbert (retired).¹⁰⁶

Some of the best examples of Federal Government roadblocks to the effective operation of the Freedom of Information Act were provided in testimony by Mr. Sanford Jay Rosen and Mr. John Shattuck of the American Civil Liberties Union (ACLU), both of whom have had extensive experience in FOI Act litigation.¹⁰⁷

Among specific FOI Act cases being handled by the ACLU attorneys, Mr. Rosen mentioned those involving a university professor seeking a study of Vietcong defector morale; a law review project involving disciplinary proceedings at the U.S. Air Force Academy; a death report being sought by a father from the Navy on the demise of his son; and the efforts of a historian to obtain access to documents in the National Archives that are some 30 years old.¹⁰⁸ It is expected that this latter subject will be dealt with in another report.

Remedies Suggested by Witnesses To Limit Governmental Roadblocks

A number of significant approaches to limit governmental roadblocks to more effective and expeditious administration of the Freedom of Information Act were suggested by subcommittee witnesses.

It is abundantly clear, however, that procedural changes in administrative regulations or even amendments to the act itself will not necessarily solve the types of abuses brought to light during the course of these hearings. This point was effectively made in the foreword of the Attorney General's memorandum setting forth guidelines for administration of the FOI Act 5 years ago:¹⁰⁹

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

One of the key purposes of the act, reiterated in that same memorandum was "that there be a change in Government [information] policy and attitude." The committee has noted the original hostility toward the FOI bill by the Federal bureaucracy and the fact that, in historical terms, 5 years of experience in the administration of the act measured in these hearings is not a significant time period.

It also notes the significant efforts on the part of many Federal agencies to comply fully with the congressional intent and the Attor-

¹⁰⁵ *Ibid.*, pp. 2128-2131.

¹⁰⁶ *Ibid.*, p. 2131.

¹⁰⁷ *Ibid.*, p. 2204. Their excellent analysis of leading FOI Act court cases appears on pp. 2205-2212. The ACLU witnesses also provided for the hearing record a number of suggested amendments to the FOI Act. Hearings, pt. 6, pp. 2234-2235.

¹⁰⁸ *Ibid.*, p. 2217.

¹⁰⁹ Attorney General's memorandum, p. iii, hearings, pt. 4, p. 1081.

ney General's guidelines for proper implementation of the act. It is constrained to point out, however, that such positive implementation and constructive efforts are spotty and are not uniform in all Federal departments and agencies. In a number of significant instances, the committee finds that an entrenched bureaucracy is stubbornly resisting the efforts of the public to find and pry open the hidden doors which conceal the Government's business from its citizens.

One of the positive suggestions presented for the subcommittee's consideration was contained in Recommendation No. 24 of the 1971 Administrative Conference, referred to elsewhere in this report.¹¹⁰ The specific recommendation in part B—guidelines for handling of information requests—would place a time limit of 10 working days to respond to an original request for information under the FOI Act, except under certain specific situations, and that final action should be taken within 20 working days from the date of filing an administrative appeal of an agency's denial of information.¹¹¹

The imposition of such a reasonable time limit would substantially speed up the handling of requests under the act and help correct one of the most flagrant and widespread bureaucratic abuses noted in the subcommittee's inquiry—the stalling tactics that often cause the requestor of information to abandon his efforts to obtain information because it is no longer timely for his purposes. This reform would perhaps be most significant in the case of the news media requests under the act, which have not been significant in number.¹¹² The lack of positive use of the FOI Act by newsmen and other media representatives has been puzzling to the subcommittee and was explored during the testimony of newsmen and editors who had effectively utilized the act to obtain information from government officials.¹¹³

Another suggested way to clear the massive governmental roadblocks preventing more effective operation of the Freedom of Information Act was proposed by Mr. Mitchell Rogovin, general counsel of Common Cause. He told the subcommittee:¹¹⁴

Common Cause proposes one major amendment to the Freedom of Information Act which it considers to be of the utmost importance. Our proposal for a statutory annual report by each agency to Congress is based on the belief that no law can be enforced on the Federal bureaucracy without continuous outside reinforcement of the spirit of the law. We do not believe that you can leave the enforcement of the Freedom of Information Act entirely to the initiative of those few who can afford costly litigation. Litigation is the exception, rather than the rule.

* * * This amendment we offer as paramount to all others because it should help create and maintain an atmosphere conducive to a spirit of more open access to government information. It would require continuous action of both the executive and legislative branches in behalf of the people's

¹¹⁰ See p. 55 of this report.

¹¹¹ Hearings, pt. 4, pp. 1233-1234 for full text of recommendations.

¹¹² See subcommittee questionnaire analysis, op. cit., pp. 1333-43 and remarks by Chairman Moorhead on p. 1333. Only 90 of the more than 2,200 denials of information over the 1967-71 period measured by the analysis involved the media, or about 6 percent. Of course, this does not measure the extent to which information was obtained from government officials by newsmen by expressing intent to file suit under the FOI Act to obtain information requested.

¹¹³ See hearings, pt. 4, pp. 1278, et seq.

¹¹⁴ Hearings, pt. 5, pp. 1491-1492. The problem of delay by the Federal Government in responding to complaints in court actions under the FOI Act is discussed elsewhere in this report at page 19.

right to know. It would provide an annual forum for the expression of and scrutiny by public opinion.

The amendment would require that every government department, bureau, or agency submit annually to Congress a report which would detail, item by item, the record of each agency's response to requests for disclosures of information under the Freedom of Information Act. It would, in effect, require an accounting of each and every refusal to disclose the information requested * * *.

As Common Cause has indicated, this amendment would "institutionalize" the type of work of the subcommittee in preparation for these hearings—the collection of statistical data on administration of the act over a 4-year period, analysis of such data, investigation of allegations of abuse of the exemptions under the act, and similar types of oversight activities.

Still another type of remedy is directed toward the "foot-dragging" government official who uses every conceivable device to delay making information available under the FOI Act. The dimensions of this problem were described by Mr. William A. Dobrovir, a Washington attorney who has handled a number of freedom of information cases:

The first problem is the intransigence of Government officials. Basically, they do not believe in freedom of information. They believe that the public's business is their business, and not the business of the public. Until there is a fundamental change in the attitude on the part of Government officials, either by process of education, or by a process of some kind of court sanction, I do not believe that the act is going to be administered. Government officials engage in delay. In one case, in which I represented the plaintiffs and in which we were ultimately successful, there was a 5-months' delay in the response to the appeal, which does nothing but add additional delay into the process, because never have I heard of a Government agency on appeal overturning the initial denial of access to information.¹¹⁵

The administrative appeal delay, added to the delay in responding to an original request for information, could be effectively dealt with by a time limitation such as recommended by the Administrative Conference and discussed earlier. Another witness, Attorney Bernard Fensterwald, Jr., suggested a 2-week limitation on an original request within the agency and a 2-week limit on appeal.¹¹⁶ He also proposed an additional enforcement penalty:

We might give some thought to a monetary penalty on the agency that withholds. For example, suppose the Defense Department wrongly withholds. If you charge them, for example, \$100 a day from the day that the formal request was put in until the court finally ordered that the documents be shown, this would be some incentive for them not to withhold when they should not, and too, not to drag their feet, because every day they are dragging their feet they lose and it is costing them \$100 a day * * *¹¹⁷

¹¹⁵ *Ibid.*, p. 1394. Other examples of delay are found in the ACLU statement, hearings, pt. 6, pp. 2212-2213.

¹¹⁶ *Ibid.* p. 1377. A similar proposal was made by Mr. Richard Wolf, hearings, pt. 4, p. 1066.

¹¹⁷ Hearings, pt. 6, p. 1432.

Other witnesses suggested that the law be amended to provide for the award of reasonable attorney's fees and court costs to the plaintiff when information that is sought by an individual from a Government agency under the FOI Act is refused and in a subsequent court case results in a victory for the plaintiff.¹¹⁸

In its statement to the subcommittee, the administrative law section of the American Bar Association (ABA) also made such a recommendation.¹¹⁹

The Freedom of Information Act should be amended to provide for the recovery of reasonable attorney's fees and costs by successful plaintiffs, in the discretion of the court, in lawsuits brought under the act. At present, the substantial expenses of litigation may well discourage many citizens from bringing suits under the act even where the agency has clearly withheld information wrongfully.

Another witness, Washington attorney Jacob A. Stein, suggested a procedure similar to that under the Federal Tort Claims Act:¹²⁰

Denial made at the agency level, I would suggest, must be made within 60 days. I use the 60-day figure because many times the information really is not available to the agency on a good faith basis. However, in making a denial, the agency must specify the defenses pursuant to the act, and that specification must be made in good faith. No defense may be raised when this matter is litigated unless such defense was presented at the agency level. Upon hearing in court, if the court finds that a defense raised at the agency level was not made in good faith, the court shall award reasonable attorney's fees and costs upon such finding * * *

A more extreme approach to the governmental FOI Act roadblock problem was discussed in the following colloquy between Representative Frank Horton and Interior Department Solicitor Mitchell Melich.¹²¹

Mr. HORTON. Does the Department of the Interior have any recommendations with regard to changes in the Freedom of Information Act prompted by experience in working with it * * *

Mr. MELICH. I would say to the committee that I think, in order to have a much freer flow of information, that the act ought to be amended to have specific sections requiring the Government to make disclosure, and I think where the difficulty is, is that you leave that to the discretion of us in the bureaucracy. That is where we have our difficulty and I realize it is a difficult thing to write the kind of mandatory regulation which I think ought to be in the act so that there would not be any question about some of these gray areas

¹¹⁸ For example, see statement by Mr. Robert Ackerly, hearings, pt. 5, p. 1432; sec. 2412 of title 28 of the United States Code presently permits the award of court costs to plaintiffs in civil suits against the Federal Government in certain instances. Costs and attorney's fees are authorized in certain civil rights cases; see 42 U.S.C. 2000(e)-5(k).

¹¹⁹ Hearings, pt. 5, p. 1436.

¹²⁰ *Ibid.*, pt. 5, p. 1392.

¹²¹ *Ibid.*, pp. 1731-1732. An earlier witness, Mr. Frank M. Wozencraft, had proposed that agency budgets have line items devoted to "compliance with the FOI Act." He argued that this would remove the most prevalent excuse for failure to comply with the act and enable the agency to be held more strictly accountable. See hearings, pt. 4, pp. 1073-1074.

that we get into when we refuse the request * * *. I favor that approach.

The effective administration of the FOI Act, with all its problems, is considered by some to be largely a matter of positive attitude or philosophic conviction that supports the principle that the public is entitled to know the business of its government. This point of view was expressed by Mr. David Parson, a Chicago attorney and Chairman of the Committee on Government Information of the Federal Bar Association:¹²²

When the head of the agency has as his basic tenet the distribution and availability of information, then it follows that everybody or most everybody in the agency will follow his policy; therefore, it does not become a problem for the lawyer, and it does not become a problem for the public information officer. It is only when the head of the agency does not set that policy of distribution of information that it then becomes a problem of whether we are charging too little or too much, whether one person or another has to make that final determination of what will be distributed.

So I think the crux of the matter is, as I have also seen it in practice, is that once the heads of the agencies are aware of the need for the public to have this information, any information, information which does not violate the right of privacy and national security, then all of the other problems really melt away.

The administrative law section of the American Bar Association (ABA) also noted that "despite general compliance with the statute by most agencies, problems have been encountered in receiving prompt replies to requests for agency records."¹²³ The ABA statement said:

The administrative law section believes that the Freedom of Information Act is serving a useful and necessary function in our society, and, notwithstanding the dire predictions of some when it was enacted, has proved to be a workable statute.

The statement recommended a number of proposals to alleviate some of the enforcement problems:¹²⁴

First, agencies should make a greater effort to educate information officers and other personnel at all levels of the government as to their obligations and responsibilities under the Freedom of Information Act, and should encourage a spirit of maximum disclosure of Government information among all employees.

Second, agencies should conform, insofar as is practicable, their internal regulations with the uniform regulations in implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States. (Recommendation No. 24.) The administrative law section believes that adoption of these regulations, which establish specific time limitations for responding to requests,

¹²² Hearings, pt. 4, p. 1164.

¹²³ ABA statements, op. cit., hearings, pt. 5, p. 1435.

¹²⁴ Ibid., p. 1435.

require that denials be supported with specific references to exemptions, provide for uniform fees for furnishing records, etc., could do as much as any single measure to assure effective implementation of the Act.¹²⁵ In addition, agencies should include in their regulations in implementation of the Information Act a provision requiring the agency to disclose information that is technically exempt from mandatory disclosure where there exists no legitimate purpose for withholding the information. Several agencies already have such provisions in their regulations, but the practice should be universal.

Third, Congress should conduct periodic oversight hearings, like these hearings, to assure that agencies are complying with the act's requirements, are attempting to bring their regulations into line with the uniform regulations, and are generally living up to the act's objective of maximum disclosure.

Fourth, agencies should maintain, insofar as is practicable, detailed statistics concerning requests for information, and the disposition of those requests, especially denials. At present, it is extremely difficult to obtain any meaningful idea of the agencies' compliance with the Information Act.

Summary

The committee finds that the correction of some basic problems of administrative roadblocks which hinder the fully effective operation of the Freedom of Information Act, typical examples of which are outlined above, require significant amendments to the act. Some of the general suggestions presented by witnesses to improve the effectiveness of the act have also been described in this part of the report. Specific legislative objectives to remedy the types of problems in the administration of the act over the past 5 years, pinpointed by the subcommittee's investigations, studies and hearings are described later in this report.¹²⁶ Other administrative problems, such as those involving defective regulations, lack of proper training in the act, overly excessive search and copying fees for provision of information, inadequate recordkeeping, and similar matters might be properly corrected by the type of positive action recommended later in this report.¹²⁷

¹²⁵ Last year, the Committee on Access to Government Information of the Section of Administrative Law endorsed Recommendation No. 24 in a report to the section.

¹²⁶ See p. 80 of this report.

¹²⁷ See p. 83 of this report.

V. PUBLIC INFORMATION EXPERTS AND THE FREEDOM OF INFORMATION ACT

One would expect that when a department or agency is faced with a question whether to withhold or release a document requested by a taxpayer under the Freedom of Information Act, expert advice and recommendations would be sought from that department's or agency's chief public information officer. But this advice often is not sought and in a number of cases the chief public information officer may even be unaware such a question is under consideration.

There seems to be a pattern throughout Government that these matters are handled by the General Counsel, sometimes in consultation with a policymaking official whose primary interest may be protecting the agency from criticism. A public information officer, if asked for advice, might head off a number of such refusals by pointing out that withholding can subject the agency to even more serious criticism.

As Harold R. Lewis pointed out:¹²⁸

Information people are by the nature of their training and in the performance of their job, more sensitive, I think, to the general needs of the public than are technical and administrative people.

They work every day with the media people, and know better the impact of what is going to happen, either good or bad, based on how an information situation develops.

Refusals often raise the question, justified or not, "What is the Government trying to hide?" A minor matter can often take on a sinister appearance under such circumstances. Thus, the preference always should be toward public disclosure unless solid defensible and compelling reasons exist otherwise. There must be no doubt they can hold up at the bar of public opinion, as well as in court.

Decentralization Problem in USDA

The subcommittee found in its hearings that some large Government departments and agencies are set up under a system of decentralized operations which, by their organizational nature, impede the chief public information officers in providing the type of advice that should be immediately available and given. This is true of the Departments of Agriculture, Interior, and Labor, for example. The following questioning by subcommittee Chairman Moorhead of Mr. Charles W. Bucy, Assistant General Counsel of the Department of Agriculture, and its Director of Information, Mr. Claude W. Gifford, is illustrative of the problem:¹²⁹

MR. MOORHEAD. I would like to ask you gentlemen if it is not correct that the handling of information requests by the

¹²⁸ Hearings, pt. 4, p. 1058.

¹²⁹ Hearings, pt. 5, p. 1561.

Department of Agriculture is done on what I call a very decentralized basis? In other words, each agency head has the final say on a request for information; is that correct?

Mr. BUCY. That is correct, Mr. Chairman.

This was followed later by these additional questions and answers:

Mr. MOORHEAD. How many times in the 4 years under the act did operating officials seek the advice of public information experts before making the decision to withhold?

Mr. BUCY. We don't have any record on that, Mr. Chairman, because there we leave it to the attorneys who service the particular agency to answer in the first instance. Then they come to one of the divisions that happens to be under my supervision which coordinates and keeps all of the people in the General Counsel's Office advised of developments in this field, but we wouldn't have a record that would be meaningful as to the number of times that we have been consulted with respect to initial requests and decisions on information.

Mr. MOORHEAD. I think maybe I should have directed that question to Mr. Gifford since it asked how many times they asked the advice of public information experts.

Mr. GIFFORD. Mr. Chairman, I have been with the Department only since June 15 last year and I am trying to recall whether anything has come to my attention since that time. I can't recall anything coming to my particular attention. It could have been brought up with the Deputy Director. I don't know.

Of course, on many occasions information people within the agencies will consult with us on matters usually having to do, however, with expediting the release of information. This would not relate to the question of what information is going to be withheld, but usually relates to how we can get something moving when the information machinery, let's say, is not turning as rapidly as it should.

Labor Department Information Practices

This issue was brought up again in testimony before the subcommittee by Mr. Richard F. Schubert, newly appointed solicitor of the Department of Labor. Chairman Moorhead queried Mr. Schubert on whether the advice of public information officers was sought on decisions by other departmental officials in providing information when requests came to them. The response was:¹³⁰

Mr. SCHUBERT. There is not any requirement. My investigation, primarily as a result of the discussion that we had with your staff a week or so ago, revealed that the practice was at best mixed and it was as a result of that finding that I have asked my people in the Washington office of the Solicitor's Office to set up a procedure whereby not only public information officers in the Labor Department in Washington, but also the Special Assistant to the Secretary for Press Relations be a part of any appeal process on the decision made to deny disclosure.

¹³⁰ Ibid., p. 1622.

Mr. MOORHEAD. Is that on an appeal or on the initial request?

Mr. SCHUBERT. On appeal. The initial decision under the rules and regulations is made by the highest officer of the unit in the field, as I indicated, almost invariably after discussion with the Solicitor's Office indicated, but there is nothing in the procedure which wires the public information officer into that process.

Mr. MOORHEAD. Well, whether the request was to Washington or to the field and then there is a denial, then an appeal is made, to whom does the appeal go?

Mr. SCHUBERT. The appeal is to the Solicitor and what I have said to my staff was I want to be sure whenever an appeal is received that that appeal be coordinated and that the process of determination regarding that appeal include the public information officer and the Special Assistant to the Secretary.

Chairman Moorhead told Mr. Schubert earlier that staff investigation showed initial decisions to refuse information were made for the most part at the various operative levels within the Department of Labor and public information experts played no part in the decisions.

"Appeals are handled by the Under Secretary after seeking the advice of the legal office," Congressman Moorhead said. "Although the Labor Department has an extensive public information office and the Secretary has a special assistant who is an expert in the field * * *, none of the information people apparently are consulted at any time in the public information process."¹³¹

Interior Department PIO Role

The Interior Department also kept no records of requests under the act; the public information office (PIO) was not consulted in handling such requests; and decisions on refusals were made at low administrative levels. Access to information requested was granted in only 40 percent of the cases.¹³²

Robert Kelly, Director of Communications for the Department of the Interior, was asked by Congressman Conyers whether his office has "ever been asked for advice on a refusal." Mr. Kelly's answer was: "Not since I have been there, really."¹³³

Federal Communications Commission Ignores PIO

Some regulatory agencies, such as the Federal Communications Commission (FCC), ignore the public information officer. Staff studies introduced into the record during the hearings showed 36 percent of the 98 requests to the FCC were refused.¹³⁴ The initial decisions were made by the FCC Executive Director with the advice of the General Counsel's Office. The Public Information Office was never consulted, neither in response to an initial request for information or when an appeal was acted upon. The FCC General Counsel, in answering a written question submitted by the subcommittee, said bluntly: "The

¹³¹ *Ibid.*, p. 1614.

¹³² See subcommittee questionnaire analysis, hearings, pt. 4, pp. 1333-1334.

¹³³ Hearings, pt. 5, p. 1714.

¹³⁴ Subcommittee questionnaire analysis, op. cit., p. 1339.

Executive Director is not required to seek the advice of, nor does he in practice consult with, the Public Information Officer before acting upon a request which raises a question of interpretation under the Freedom of Information Act." ¹³⁵

Selective Service System Ignores PIO

Very few information experts in our Government are at the top administrative level where credibility is determined and even when they are, they are sometimes not consulted. The Selective Service System was a prime example of the latter. Although the Chief Public Information Officer is a super-grade and referred to as "a member of the top-management team," he has played virtually little or no role in advising on refusals to provide information to the public. Questions confirming this brought forth an assurance from the General Counsel that the situation would be rectified and the Chief Public Information Officer would be consulted in the future. ¹³⁶

Contrasting View of PIO Role

A somewhat different point of view was expressed by several attorneys who have had extensive experience in Freedom of Information matters. Mr. Frank Wozencraft, a former assistant attorney general who participated in the drafting of the 1967 Attorney General's memorandum on the act, said: ¹³⁷

I did not mean to imply that only lawyers should be charged with releasing documents. As I said earlier, I think the public information officer can be very useful in a great many situations, but a lot of times his problem is also to have great consciousness of the image of the agency. Sometimes if the image of the agency might be tarnished a little bit by the document, he may be much more inclined to withhold it rather than release it.

And my thought of having a general counsel in at the appellate level is in case that does happen, to let us have someone else to whom an appeal can be directed.

The General Counsel of the Civil Service Commission, Mr. Anthony Mondello, who also served in the Justice Department and participated in the drafting of the Attorney General's memorandum, argued for a dominant role for agency lawyers in FOI Act cases: ¹³⁸

* * * I think we should keep lawyers on the scene all of the time because I think the lawyers in Government have been very helpful in persuading these operation officials who, you know, for 20 years perhaps ran an office, owned the files, so to speak, and have been turning down everybody under former section 3. It has been legal counsel, I think, who has been very instrumental in letting them realize that day is gone, and the great benefits of the act seen in the past 4 years, I think, are a direct result of that kind of working out with lawyers with the threat that we are going to lose it in court, and you make the agency head resist, and nothing

¹³⁵ Ibid., p. 1795.

¹³⁶ Hearings, pt. 6, pp. 1834-1836.

¹³⁷ Hearings, pt. 4, p. 1158.

¹³⁸ Ibid.

could be more devastating than when the Department of Justice Committee says to somebody that it is indefensible and we will not take it to court. We will not defend it, and I think that is the end of the road right there, and there are lawyers who do that, too.

A similar question concerning the proper balance between the roles of public information officers and legal authorities of an agency was put to another witness, Mr. Ralph E. Erickson, then Assistant Attorney General, Office of Legal Counsel, Department of Justice. He responded:¹³⁹

I would feel rather clearly that if the inquiry were to come into the public information officer, that the public information officer should handle it to the extent that he can.

If he runs into a situation where he feels that it is something that he should not disclose or cannot disclose, for some reason, he certainly should consult the general counsel. I would not expect that all of these things would be formalized within the General Counsel's Office. That, to me, is over-legalizing it, if you will * * *.

I am assuming that we have a responsible public information officer that is going to be aware of the concerns, the interests of the Department, and the interest of the public, and the individual that may be involved in the disclosure which could be harmful to the person about whom the disclosure is being made.

And at that point in time we would expect a responsible public information officer to check with his general counsel.

Health, Education, and Welfare Involvement of PIO

During the subcommittee's review of the administration of the Freedom of Information Act, Chairman Moorhead commented on the public information role in the Department of Health, Education, and Welfare:¹⁴⁰

HEW is the only agency in which the public information people appear to control public information. When the FOI Act was passed, HEW set up a special office to help administer it. This was part of HEW's continuing effort—going on ever since the Department was created—to gain some semblance of coordination over the diverse agencies which made up the Department.

HEW now has an Assistant Secretary for Public Affairs, the only agency outside of Defense and State where the information function is raised to the top operating level. Their special FOI office operates under him.

HEW listed as freedom of information requests only those requests for information which were in writing and mentioned the FOI Act. Requests go to program officials—that is, those running particular programs such as health, social security, for food and drug, with which the information is concerned. Anyone can grant information but only the chiefs of public information can deny information.¹⁴¹

¹³⁹ *Ibid.*, p. 1195.

¹⁴⁰ Hearings, pt. 5, p. 1657.

¹⁴¹ *Ibid.*, p. 1657.

If the information chief proposes to deny a request, he must discuss the situation in advance with an information lawyer in the Office of the General Counsel, the operator who wants the information denied, and the public information adviser.

They have had a number of seminars and conferences with low level officials on administration of the FOI Act. And they report they rarely charge fees for search and seldom for copies.

In responding, Mr. Robert Beatty, Assistant Secretary of Public Affairs for HEW, said, "I think a major factor in the department's affirmative approach to the act has been the early and continuing involvement of public affairs professionals in its implementation. Additionally, I think every secretary of the department since the inception of the act to the present has vigorously supported its intent and purpose."¹⁴² Mr. Beatty added that HEW has confined its denial authority to four persons, all public affairs officials.

The HEW official said "It was Congressman Moss, who determined in 1968 that something like 18/100,000th of the entire Federal budget is spent on the dissemination of information about what the Government is doing and that as much Government effort is spent to inform 535 Congressmen as is spent to inform 210 million American citizens. I think this is a ridiculous imbalance of this allocation of resources and I think it is one of the reasons—and I say this in all sincerity—that the people, regardless of party in this country, are growing increasingly disenchanted with their Government because they know so little about what is going on or what is supposed to be going on or what it can do."¹⁴³

Need for Improved Public Information Capability

The problem of proper authority over information requests was also dealt with by other witnesses, Mr. Arthur Sylvester, former Assistant Secretary for Public Affairs, Department of Defense. He suggested that the subcommittee "consider the feasibility of requiring each agency to identify a single person as responsible for the release of information, someone on whom you can put your finger for the responsibility of getting the news out. I think this would tend to reduce buckpassing."¹⁴⁴

Another witness, Mr. Harold R. Lewis, former Director of Information for the Department of Agriculture observed:¹⁴⁵

Typically, three types of officials would be involved in considering an FOI request or appeal—an administrator, a legal counselor, and an information officer. The information officer's role would chiefly be that of adviser, not decisionmaker. He would have to resort to persuasion rather than clearcut decision, and persuasion rarely carries the weight of authority.

As a result, some FOI decisions could be made without adequate regard for implications of withholding action. A central point of review, with specific authority beyond that usually provided department officers, would obviate many

¹⁴² *Ibid.*, p. 1658.

¹⁴³ *Ibid.*, p. 1662.

¹⁴⁴ Hearings, pt. 4, p. 1016.

¹⁴⁵ *Ibid.*, p. 1017.

FOI difficulties and provide for continuous review and education.

Mr. J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare, put his finger on what is perhaps one of the basic reasons for the lack of input by Government public information officials in agency decisions involving the FOI Act. He said:¹⁴⁶

As a member of the executive branch and as a Government information officer, I welcomed this legislation when it was enacted. I have been puzzled, if I may say so, at the apathy of some of my colleagues in public information who should, in conscience and as a practical matter, have become its vigorous champions. They and the members of the press should give you their enthusiastic approbation and support.

More than a month later, another witness gave indication that efforts were underway to upgrade the status of public information officers. Mr. William L. Webb, president of the 200-member Government Information Organization, stated that "many times where information is denied, the information officer himself or office has not been consulted or not been given an opportunity to make any input or whether or not the document should be made available."¹⁴⁷

He went on to tell the subcommittee that:

In some agencies the information officer is not placed in the same professional category as, for example, a lawyer, an engineer, an economist, or an accountant. Yet the information officer is charged with the somewhat awesome responsibility of serving as a bridge between the citizen and his government.

Webb said that his organization had set up an ad hoc committee to review the role of the government information officer. He observed:¹⁴⁸

It is my feeling that the mission of the public information officer not only has never been adequately defined, but is often misunderstood. In many agencies the information officer plays only an administrative, or housekeeping role. Some information people are faced with a "wish you'd go away" syndrome. They feel that their agencies would really prefer not to have any information officer at all, and sometimes try, budget-wise and personnel-wise to come as close to this goal as possible.

Public Information Role Requires Upgrading

A more clearly defined role for public information personnel in the Federal Government and a general uplifting of their status within the bureaucracy are long overdue. Not only could such steps have significant impact on more conscientious administration of the Freedom of Information Act—both the letter and spirit of the

¹⁴⁶ *Ibid.*, p. 1021.

¹⁴⁷ Hearings, pt. 6, p. 2157. A discussion of the problems of a public information officer in getting news across to the media is contained in a colloquy with Mr. Leonard Weinles of the FCC in pt. 5 of the hearings, pp. 1802-1803; 1808-1810.

¹⁴⁸ *Ibid.*, p. 2167.

law—but it would also give proper recognition to the legitimate and increasingly necessary role of public information officers as “the bridge” between faceless government and its citizens.

This committee recognizes the increasing dangers of impersonal government by computers and the adverse effect it can have as a dehumanizing force in our increasingly complex and interdependent society. It also recognizes that Federal programs have been expanded into virtually every facet of human endeavor and their administration has been greatly decentralized to the community level. There is, therefore, an even greater need to relate such programs to individual citizens and groups through efficient, skilled, nonpartisan public information specialists. Otherwise, it will be difficult for many Americans to benefit fully from the programs created and funded by the Federal Government.

A Question of Legitimacy—Section 3107 of Title 5, United States Code

One of the most frequently cited inconsistencies in Federal law that affects the role of public information officials is section 3107 of title 5, United States Code:

Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.

The prohibition was written into an October 22, 1913, law dealing with the Interstate Commerce Commission and has remained on the statute books ever since, despite the vastly different role that “publicity,” public information, or public relations plays in our modern industrial society. Also, our governmental structure and programs over the past 60 years have been drastically changed but the law has remained the same.

Mr. William L. Webb, president of the Government Information Organization, said in his statement to the subcommittee.¹⁴⁹

The Freedom of Information Act, when laid side by side with section 3107 of title 5 of the United States Code, creates a state of schizophrenia in the minds of many government public information employees * * *. Many government public information officers feel they are caught in the cross-currents of these two statutory directives, and that the public is the real loser. The Freedom of Information law clearly orders the Government to recognize the public's right to know what its Government is doing. Obviously there must be an effective and free flow of information from the Government to the public if we are to comply with this mandate. But the machinery to accomplish this obligation takes personnel and money, and section 3107 can be construed as outlawing funds and people for such purposes.

¹⁴⁹ Hearings, pt. 6, pp. 2155-2156. An analysis of President Nixon's Nov. 6, 1970, memorandum directing a curtailment of “public relations” activities by Federal agencies may be found in pt. 6 of the hearings, pp. 2169-2187. The July 24, 1971, National Journal article by Dom Bonafede is entitled “White House Report—Agencies Resist Nixon Directive To Cut Back Spending on Public Relations.” The subcommittee has been regularly monitoring agency reports to OMB as required by the directive to determine the effect of cuts on effective administration of the FOI Act. For a history of the 1913 rider, see article by Mr. Joseph S. Rosapepe, hearings, pt. 6, pp. 2170-2175.

He added:

I doubt that you will find any job descriptions in the public information service which define the incumbent as a publicity expert * * *. Some information people, I am told, are quietly disguised as administrative or special assistants and they reside in innocuous places, such as personnel or budget offices.

Whatever label we bear, and we are called many things, our basic function and primary reason for existence is the dissemination of information to the public. We would appreciate some assurance from this subcommittee that we are not violating section 3107 of title 5 of the United States Code, and, thus, become instant criminals every time we disseminate information to the public, as we are required to do under provisions of the Freedom of Information law.

This point was also made in earlier testimony by Mr. Robert O. Beatty, Assistant Secretary of Public Affairs, Department of Health, Education, and Welfare. Beatty told the subcommittee.¹⁵⁰

* * * Without going into details of the damage that perhaps the law has done, even though it was well intentioned as a constraint on flackery in Government, I will say I think it has not prevented abuses that it was intended to prevent and has, at times, driven legitimate public affairs people underground, so to speak, because it does reflect an attitude on the part of Congress that public affairs, public information, public relations are somehow not quite legitimate functions of Government.

Beatty urged that the ancient (1913) provision contained in section 3107 be superseded so as to "legitimize public affairs as a valid function of Government, clearly defining its functions and responsibilities across the board."¹⁵¹ He also suggested as other ways to upgrade the status of Government public information:¹⁵²

In summary, what this country needs is more information about its Government—and more resources allocated to the task, not less. One way to achieve this would be to:

Establish an assistant secretary for public affairs in every executive department;

Supersede the 1913 law which places the role of public affairs personnel in Government in doubt;

Require accountability to the Cabinet level and to Congress for public affairs planning, performance and budgeting;

Investigate, with a view of legislative or administrative action to correct, the morass of bureaucratic constraints to the production of effective Governmental communications.

I urge the House Subcommittee on Government Information to take a hard look at these things, Mr. Chairman.

¹⁵⁰ Hearings, pt. 5, p. 1661.

¹⁵¹ *Ibid.*, p. 1661.

¹⁵² *Ibid.*, p. 1667.

Finally, I'd be the first to admit that like any other function of Government, resources (e.g., people and tax dollars) applied to public affairs are subject to abuse or misuse. The best safeguard against that happening is to give the function sufficient authority and the resources to develop the professionalism that transcends political expediency. To the extent that it happens, the public will be better served and what the people have a need and right to know about their Government will no longer be an issue.

While the committee does not concede that the provision contained in section 3107 represents any serious conflict with the responsibility of Federal agencies to adhere fully to the provisions of the Freedom of Information Act, it does recognize the psychological effect it has on many Government public information officials that contributes to an overall downgrading of status and professionalism of this vital function of modern government.

Despite the fact that this restrictive language of section 3107 is already included in title 5 of the U.S. Code, the similar language continues to be added to the "general provisions" section of several appropriations bills each year as a limitation on the appropriations made for these departments and agencies.

VI. THE HIGH COST OF INFORMATION

One of the related perplexing problems of individual citizens in obtaining information from Federal agencies has been the matter of fees charged for search and copying of material to be made available under the Freedom of Information Act.

Section 552(a)(3) provides, in part:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, or 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, shall make the records promptly available to any person * * *.

This language and references in the legislative history make it clear that Congress intended that "search and copying fees" authorized under existing statutes could be charged for records made available under the act.¹⁵³

Guidelines set forth in the Attorney General's Memorandum further emphasize this point:¹⁵⁴

The provision authorizing agencies to require payment of a fee with each request for records under subsection (c) makes it clear that the services performed by all agencies under the act are to be self-sustaining in accordance with the Government's policy on user charges * * *

The law (5 U.S.C. [1964 Ed.] 140) referred to in the House Report as directing Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents provides the statutory foundation of the user charges program * * *

The statute further authorizes the head of each agency to establish any fee, price, or charge which he determines to be "fair and equitable" taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *.

User Charges

User charges policy for Federal agencies is contained in Office of Management and Budget Circular No. A-25 "User Charges."¹⁵⁵ The circular provides that "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service."

¹⁵³ H. Rept. No. 1497, 89th Cong., 2d sess., p. 9.

¹⁵⁴ Pp. 25-27. Reference to subsec. (c) are to the precodification version as contained in Public Law 89-487; present reference is subsec. (3) of Public Law 90-23 (5 U.S.C. 552(a)(3)). The reference to the user charges statute (cited above) (5 U.S.C. 140) has been codified as 5 U.S.C. 483(a).

¹⁵⁵ Issued Sept. 23, 1959 (revised October 22, 1963).

The circular provides some broad guidelines to be used in (1) determining the costs to be recovered, (2) establishing appropriate fees, and (3) providing for the disposition of receipts from the collection of fees and charges.

The Attorney General's memorandum further observes:¹⁵⁶

It is evident from the provisions of the user charges statute, the Bureau of the Budget circular, and the legislative history of the act that the enactment does not contemplate that agencies shall spend time searching records and producing for examination everything a member of the public requests under subsection (c) (now subsection (a)(3)) and then charge him only for reproducing the copies he decides to buy. Instead, an appropriate fee should be required for searching as distinguished from a fee for copying. Such fees should include indirect costs, such as the cost to the agency of the services of the Government employee who searches for, reproduces, certifies, or authenticates in some manner copies of requested documents. Extensive searches should not be undertaken until the applicant has paid (or has provided sufficient assurance that he will pay) whatever fee is determined to be appropriate.

* * * Charging fees may also discourage frivolous request, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the performance of other agency functions as well as its service in filling legitimate requests for records.

This committee's 1968 committee print containing a staff compilation and analysis noted that after 1 year of operation the problem of fees was already apparent:¹⁵⁷

Another aspect of the law which could be used to block, rather than facilitate access, is the reference to fees (to the extent authorized by statute) to recover the costs of clerical handling of information requests. The intent of the law was to make information available to the public, yet some agencies have raised possible financial barriers using the fee device.

The analysis went on to cite the wide disparity of fees provided for in various agency regulations and the lack of any uniform standards. It stated further:

Although the Freedom of Information Act does not address itself to the possibility that request for information may be considered frivolous by the agencies, the Attorney General's memorandum states: 'Charging fees may also discourage frivolous requests . . .' In view of the wide range of application and search fees, it appears that there is no agreement on the use of fees to discourage 'frivolous requests,' although spokesmen for several agencies concede that this is the reason for some of their charges. Neither in the law nor in the Attorney General's memorandum is there a definition of 'frivolous' or a suggestion for the establishment of adminis-

¹⁵⁶ Pp. 28-27.

¹⁵⁷ *Ibid.*, p. 6. See footnote 12.

trative machinery to determine if a request is 'frivolous,' thus some agencies have abrogated to themselves more power in the handling of public information than the law intended.

During the subcommittee hearings, considerable attention was devoted to a discussion of fee schedules of various Federal agencies and the extent to which such search and copying fees were being used to deny information that Congress intended to be made available to the public upon request under the act. Executive branch witnesses were also requested to supply information on the amount of fees collected under the act during the previous fiscal year.¹⁵⁸

Administrative Conference—Recommendation No. 24

Valuable insights into the scope of this problem of administrative problems and fees were furnished by Mr. Roger C. Cramton, Chairman of the Administrative Conference of the United States, during his testimony on March 14, 1972.¹⁵⁹ The Conference had undertaken some 2 years ago a detailed study of the implementation of the Freedom of Information Act and in May 1971 had adopted Conference Recommendation No. 24, entitled "Principles and Guidelines for Implementation of the Freedom of Information Act." The recommendations have been transmitted to all Federal departments and agencies and, while not binding upon them, should receive most serious consideration because of the prestigious makeup of the Conference.

Among the important recommendations of the Conference were those set forth in "Part A, General Principles":¹⁶⁰

- (1) A restrictive interpretation of the exemptions authorizing non-disclosure;
- (2) Full assistance and timely action on public request for information;
- (3) Disclosure to the fullest extent possible of all but exempt parts of documents;
- (4) Specification of reasons when requests for information are denied, together with a statement as to how the denial may be appealed and to whom; and, finally,
- (5) Minimum fees for providing information, which should be waived when it is in the public interest to do so.

Part B of Recommendation No. 24 provides that each agency should adopt procedural rules to effectuate the above principles and details guidelines as a model for the kinds of procedures that are appropriate for such purpose.

Part C of the recommendation calls upon each agency to establish a fair and equitable fee schedule relating to the provision of information. It also proposes that a committee of representatives from the Office of Management and Budget (OMB), the Justice Department,

¹⁵⁸ For examples of response, see hearings, pt. 5, pp. 1595, 1625, 1679, 1713, 1763. See hearings, pt. 6, appendix for a listing by agency; see also p. 58 of this report.

¹⁵⁹ Hearings, pt. 4, pp. 1219-1251. The Administrative Conference of the United States, a permanent, independent Federal agency, is engaged in the improvement of the procedures of Federal departments and agencies. The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers.

¹⁶⁰ *Ibid.*, p. 1221

and the General Services Administration (GSA) should establish criteria for determining what are "fair and equitable fees."

Conference Chairman Cramton told the subcommittee:¹⁶¹

Recommendation 24 was communicated to all Federal agencies. They were asked to consider it seriously. They were also asked to respond to us by a given date as to the extent to which they had taken action pursuant to it and what further plans they had for such action. We have now received comments from all but a handful of Federal agencies.

Looking first to the five general principles of the recommendation, the record of compliance revealed by these agency responses is good. This assumes, of course, that compliance means a statement of intention to adhere to these principles in practice as distinguished from merely having them publicly stated in regulations. On this basis, we have rated about 25 agencies as in substantial compliance with the policies of the recommendation, and 11 agencies in partial agreement, with further study underway.

Mr. Cramton went on to point out, however, that with respect to "compliance with the major specific proposals of the guidelines, the record becomes more checkered."

The Office of Legal Counsel, Department of Justice, took the initiative in calling a meeting of the interagency committee recommended in part C. The OMB and the GSA joined Justice in the interagency committee study of fee schedules and the following conclusions were reached:¹⁶²

- (1) Fee schedules for routine reproduction or photocopying of documents are often too high;
- (2) Charges for time spent in routine search or in monitoring reproduction should be at a clerical rate;
- (3) Considerable flexibility is necessary with respect to fees for nonroutine compilations and reproductions of files where searches may require use of professional, operating, or management personnel. This last problem is particularly acute because to charge actual costs would often result in a prohibitively high fee, thus frustrating the primary intent of the Freedom of Information Act.

OMB Director George P. Shultz stated in a letter to Chairman Moorhead dated March 6, 1972:¹⁶³

OMB joined with Justice and GSA to establish a committee as recommended in part C of the Conference's Recommendation No. 24. The committee concluded that fees charged by agencies were lacking in uniformity and in some cases appeared to be excessive, and recommended that these matters be brought to agency attention. Action to give

¹⁶¹ *Ibid.*, p. 1222; see pp. 1232-1235 for text of Recommendation No. 24; the staff work was done by Prof. Donald A. Giannella, Professor of Law, Villanova Law School; see p. 55 of this report for additional discussion of Recommendation No. 24. The new head of the Office of Legal Counsel is Mr. Roger C. Cramton who, as Chairman of the Administrative Conference of the United States, testified before the subcommittee on Recommendation No. 24 to improve the administration of the FOI Act.

¹⁶² *Ibid.*, p. 1223.

¹⁶³ The text of OMB Director Shultz, memorandum appears at pp. 1231-1232 of pt. 4 of the hearings.

effect to this recommendation of the interagency committee is now in process, and I will be pleased to make a further report when that action is completed.

Subsequent to the issuance of Recommendation No. 24 by the Administrative Conference, Chairman Moorhead requested the General Accounting Office (GAO) in a letter dated July 19, 1971, to investigate the appropriateness of fees charged by Federal agencies for searching and copying. Several meetings between the subcommittee staff and GAO investigators resulted in inquiries to the interagency committee established by Justice, OMB, and GSA as to progress being made on their study, so as to avoid unnecessary duplication of effort by GAO. Conclusions of the interagency committee as stated above were duly referred to OMB because of its overall responsibility for the administration of user charges through Circular No. A-25.

On May 5, 1972, Chairman Moorhead was advised by letter from Mr. William L. Gifford, Special Assistant to the President, that a memorandum, dated May 2, 1972, had been sent to the heads of all executive departments and agencies "asking that they initiate a review of their agencies' charges for search, reproduction, and certification of records. The purpose of this review is to determine whether some reductions of current charges could be made while continuing to cover the costs of providing the service. The memorandum emphasizes that fees should not be set at an excessive level for the purpose of deterring requests for copies of records."¹⁶⁴

Mr. Cramton summarized the findings of the Administrative Conference's survey of agency fee schedules in his testimony:¹⁶⁵

Almost every agency has a rule which calls for charging fees.

Almost every agency has a rule permitting the waiver of any charge in appropriate cases and most make no charge where costs would be \$1 or less * * *.

Several agencies have a mandatory minimum charge for handling information requests whether any documents are provided or not. But mandatory fees are often not charged even when applicable * * *.

Copying charges vary widely, from 5 cents per page at Agriculture to perhaps as high as \$1 per page at the Selective Service System. A charge of 25 cents per page is most common.

Clerical research charges vary widely, from a low of \$3 per hour at the Veterans' Administration to as much as \$7 per hour at the Renegotiation Board.

The committee is concerned over the real possibility that search fees and copying charges may be used by an agency to effectively deny for exemption under subsection (b) of the act. As Chairman Moorhead pointed out during the hearings, many agencies have circumvented the copying cost problem by leasing copying facilities to private companies who charge the public for the services. Such

¹⁶⁴ Hearings, pt. 4, pp. 1223-1224.

¹⁶⁵ *Ibid.*, p. 1218. A table showing typical agency fees for the production of documents compiled by the Conference appears at p. 1245.

charges—which obviously include a profit margin for the company—are also a matter of concern to this subcommittee.¹⁶⁶

Fee Problems Under Freedom of Information Act

Several witnesses detailed their experiences with Federal agencies on the fee problem.

Reuben B. Robertson, III, an attorney with the Center for the Study of Responsive Law, testified:

My own view is that the search fee should be eliminated entirely, because it is essentially inconsistent with the basic provision of the Freedom of Information Act that the Government should properly index and file and maintain its records.

The only reason that a search fee would be necessary is that there is no index in the agency of what information is available and where it is located. Very few, if any, agencies have gone to any kind of automatic data processing. Very few have comprehensive resources where you can go and find out what is available, and how you can get it, and whom you are supposed to ask.

One particular incident, which demonstrates the intentional harassment aspect, occurred when one of the students working under me in a study of air safety asked an official at the Federal Aviation Administration for the names of the 26 inspectors who reported directly to him. He was charged a search fee for that information. That is typical of what can happen.

Mr. Harrison Wellford, also with the Center for the Study of Responsive Law, described to the subcommittee a case involving a scientist teaching at the University of Georgia who requested information on pesticides from the Department of Agriculture (USDA) and was asked to give some assurance "that he could pay at least a fee of \$100 before they would go to the trouble of making the search."¹⁶⁷

He went on to detail a personal case with the Department of Agriculture, also involving pesticide information, in which the "USDA stated that if the information were made available, it would cost \$91,840 to prepare the registration files for public viewing."¹⁶⁸

Still another witness, Mr. Bertram Gottlieb of the Transportation Institute, told the subcommittee of his efforts to obtain information from the Maritime Administration on all ships that had been purchased by American operators from the U.S. Government under the Ship Sales Act of 1946 and the amounts of operating differential subsidies each received from public funds.¹⁶⁹ His request was turned down as being "too broad," whereupon he submitted the names of each of the ships, obtained from another source. The Maritime Administration then quoted a minimum fee of \$8 an hour for its personnel to produce the subsidy information requested, working on weekends, or a total minimum fee of some \$12,000. Mr. Gottlieb testified that after "considerable dickering", he received permission to employ

¹⁶⁶ Ibid., p. 1252.

¹⁶⁷ Ibid., p. 1253.

¹⁶⁸ Ibid., p. 1255. This matter was discussed by a USDA witness, see hearings, pt. 5, p. 1559 and 1595.

¹⁶⁹ Ibid., p. 1270-1271.

some university students to review the agency records and in this way finally obtained the data he was seeking.

The imposition of fees by agencies for searching and copying information sought under the provisions of the FOI Act is further complicated by the agency's administrative costs. Chairman Moorhead pointed out:¹⁷⁰

Although the authority to impose fees was designed to offset the cost of the Government for the provision of requested information, it is questionable whether this intent is effectively being carried out. One regulatory agency did a statistical study of this problem. About 34,000 items for which a fee could have been charged were handled during the fiscal year in question. The fees collected would have amounted to about \$17,000. However, some 11,000 bills would have been mailed to collect those fees. Since it costs this agency \$1.60 to send out a bill, the cost of billing would have been about \$17,600—or about \$600 more than the amount they could have collected. At last word, the agency is still pondering the problem.

During the hearings, departmental and agency witnesses were asked to furnish statistics on the amount of fees collected during fiscal year 1971 for search and reproduction of records made available under the FOI Act. Some departments, such as Defense and Transportation, said that they kept no such records; others provided estimates. The total fees collected by the 10 responding agencies that kept records was \$345,955.¹⁷¹

¹⁷⁰ *Ibid.*, p. 1218. The agency referred to is Federal Power Commission.

¹⁷¹ See hearings, pt. 6, appendix for a listing by agency.

VII. PUBLIC INFORMATION VERSUS PUBLICITY

It is axiomatic that the requirement for Government agencies to inform the public about their activities can result in propaganda. The line between "public information," "publicity or public relations," and "propaganda" is fine indeed and, like beauty, is often in the eye of the beholder.

Mr. Robert O. Beatty, HEW's Assistant Secretary for Public Affairs, testified:¹⁷²

Generally, in government, public information is "good" and public relations is "bad," because it's supposed to connote some sort of self-serving propaganda effort for the perpetuation of bureaucrats or politicians.

As discussed elsewhere in this report, Beatty preferred the term "public affairs," and urged repeal of the 1913 statute which prohibits the use of appropriated funds to pay a "publicity expert."¹⁷³ Such action is necessary to help legitimize essential Government information activities and to raise the role of public information personnel to a higher level of professionalism and status within the agency to enable them to fully participate in effectively administering the Freedom of Information Act.

Warnings against press agency or image making by Federal agencies apply equally to those which seem to be administering the FOI Act properly, as well as to those agencies which have made few changes in their public information policies and practices since the new law took effect. Examples are apparent in the old line agencies like the Department of the Interior and in new agencies such as the Environmental Protection Agency (EPA), established after the enactment of the FOI Act.

The Image of EPA

"A Federal agency that wishes to have credibility with the public must be frank and open in its conduct of affairs," John R. Quarles, Jr., general counsel of EPA, testified about his agency's implementation of the Freedom of Information Act.¹⁷⁴

EPA witnesses also testified that final authority on refusals of access to public records rests with the agency's public affairs officers and that other provisions of the act are administered to speed the disclosure of information. For instance, tight limits are applied to the time EPA officials may take to make disclosure decisions, and fees for search and copying public records often are waived. Such forward-looking provisions for public access to EPA information can, however, be nullified when information activities become publicity-seeking devices.

Shortly after testifying to EPA's steadfast commitment to a proper Government information program the agency selected two New York

¹⁷² Hearings, pt. 5, p. 1666.

¹⁷³ For a discussion of this aspect of public information's role in Government, see pp. 49 and 50 of this report.

¹⁷⁴ Hearings, pt. 6, p. 1876.

City agencies to develop plans to advertise the work of EPA. Both agencies were to develop comprehensive advertising plans to cover, among other things, "the image of EPA projected through advertising."¹⁷⁵ One of the image-making companies was to concentrate on advertising strategy for inner city programs. The other company was to worry about the EPA's image in the rest of the nation.

The agency selected to handle the overall EPA "image problem" is Geer, DuBois & Co. of New York City; the agency selected for an "inner-city image-making plan" is John F. Small, Inc., of New York's Madison Avenue. Both agencies were directed to make sure their employees working on the project were thoroughly familiar with EPA's mission and the environmental problems it is supposed to help solve—details which the EPA's full-time public information staff would not have to spend time learning.

The price EPA paid the advertising agencies to find out EPA's mission and develop an advertising program to sell EPA to the public was \$101,535. The contracts were of an open-end nature, with wage rates pegged on an hourly basis for 22 employees specifically named in the contracts. The contracts call for the hourly rates to be paid "for the duration of this agreement," which is to be 1 year from the date the contracts are signed.¹⁷⁶

For John F. Small, Inc., the hourly wages range from \$50 an hour for Small himself and two of his top associates down to \$25 an hour for a print production supervisor. For Geer, DuBois & Co., Inc., the hourly wages range from \$50 an hour for Peter Geer and \$40 an hour for his executive vice president, down to \$16 an hour for a production and traffic operator.

The Interior Department's Publicity Program

The Department of the Interior confuses "image-making" with "public information" on a slightly smaller scale than EPA. The agency paid \$121 a day to a political publicity man to recommend improvements in Interior's public information practices and then decided that the public information report was not a public record under the FOI Act.

Harry Treleven, who worked in President Nixon's successful 1968 campaign and was a leading character in the book "The Selling of the President, 1968," prepared a report to Interior Secretary Rogers C. B. Morton on the information and public relations activities of the Department.¹⁷⁷

The 85-page report was presented in April 1971. It included 18 pages of general observations and recommendations with the remainder covering in slightly more detail the information activities of the Department's 11 divisions.¹⁷⁸

Ward Sinclair, a reporter for the Louisville Courier-Journal, asked for copies of the Treleven report but was refused. He appealed the refusal under the Freedom of Information Act but was again refused. Mr. Mitchell Melich, Solicitor of the Department of Interior, argued

¹⁷⁵ For details of these contracts see hearings, pt. 6, appendix.

¹⁷⁶ *Ibid.*

¹⁷⁷ This case is discussed at length in the hearings; see pt. 4, pp. 1280-1281 and also pt. 5, pp. 1743-1751. An article by columnist Jack Anderson, revealing portions of the Treleven report appears on pp. 1740-1741 of the hearings.

¹⁷⁸ This 18-page portion of the report may be found on p. 1744 of pt. 5 of the hearings.

that the Treleaven report, designed to improve the Department's publicity practices was an "internal document" and exempt from public scrutiny under section (b)(5) of the Freedom of Information Act. He also testified:¹⁷⁹

Just as important was the fact that disclosure would result in an unnecessary invasion of the personal privacy of those department employees named in the report.

The Department had sent the Treleaven report to a number of Members of Congress and also made it available to the Foreign Operations and Government Information Subcommittee. Chairman Moorhead sent the subcommittee copy of the report back to the Department, pointing out that only the last sections named Interior Department employees and suggesting that the general comments and recommendations in the first 18 pages of the Treleaven report be made available for the subcommittee's public record.¹⁸⁰

The Department reluctantly agreed to make public the first 18 pages of the report except for a single paragraph which, Solicitor Melich argued, contained "references to named individuals, the disclosure of which could prove an unwarranted embarrassment to those individuals." In spite of the fact that the FOI Act permits withholding under the privacy claim only if the information would constitute a "clearly unwarranted invasion of personal privacy", Solicitor Melich argued:¹⁸¹

When the Secretary sought the advice and counsel of Mr. Treleaven a confidential relationship was established. Disclosure of Mr. Treleaven's views with respect to a particular individual could result in personal embarrassment without serving any useful purpose.

The University of Missouri Freedom of Information Center formally asked for access to the first 18 pages of the Treleaven Report, including the single censored paragraph. Apparently, investigators for the center had access to the censored section—a section which had been included in the document given to many Members of Congress and circulated in the Interior Department. When the center appealed to Secretary of the Interior Rogers C. B. Morton to lift the censorship of the offending paragraph, the center identified the employee who might be embarrassed by identification.¹⁸²

Harry Treleaven's censored paragraph had recommended that the Department's publicity practitioners should make greater use of Secretary Morton on television, getting him visually involved in newsworthy events. Treleaven's report said:¹⁸³

Secretary Morton is not only the most photogenic member of the administration—but he's also able to participate physically in all kinds of outdoor situations and look natural. It's important that the communications program make full use of this, because it's a way of making sure that the Secretary's statements get maximum exposure, as well as building

¹⁷⁹ *Ibid.*, p. 1695.

¹⁸⁰ Correspondence relative to the report is in pt. 5, pp. 1743-1744; 1749-1751 of the hearings.

¹⁸¹ *Ibid.*, p. 1751.

¹⁸² Hearings, pt. 6, appendix, pp. 2275-2276.

¹⁸³ Hearings, pt. 6, appendix, p. 2276.

valuable goodwill for the Department and the administration. Information officers in each of the Bureaus should be required to submit, on a regular basis, ideas for this kind of involvement. (Every time this was suggested in an interview it immediately sparked ideas.) And arrangements for motion picture and still photography should be built into all personal appearance plans.¹⁸⁴

¹⁸⁴ Ibid.

VIII. THE DEPARTMENT OF JUSTICE'S ROLE IN THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

Shortly after the Freedom of Information Act was signed into law in 1966, the Department of Justice was assigned the task of preparing guidelines for the administration of the act by Federal departments and agencies. Supervision for the project was assigned to then Assistant Attorney General Frank M. Wozencraft, Office of Legal Counsel (OLC) at the Department.¹⁸⁵

These comprehensive guidelines, published in June 1967, were officially entitled "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act." The memorandum served as the basis for the drafting of regulations by executive agencies for the administration of the FOI Act, which became effective the following month.¹⁸⁶ Next to the act itself, and the legislative history contained in committee reports and debates on the bill, the Attorney General's memorandum has become the single most important interpretative document upon which executive departments and agencies rely to defend judgments on what information should be made available to the public under the act.

The foreword to the memorandum by Attorney General Ramsey Clark set forth the general principles accurately reflecting congressional intent in enacting the FOI Act and correctly pointed out that:¹⁸⁷

* * * Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

This observation is particularly important in the case of the FOI Act, which represented such a vast departure in both the philosophy as well as the information practices of the Federal bureaucracy.

As Mr. Wozencraft stated:¹⁸⁸

The act was a watershed event, because it reversed the philosophy of releasing Government information. Previously, the Government would withhold the document unless it was persuaded that there was a valid reason to disclose it. Now, it must release the document, unless it can establish a valid reason to withhold it. That was, and is, and should be, a cause for jubilation in itself, even though its promise has yet to be entirely fulfilled.

As the hearing record clearly shows, the laudatory principles and goals set forth in the memorandum have seldom been achieved by Federal agencies in their administration of the FOI Act. Part of the reason may be attributed to sections of the memorandum, which

¹⁸⁵ Mr. Wozencraft testified before the subcommittee, hearings, pt. 4, pp. 1068, et seq.

¹⁸⁶ See pp. 5-6 of this report for background discussion of memorandum.

¹⁸⁷ Attorney General's memorandum, see p. 4 of this report.

¹⁸⁸ Hearings, pt. 4, p. 1069.

in its overall tone and in detailed discussions of the exemptions of subsection (b) of the act leans toward a restrictive interpretation of these key provisions. Conflicting language in the House and Senate reports on the legislation and the natural tendency of an executive department to interpret any act in their favor may have contributed to the direction taken in this guideline document.

The memorandum stressed an important principle of the act—that the use of the nine exemptions of subsection (b) is permissive and not mandatory, a point that many Federal agencies do not adequately reflect in their administration of the act over the past 5 years. The memorandum stated:¹⁸⁹

* * * Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Mr. Wozencraft pointed out in his testimony that in the drafting of the memorandum, the interpretations of provisions of the FOI Act could only be "our best effort" and that "definitive answers" necessarily had to await judicial rulings to provide more clear interpretations of some of the ambiguous portions of the statute.¹⁹⁰

There is no question that in the drafting of the memorandum, the Justice Department officials who were responsible made conscientious efforts to provide an equitable guideline basis for administration of the act. Mr. Wozencraft testified that he and his staff consulted with general counsels of Federal agencies, with the staffs of the two congressional committees which had jurisdiction over the legislation, with bar association groups, and with various organizations representing all segments of the news media.¹⁹¹

Justice Department's Triple Role

The Department of Justice plays three roles under the Freedom of Information Act. First, as an executive department, it is an "agency" under the act and is subject to all of the same administrative procedures in making information available under the act as are other Federal agencies.¹⁹²

The second important function of the Department of Justice is its role as legal counsel to the Federal Government. As the executive branch's "law firm", the Department has exercised considerable influence over the operation of the FOI Act since its enactment. Then Assistant Attorney Ralph E. Erickson told the subcommittee:¹⁹³

* * * The Civil Division of our Department handles the litigation for most Government agencies when suit is filed under the Freedom of Information Act. A status report indicated that as of January 1, 1972, the Civil Division had 46 freedom of information suits pending in some stage of litigation * * *

¹⁸⁹ Attorney General's memorandum, pp. 2-3.

¹⁹⁰ Hearings, pt. 4, pp. 1070-1071. For a valuable study by the American Law Division, Library of Congress entitled, "The Freedom of Information Act: Comparison of the Case Law With the Attorney General's Memorandum," see hearings, pt. 6, p. 2254.

¹⁹¹ *Ibid.*

¹⁹² The Department's own administrative record of handling FOI requests is discussed in the hearings, pt. 4, pp. 1175-1177.

¹⁹³ *Ibid.*, p. 1177. An estimated 200 suits have been filed under the FOI Act.

In information subsequently furnished to the subcommittee on the details of the Civil Division's role in handling litigation under the FOI Act, the number of cases had risen to 48 as of March 1, 1972, of which number some 12 cases "were being handled directly in all respects by Civil Division attorneys." In two additional cases, "briefs were prepared by Civil Division attorneys and filed although the oral argument was left to the U.S. attorney's office."¹⁹⁴

The third, and most vital role played by the Justice Department affecting the governmentwide policies for administration of the Freedom of Information Act is the advisory or consulting responsibilities exercised by the Office of Legal Counsel through its Freedom of Information Committee, currently headed by Mr. Robert Saloschin. Mr. Erickson described in his testimony the broad groundrules:¹⁹⁵

* * * In such [FOI] cases, our functions are limited by the decentralized administration of the act, as prescribed by Congress, in requiring each agency to act on requests for its own records. In other words, we generally have no authority to compel another agency to comply with a request for its records. Subject to this limitation, the functions of the Justice Department in freedom of information matters are counseling, coordinating, and representing other agencies in court * * *.

Work of the Freedom of Information Committee

The Freedom of Information Committee, composed of five lawyers from the Office of Legal Counsel and the Civil Division, was created by a December 8, 1969, memorandum cosigned by Mr. William H. Rehnquist and Mr. William D. Ruckelshaus, then heads of the OLC and the Civil Division, respectively.¹⁹⁶

That memorandum was prompted by a series of events during 1968 and 1969 that concerned administrative problems under the FOI Act being experienced by various Federal agencies. Mr. Erickson testified that the Department "began to be increasingly concerned that some agencies might be engaging in dubious or unwarranted denials of requests under the act, leading to litigation burdensome both to the requestor and to the Government. This feeling crystallized after the July 10, 1969, decision in the famous hearing aids case."¹⁹⁷ He went on to say that this impression "was sharpened that same summer after various informal requests for assistance and advice reached us from agencies that were receiving the attentions of Mr. Nader and his associates."

In addition to establishing the Freedom of Information Committee, the December 8, 1969, Rehnquist-Ruckelshaus memorandum, addressed to "General Counsels of all Federal departments and agencies re coordination of certain administrative matters" under the FOI Act requested that the Department of Justice be consulted prior to the issuance of a final denial of a request for information if there was any possibility that the denial might result in litigation. The memorandum made the following major point:¹⁹⁸

¹⁹⁴ *Ibid.*, p. 1197.

¹⁹⁵ *Ibid.*, pp. 1177-1178.

¹⁹⁶ The text of the memorandum appears in the hearings, pt. 4, pp. 1132-1133.

¹⁹⁷ *Ibid.*, p. 1178. *Consumers Union v. Veterans' Administration*, 301 F. Supp. 796 (S.D. N.Y. 1969) (footnote 2 on p. 1178 of hearings).

¹⁹⁸ Dec. 8, 1969, memorandum, *op. cit.*, p. 1132. The memorandum was addressed to general counsels only, not public information officials.

In discharging these functions, the Department has noted several developments which we believe warrant your attention. First, the Government in recent months has lost cases in court which involved a number of the exemptions contained in the act. *Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. July 10, 1969) (involving exemptions 2, 3, 4 and 5); *General Services Administration v. Benson*, 415 F. 2d 878 79th Cir. Aug. 26, 1969) (exemptions 4 and 5). Second, there has been considerable variation in agency practices with respect to consulting the Department on freedom of information controversies before the agency takes final action, which may result in the filing of suit against the agency. Third, there are particular problem areas under the act, which are common to a number of agencies, where an exchange of views may be beneficial.

The implications of the judicial decisions cited above, as well as other cases, are under continuing review in the Department. However, enough review has already been accomplished to point to two conclusions: (1) Although the legal basis for denying a particular request under the act may seem quite strong to an agency at the time it elects finally to refuse access to the requested records, the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the act; (2) an agency denial leading to litigation and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved, insofar as it creates a precedent affecting other departments and agencies in the executive branch.

In order to coordinate activities among Federal agencies and to avoid the creation of "bad" precedents under the FOI Act from the Government's viewpoint, the Freedom of Information Committee in OLC was established. The memorandum said: ¹⁹⁹

In view of the foregoing, it seems manifestly desirable that, in most instances, litigation should be avoided if reasonably practicable where the Government's prospects for success are subject to serious question. This can often best be done if, before a final agency rejection of a request has committed both sides to conflicting positions, the matter is given a timely and careful review, in terms of litigation risks, governmentwide implications, and the policy of the act, as well as the agency's own interests. To facilitate review of the nature just described, we need your cooperation. To improve cooperation on our part, we have just established an informal committee of representatives of the Civil Division and of the Office of Legal Counsel. The functions of this committee will be to assist in such review and help assure closer cooperation in our work.

We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any sub-

¹⁹⁹ Ibid.

stantial possibility that such denial might lead to a court decision adversely affecting the Government. Such consultation will serve the review function discussed above, and in some instances may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request. The requested consultation may be undertaken formally or informally as you prefer, and ordinarily should be directed initially to the Office of Legal Counsel rather than to the Civil Division.

This committee places great importance on the role that the Freedom of Information Committee can and does, in many cases, play in the administrative processes of Federal agencies involving the handling and decisionmaking on requests made under the FOI Act. For the most part, it believes, the committee has had a salutary effect on the overall administration of the act. This committee also is convinced that the FOI Committee and the Office of Legal Counsel could—and should—exercise more of a leadership and coordinating function to improve the administrative machinery as well as to foster a more positive attitude in the Federal bureaucracy toward the basic principles and goals of the FOI Act. These administrative problems were spelled out earlier in this report.²⁰⁰

Mr. Erickson testified that through March 1, 1972, the FOI Committee had received “an estimated 400 to 500 contacts, which have led to approximately 120 committee consultations * * * (and) have involved about 30 different agencies.”²⁰¹ He explained the consultation procedures as follows:

Consultation procedures are usually quite simple. About 80 percent of consultations are conducted by a face-to-face meeting of the committee with representatives of the agency. Agencies usually send a lawyer and one or two operating officials to a consultation, although the representation may vary from just one person to several and occasionally includes both the general counsel and the head of the agency. Typically the committee is represented by at least three and usually four of its members. All five members are of course notified of every meeting, and sometimes all five attend.

Speed is a major goal in all the committee's work, and it is usually obtained. A meeting usually occurs within less than a week of the phone contact which led to it, and some are held the very next day. Sometimes papers that will be discussed at the meeting are shown to committee members beforehand.

The meetings vary in length from about 30 minutes on simple matters to 2 hours or more on complex ones. No minutes are kept, although any participant is free to take his own notes. The agencies usually get the committee's reaction immediately, from the discussion during the course of the

²⁰⁰ See pp. 9-10 of this report.

²⁰¹ Hearings, pt. 4, pp. 1179-1180. For a listing of agencies consulting with the FOI Committee, see p. 1181; for a listing of the range of subject areas covered by these 120 consultations, see p. 1213. A colloquy with Mr. Erickson revealed the fact that the FOI Committee does not respond to requests by the public for such counseling; see p. 1198.

meeting, although in some cases there may be further telephone calls or other contacts after a meeting. As for the remaining 20 percent or so of committee consultations which do not involve a face-to-face meeting with agency representatives, the usual procedure is that papers from the agency are circulated to the committee members, who read them and give their comments to the chairman, and if no further discussion is needed, the chairman gives the agency the committee's collective reaction by telephone.

Mr. Erickson indicated to the subcommittee that "the rate of consultations seems to be accelerating, and is estimated to be running now at roughly between 75 and 100 a year."

According to his testimony, the FOI committee's consultations on the 120 cases through March 1, 1972, resulted in advice to the agencies that (1) the information was clearly exempted from disclosure—about 40 cases or one-third; (2) the information was probably not exempt and should be released—about 40 cases or one-third; and (3) the information was in an uncertain category, suggesting an alternative solution or a practical accommodation of the dispute over disclosure—about 40 cases or one-third.²⁰²

It is difficult to determine precisely what effect the FOI Committee's recommendations have had on agency decisions in FOI Act requests. The informal nature of the work of the committee and the lack of documentary evidence of subsequent actions taken by the individual agencies on cases brought to the committee for consultation points up one of the administrative weaknesses of the procedure. Nevertheless, the Committee on Government Operations shares the positive view of the Department toward the work of the FOI Committee in helping to encourage greater understanding of the act and to help bring about a more enlightened administration of the act within the Federal bureaucracy.

This committee's studies of the FOI Act's operational status after 5 years would generally parallel the evaluation stated by Mr. Erickson at the conclusion of his testimony:²⁰³

* * * The act is an epochal step in democratic government. Our experience indicates that that act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations.

²⁰² Ibid., pp. 1182-1183

²⁰³ Ibid., p. 1184.

IX. LITIGATION UNDER THE FREEDOM OF INFORMATION ACT—1967-1972

The ultimate weapon provided to the public under the Freedom of Information Act that can be wielded against a recalcitrant Federal bureaucracy is the right to file suit in a U.S. District Court to obtain requested Government records if all other efforts are fruitless. The law directs that such cases be considered in the form of injunctive proceedings against the Government. Such cases are considered *de novo* and the burden is on the agency to justify its refusal to make records available to the complainant. In the case of noncompliance with the order of the court in such cases, the responsible Government employee or member of the uniformed service involved in the suit may be punished for contempt.²⁰⁴

No law is self-enforcing, least of all a law designed to help the citizen in a contest with the government. Thus, the Freedom of Information Act has a built-in enforcement tool—the citizen's right to go to court and force the government to prove the need to withhold public records.

The court-enforcement provision has been used effectively during the first 4 years the act has been in operation. In some areas—particularly the protection of national defense information and the protection of investigatory files—the courts have been reluctant to order the disclosure of government secrets. In other areas—particularly the contention that privileged financial information and internal memoranda must be hidden from the public—the courts have rejected Government arguments.

Hopefully, Government agencies will consider the trend of court action and stop using the excuses for secrecy which have been rejected by the courts. If not, it may be necessary for Congress to amend the Freedom of Information Act to limit further the Government's claim that routine financial information and government memoranda are not public records.²⁰⁵

As noted earlier, the Justice Department witness stated that about 200 suits have been filed under the FOI Act, and that some 48 cases were pending in the Civil Division as of March 1, 1972. He estimated that the Government's position has been sustained in about half of the FOI cases litigated nationwide, "although the Government has had very little success in the Court of Appeals for the District of Columbia circuit."²⁰⁶

Another witness told the subcommittee:²⁰⁷

So far the act has received relatively little examination by the courts, despite the hundred or so cases that have thus far

²⁰⁴ Sec. 552(a)(3) of title 5, United States Code.

²⁰⁵ Statement by Chairman Moorhead, Mar. 19, 1972. Hearings, pt. 4, p. 1344.

²⁰⁶ Hearings, pt. 4, p. 1177.

²⁰⁷ Mr. Richard Wolf, Institute for Public Interest Representation, Georgetown University Law Center, hearings, pt. 4, p. 1067.

appeared. My count indicates that the Federal courts of appeals have decided only 17 cases. Nine of these have occurred, as might be expected, in the District of Columbia circuit. We are seeing some trends developing in this circuit. But the Supreme Court, except for yesterday's announcement, has yet to pass on any of the complex issues of privacy and disclosure which are raised in the act. Some of these difficult problems are perhaps better left to careful judicial development, and this will certainly occur.

It is difficult to deal adequately in this report with the matter of court decisions under the FOI Act in sufficient detail to make such an analysis meaningful in this context. Moreover, oversimplification of case references would necessarily tend to be misleading to Members of Congress, private attorneys, Government officials, students, and others who will utilize the contents of this report. For this reason, the committee has included in the hearing record a comprehensive analysis, summary, major holdings, and important court dicta on more than 30 of the leading cases decided thus far under the act. These objective studies were prepared by researchers in the American Law Division of the Congressional Research Service of the Library of Congress.²⁰⁸ The general summary of court decisions that follows is taken from these studies.

Within this caveat, it is accurate to state in a summary fashion, that the courts have been generally reluctant to order the disclosure of Government information falling within exemption (b)(1) of the act—information “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy”—and exemption (b)(7)—“investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.”

On the other hand, the courts have generally ruled against the Government's contention that “trade secrets and commercial or financial information obtained from a person and privileged or confidential” should be withheld from the public under exception (b)(4) of the act. In a majority of the cases thus far decided, the courts have also rejected Government arguments that “interagency 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” should be withheld from public disclosure under exemption (b)(5).

There have been too few court decisions to indicate a clear pattern on other sections of the FOI Act, including several of the other exemptions permitted in subsection (b). A number of other valid observations may be made, however, on the basis of the Library of Congress studies:

- (1) the courts are taking seriously the statutory grant of authority to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld;
- (2) the courts are following the statutory directive to put the burden of proof that withholding of requested information is necessary on the shoulders of the Government agency that withholds public records;

²⁰⁸ *Ibid.*, pp. 1344-1367.

- (3) while the courts do not always rule in favor of the person seeking access to public records, they have exercised a judgment that used to be exercised solely by the Federal bureaucracy, often having a personal or political stake in keeping it secret;
- (4) the courts have generally ruled that on the question of an "identifiable record" requested by the public under the act, the Government agency may not use the identification requirement as an excuse for withholding because the means to identify documents are solely within the control of the agency holding the requested record;
- (5) the courts have rejected Government arguments that the particular information being sought could be ferreted out by diligent search outside the Government;
- (6) the courts have also ruled against Government claims that all of a public record could be withheld if only part of the document is exempt from disclosure under the Act;
- (7) the courts have likewise rejected arguments that a Government unit is not an "agency" covered by the law, even though it has substantial independent authority to exercise specific functions; and
- (8) the courts have a spotty record with regard to the provision of the Act that directs "precedence on the docket" and expeditious handling of FOI Act cases. This particular observation is dealt with later in this section of the report in detail.

The analysis of litigation under the FOI Act does not take into account the many thousands of Government documents, records, and other information which have been made available to the public upon request without the necessity of resorting to relief in the courts. Nor does such analysis clearly reflect the results of the administrative actions taken upon requests for information by Government agencies.

Of the 2,195 denials of information reported in detail to the subcommittee by 29 major departments and agencies, only 296 were appealed administratively within the agency by the requestor. Of this number, 196 original denials were upheld by appeal to higher authority, while 37 denials were reversed; an additional 42 original denials were reversed in part through appeal. But in only 99 cases where the requestor was finally denied information by an agency was court action initiated. In only 23 of these 99 cases was the agency's refusal to furnish the information requested sustained by the courts. The agency's refusal was reversed in whole or in part by the courts in 32 of the cases.²⁰⁹

Thus, while there have been too few landmark cases by the courts to accurately interpret many sections of the FOI Act during the 5 years since it became effective, the record shows that by and large the courts are effectively exercising their responsibility to judge the Govern-

²⁰⁹ Hearings, pt. 4, pp. 1338-1343. The total of 99 cases used here is substantially less than the 200 FOI cases mentioned earlier because they represent the experience of only the 29 largest Federal agencies; moreover, many suits are dropped before being acted upon by the court as information requested is often made available.

ment's stewardship of the people's right to know and the courts' judgment has usually been against unjustifiable Government secrecy.

The High Cost of Obtaining Relief

Many private attorneys and public interest organizations who testified before the subcommittee stressed the high cost of litigation under the FOI Act. This fact is also reflected in the statistical analysis of agency denials based on the subcommittee's questionnaire, which shows that of the 2,195 denials of information cited above, 640 were requests for government information or records by corporations and private law firms—about 30 percent of the total, while only 90 represented denied requests from the media; 85 from public interest groups; 41 from researchers; and 13 from labor unions. Some 547 were lumped as "other," which included other categories of miscellaneous organizations and the individual citizens.²¹⁰ A review of the cases listed in the Library of Congress study mentioned above will confirm the large number of them that involve corporations or law firms representing citizen complainants.

Few individuals can afford the expense of litigating a suit under the Freedom of Information Act, even though the agency's decision to withhold information may be clearly unlawful. Mr. Reuben B. Robertson, III, an attorney with the Center for the Study of Responsive Law pointed out during the hearings:²¹¹

The filing of any suit, of course, entails obtaining legal counsel, it involves the expenses of legal costs and fees, and a great deal of time and delay. Most people, I think, when they are confronted with this kind of an approach do tend to go away. Often we have found that just the filing of a suit is enough to get the Government to release the information. * * *

Harrison Wellford stated that:²¹²

* * * One problem is that the act expects of public officials an obedience to the unenforceable. If a public officer ignores the act, the citizen must engage the agency in court, the only recourse afforded by the act. Those who can afford legal challenge are those special interests who need the FOIA least of all. Examination of court records establish this point. In the first 2 years of FOIA, 40 cases were brought under the act. Thirty-seven of these involved corporations or private parties seeking information for some private claim or benefit. Only three cases involved a demand by the public at large for information. Most surprising of all, no member of the media, which should be the prime beneficiary of the FOIA, had initiated a single court action under the act. In practice, therefore, the attitudes of agency personnel determined whether FOIA was to be a pathway or roadblock for citizen access.

²¹⁰ Ibid.

²¹¹ Ibid., p. 1252; see pp. 55 and 56 of this report for a discussion of remedies.

²¹² Ibid., p. 1257. A unique approach to the problem of high costs in FOI suits involving low-income citizens is a class action suit by five low-income homeowners representing the interests of over 30,000 such persons in Philadelphia. The suit was filed by an attorney with the Community Legal Services, Mr. George D. Gould, who testified before the subcommittee. See hearings, pt. 5, pp. 1402-1403.

It has been pointed out that the costs of the Government in defending suits against the public, costing hundreds of thousands of taxpayers' dollars, are provided through agency budgets. Of course, the tremendous manpower and resources of the Justice Department can be brought into play against any plaintiff bringing suit under the FOI Act. These court costs and attorney's fees of the Government are, in effect, also being borne by the individual citizen-plaintiff through his taxes that go to pay for the cost of running the Government, including the salary of his adversary in court.

As a deterrent to the action of a governmental official who abuses his authority, either by a willful misinterpretation of the FOI Act or by some other action to deny information to an individual, it was suggested in one colloquy during the hearings that such Government official be subject to a fine or administrative reprimand. The witness, Mr. William Dobrovir, a Washington attorney replied: ²¹³

Well, I do not think that a fine would be appropriate, but certainly an administrative reprimand or something that would go in the official's file, assuming it is a civil service person, something that would go in his file that would show that he made this decision, and that the decision was wrong, or was made, and if the court ruled, you know, the decision was made, in bad faith—but ordinarily courts do not do that.

Delay in Filing Responsive Pleadings

A major complaint voiced by a number of witnesses who have had extensive experience in Freedom of Information Act litigation is the delay in responsive pleadings by the Government. Under the Federal Rules of Civil Procedure, the Government is accorded 60 days in which to answer the complaint and each additional motion. Private litigants, on the other hand, must respond within 20 days in each such case. This has led to interminable delays in the adjudication of suits under the FOI Act, since the Government often makes full use of the time period accorded to them for response, and in some cases exceeds the 60-day limitation. Information sought by plaintiffs from Government is likely to be a perishable commodity, and in many cases these procedural delays by Government attorneys—whether or not made in good faith—may result in substantive damage to the plaintiff's case. In some instances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy.

Typical of the comments by witnesses are these statements:

* * * The Government should, upon complaint in court, be given the same 20-day period in which to reply as is accorded to private parties in a case in Federal court, and not the 60 days normally given to the Government. And the Freedom of Information cases, in fact, should be expedited in hearing, which they currently are not.²¹⁴

* * * If I sue a citizen in the Federal district court, they have 20 days in which to respond; yet if I sue the Federal Government under this (FOI) act, even though Congress intended

²¹³ Hearings, pt. 5, p. 1427.

²¹⁴ Bernard Fensterwald, Jr., Washington attorney, *ibid.*, p. 1377.

that there be an immediate action, there are 60 days in which the Government can respond. But I think certainly there ought to be a shortening of that time through either the rules of Federal procedure or, more specifically, through congressional action.²¹⁵

* * * * *

A colloquy between Representative Erlenborn and these two witnesses on this problem of Government delay in filing responses produced a positive approach:²¹⁶

Mr. ERLBORN. As a last observation, I would agree with many of the suggestions that have been made here today as to speeding up the process. It seems to me that any action bogs down with 60 days for filing of an answer; and no final decision for a good deal of time after that makes the information in many cases useless, and probably inhibits the filing of suits. Perhaps either the establishment of some central office for making final decisions at the executive level, or putting the burden on the head of the agency, rather than having it dispersed in various places within the agency, might also be helpful, with some set period of time for appealing, say, from the decision of some bureau chief to the head of the agency, the Cabinet officer or the chairman of the independent regulatory agency. This would centralize at least within that agency decisionmaking, and you would have some coherent policy of that agency.

Mr. FENSTERWALD. It is centralized in the Justice Department now. I do not know how successful it is, but they have requested all departments and agencies to clear with them any final denial before it goes forward.

Mr. ERLBORN. What about a formal written statement from the head of the agency? For example, if you wanted information from Defense, Mr. Laird himself would have to make the ultimate decision?

Mr. KASS. With a time limit on it?

Mr. ERLBORN. Yes; with a time limit on it. Would that be helpful?

Mr. KASS. Very much so.

Mr. ERLBORN. It is better to have him do it, or some person within the Defense Establishment at a lower level?

Mr. KASS. Congressman, if I could give you some of my own background on this quickly, having participated to some extent in the drafting of this, there was no specific procedure in the Freedom of Information Act itself requiring these exhaustive administrative remedies. When the Justice Department prepared their memorandum and discussed it with the committee, and the committee staff, trying to incorporate some form of exhaustion of administrative remedies at the top of the agency, there was no objection because what was pointed out to us by Frank Wozencraft and others who have been here before, the main reason for that was to let somebody in the very top, in a political and substantive position, make a final determination.

²¹⁵ Benny L. Kass, Washington attorney, *ibid.*, p. 1380.

²¹⁶ *Ibid.*, pp. 1414-1415.

This is the problem, except in the Justice Department if you write the Attorney General, he will not answer you because he has to make the final response. You have to write him again, two or three more times, before you ever get a response.

Mr. ERLBORN. Well, I certainly would hope that one of the things that we could consider and do would be to put some short time limit in the act.

A statistical analysis of 33 FOI Act suits filed in the U.S. District Court for the District of Columbia shows that it took an average of 68 days for the Government to file a responsive pleading and an average of 167 days before the FOI Act was decided by the court.²¹⁷ This record hardly meets the criteria spelled out in subsection (a)(3) of the act that, except for cases the court deems of greater importance, FOI Act cases shall have "precedence on the docket," shall be assigned for hearing and trial "at the earliest practicable date," and shall be "expedited in every way."

Since the administrative remedies had been fully or partially exhausted in each of these 33 cases, the Government attorneys were fully aware of the subjects of the information request at issue even before the complaint was filed by the plaintiff. Thus, in such FOI cases it is difficult, if not impossible, to defend the rationale for extending to the Government the 60-day period for response—three times that accorded to private parties—because of its size and complexity of administrative behavior. The affected Federal agency would have already reviewed the nature of the information requested, the bases it might have to rely upon under the exemptions permitted under the FOI Act, and quite possibly would have already consulted with the Justice Department's FOI Committee as to the legal precedents that might apply. Therefore, the need for 60 days to prepare the necessary response to defend the suit for the Government can only work to the disadvantage of the plaintiff.

The Dobrovir analysis shows that in 19 of the 33 cases the Government took longer than 60 days to file a responsive pleading. One case took 140 days, another 137 days, another 135 days, another 105 days, another 104 days, and still another took 103 days. The fact that the average of all 33 cases was higher than the 60-day period provided for in the Federal Rules of Civil Procedure is a danger signal that prompts remedial action, since it strongly suggests that the procedural foot-dragging by Government attorneys in FOI Act suits may be negating the congressional intent and basic purpose of the act.

Other Problems Involving Court Interpretations

Other related problems involving court interpretations of parts of the FOI Act deal with the phrase in subsection (a)(3) "shall make the records promptly available to any person." As has been stated earlier, Congress eliminated the "need to know" requirement contained in the old section 3 of the Administrative Procedure Act when it enacted the FOI Act. Yet some courts continue to inquire into a person's "need to know" during hearings on FOI cases. It was not the intent of Congress

²¹⁷ The analysis was prepared by attorney William Dobrovir; see hearings, pt. 5, p. 1398, for table showing dates and case identification.

that any person should have to have a stated reason for wishing to see any particular Government document or record, nor should that motivation be a matter for the courts to concern themselves with during litigation under the act.

Finally, some courts have decided for themselves that it is discretionary with them whether they order the production of information which is held not to be subject to the exemptions permitted by subsection (b) of the FOI Act. In effect, they are applying theories of equity to balance the need of the individual citizen to the information requested under the act and the need of the Government to withhold such information. Information requested under the act by the plaintiff should be considered only with respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exemptions claimed. If the court finds that the Government has not met such test, the information should be ordered to be made promptly available to the plaintiff solely on the substantive merits of the case.

Summary

By and large, the Federal courts have taken adequate notice of the importance of the Freedom of Information Act as a milestone enactment by Congress of the fundamental right of all Americans to be informed about the business of their Government. Perhaps the most eloquent statements by a court in this regard were contained in the *Soucie v. David* case:²¹⁸

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate Federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

²¹⁸ *Soucie v. David*, 448 F. 2d 1067, 2 ERC 1826 (D.C. Cir. 1971).

X. ADMINISTRATIVE AND LEGISLATIVE OBJECTIVES TO STRENGTHEN AND IMPROVE THE OPERATION OF THE FREEDOM OF INFORMATION ACT

Opponents of the legislation that became the Freedom of Information Act issued dire warnings to the effect that if the bill were enacted "the administrative processes of the Federal Government would grind to a halt," that "the President would spend all his time responding to requests for information from high school students," that FOI cases "would overburden the Federal courts." They implied that the pillars of the Republic would collapse. Extreme arguments on specific legislative proposals usually are far-fetched exaggerations that cannot stand the tests of time or rational analyses. Such is the case with respect to the exaggerated claims about the effect of the FOI Act on the processes of Government.

Witnesses who expressed an opinion about the way in which the FOI Act has operated during these past 5 years were overwhelmingly positive in their comments, varying only in the degree of salutary effect the act has had on the Federal bureaucracy. Typical of the comments made by the subcommittee witnesses are the following:

Mr. LEWIS. * * * So, from the standpoint of making information freely available, the freedom of information law, I felt, was a real milestone in the long history of sensitive relationships centered on the peoples' "right to know" versus the need Government has felt to withhold information for national security or other reasons.

For a government information officer, a strategic part of whose job was to keep information moving, the new law had distinct advantages in its policy direction for disclosure, and in the provisions that put the burden of proof for withholding on the Government and which gave citizens the right to seek legal action against withholding. Particularly in the early phases of the law's application, these measures brought about a more positive attitude toward disclosure among administrative and other officials, and they strengthened the hands of those responsible for release of information. * * * 219

Mr. WOZENCRAFT. * * * Now, after almost 5 years under the act, those who expected it to strip away the veils of Government secrecy feel cheated; and those who predicted disaster grumblingly insist that although the pillars of the Republic have not crumbled the act has been an expensive and troublesome nuisance and they wish it would go away.

²¹⁹ Hearings, pt. 4, p. 1016.

Since I shared neither set of expectations, I share neither view today. I have been disappointed that the act has not yet had more impact, but I am far from disheartened. The drafting of the act leaves much to be desired, and its implementation far more. Nevertheless, viewed objectively and disregarding excessive fears or expectations, the act remains a watershed event in the history of Government, unprecedented, as far as I know, by any other nation.* * * 220

Mr. ERICKSON. * * * In conclusion, we at Justice are working with you in Congress as participants, within our own branch of Government, in the task of trying to insure the success of the Freedom of Information Act. The act is an epochal step in democratic government. Our experience indicates that that act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations. You may be assured the Department of Justice will continue to give its best efforts toward a fair, reasonable and effective administration of the act * * * 221

Mr. HUNTER. * * * In the spring issue of the Texas Law Review, in an article entitled "The Games Bureaucrats Play; Hide and Seek Under the Freedom of Information Act," Mrs. Joan Katz of Mr. Ralph Nader's Center for Responsive Law says:

[The Act] has not fulfilled its advocates most modest aspirations * * *. The ambiguities and deficiencies of [the statute] will be remedied, if at all, only by the passage of new and improved legislation.

These are harsh judgments. After 4½ years as one of the act's principal administrators in HEW, my opinion is that the truth, as it usually does, lies somewhere in between. I believe that the law's general effect has been salutary and has worked in the public interest. I believe, however, that there are faults in the act and in its administration in the executive branch which are indeed grievous and need correction. These hearings are most welcome, for there has been world enough and time to make a proper assessment of the act * * * 222

Mr. REEDY. * * * I think that you gentlemen performed a very valuable service when you passed the Freedom of Information Act. I am not quite certain that you are going to get a large number of cases under it, or that you are going to get a lot of information out of it. But frequently the value of legislation consists in the fact that it exists and that every government official knows that the press has an ultimate weapon against him if he becomes a little bit too tight, too

²²⁰ Hearings, pt. 4, p. 1069.

²²¹ Ibid., p. 1184.

²²² Ibid., p. 1019.

tough in withholding information. This means he will be considerably more candid.

But, you would still have to get back to the other question of what good is the weapon, if information can be placed into areas that cannot be reached by the normal processes. I am not a lawyer and I do not come here with specific recommendations because I think this is a legal question. But, I believe if I were in your position, gentlemen, this is the principal thing I would look at. What can be done about these huge, sprawling bureaucracies, these new agencies that are being set up within the White House itself? * * * 223

James C. Hagerty, former press secretary to President Eisenhower, observed that Government information procedures "cannot remain static, for the simple reason that Government and public attitudes do not remain static." He urged a course of action precisely like that followed by the committee in studying, reviewing, and in this report, suggesting changes and modifications to the FOI Act to meet the changing conditions and times. He told the subcommittee on the opening day of these hearings, as the leadoff witness: ²²⁴

At the outset, I think it is pertinent to the discussion to point out that the proper dissemination of Government information to the news media and to the public is by no means a new problem. It has been a fairly constant issue, in varying degrees, between Government, the news media and the citizens of our Nation almost since our founding days. From time to time in our country's history it has resulted in public distrust of the credibility of Government. It has also raised questions as to the responsibility and integrity of a free press. It has never been definitively solved and I am not sure it ever can be.

But hearings like this, I do believe, can be helpful and informative. Personally, I have always believed that Government information procedures, like Government itself, should be studied and reviewed periodically so that, if necessary, changes and modifications in policies and practices can be made to try to meet changing conditions and times. It cannot remain static, for the simple reason that Government and public attitudes do not remain static.

I think it really comes down in principle and in practice to a matter of understanding and balance between the Government and its citizens. Admittedly that understanding and balance is difficult of constant attainment and sometimes it does get out of kilter, either unintentionally or deliberately. Yet, as the 1966 report from the House Committee on Government Operations recommending passage of the Freedom of Information Act declared at that time, the goal should be the achievement of a workable balance between the right of the people to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.

²²³ *Ibid.*, p. 1014.

²²⁴ *Ibid.*, pp. 1009-1010.

And, the report added, "the right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government."

Now, I don't think that any reasonable private citizen nor any individual in Government service can deny such a goal as a necessary objective. But its practical achievement, it seems to me, lies in the key words "workable balance" and "without indiscriminate secrecy."

For no one can also fail to realize—as indeed the Freedom of Information Act does in its nine exemptions—that Government must conduct part of its operations privately if it is successfully to formulate its policies and reach its final decision in both foreign and domestic affairs. But once those final decisions are made, again with the exception of the exemptions voted in the act, they should become a matter of public record and knowledge without question, without bureaucratic delay or subterfuge.

It is within this context and the broad philosophical conviction that underlies the Freedom of Information Act that the committee makes the following administrative and legislative recommendations based upon the indepth investigations, studies, analyses, hearings, and day-to-day oversight of the administration of the act conducted by the Foreign Operations and Government Information Subcommittee.

Administrative Recommendations

The committee recommends that the following administrative actions be taken by the appropriate Federal departments and agencies to improve the administration, operation, and obtain full compliance with the provisions of the FOI Act. (For findings and conclusions, see ch. II of this report, p. 6.)

The Department of Justice should

- initiate a review of all agency regulations to determine the degree of compatibility with the Attorney General's memorandum and subsequent court decisions. Wherever deficiencies or inadequacies are found, such agencies should be advised to promulgate necessary amendments to their regulations to bring them into conformity with the spirit, as well as the letter, of the FOI Act.
- establish a regular procedure by which the Office of Legal Counsel will issue advisory opinions on the act to all agency general counsels and public information officers which opinions should also call attention to significant court decisions in FOI Act cases.
- prepare a pamphlet in simple, concise language for the general public, to be published by the Government Printing Office, setting forth the basic principles of the Freedom of Information Act, the procedures by which a citizen may obtain public records from a Federal agency, his right to appeal a denial of his request, including court remedies, and other similar advice concerning the citizen's rights under the act.

Federal departments and agencies should

- improve their system for keeping records of requests for information under the FOI Act, thus making possible a more adequate evaluation of the agency's performance in complying with the provisions of the act. Such action should include top-level administration supervision and oversight.
- each agency head should make a positive statement affirming his personal commitment to the principles embodied in the FOI Act.
- centralize within the department or agency and provide policy direction to field offices to properly implement administrative procedures affecting the FOI Act so as to achieve better coordination among all subagencies or units within the parent entity.
- require that letters refusing access to public records notify the requestor of the right of administrative appeal where it exists and cite the specific subsection or subsections of the FOI Act which are the basis for the initial refusal.
- assure maximum participation of and consultation with public information personnel in administrative actions under the Freedom of Information Act.
- establish on a uniform basis the lowest reasonable search and reproduction fees for documents made available under the act and include provisions for waiver of fees in hardship cases or when waiver would serve the public interest.
- institute seminars and other training procedures to make sure that all affected employees understand the importance, intent and proper administration of the FOI Act, including the preparation of pamphlets explaining procedures under the act.

Legislative Objectives

The legislative history of the Freedom of Information Act is not clear and simple, nor is the act itself. It contains general phraseology, undefined terms, and loosely drawn provisions that have bothered the courts as well as Government officials seeking to interpret the act. Like most important legislation, the version of the freedom of information bill finally enacted into law after 11 years of effort was a compromise that involved various public interest groups, the House of Representatives, the Senate, and officials of the executive branch. The purpose of the following legislative objectives is to clarify the compromises in the FOI Act that have been the source of confusion and misinterpretation. They are also intended to reflect some of the leading court decisions that interpreted vague phraseology. These objectives are based on the constructive suggestions presented to the subcommittee by leading legal authorities on the act.

The legislative objectives are, for the most part, in general, non-legislative language. Specific statutory language to carry out the objectives of this report will be drafted for introduction and consideration by the committee. All but three of the legislative objectives

are proposed amendments to the FOI Act itself; the exceptions are within the jurisdiction of other legislative committees of the Congress and, of course, are advisory only.

The committee recommends consideration of the following objectives for incorporation into the Freedom of Information Act to strengthen, clarify, and improve its operations:

Section 552(a)(3)

1. The requirement that a request for "identifiable records" should be reworded to require a "reasonable" identification of the record, consistent with court determinations that the requestor would not have access to detailed and complicated identification details.

2. A new subsection should be added to provide that an agency shall grant or deny access to information within 10 working days of receipt of the request. An administrative appeal against the initial refusal also should be required, with a limit of 20 working days for the agency to act after receipt of such appeals. This subsection also should provide that the failure of the agency to meet either the 10- or 20-day time limit shall constitute exhaustion of administrative remedies for purposes of litigation.

3. The Government should be required to file responsive pleadings in freedom of information cases within 20 days. Under the present Federal Rules of Civil Procedure the Government is given 60 days to file pleadings in civil cases, while private litigants are accorded only 20 days.

4. Court costs and reasonable attorneys' fees should be awarded, in the discretion of the court, to the complainant if the court issues an injunction or order against the Government agency on a finding that the information sought was improperly withheld from the complainant.

5. All Federal agencies should include in their annual report to Congress or transmit to this committee by letter each year a report detailing their administration of the Freedom of Information Act. This report should include, at the very least, data on the number of requests for records under the act, the number of denials, the number of administrative appeals, the elapsed time in responding to initial requests and the handling of appeals, the number of suits filed within the year, the section relied upon in each denial, and any regulatory changes made during the year.

Section 552(b)

Subsection (b)(2) should be amended to insure that the exemption applies to internal personnel practices as well as internal rules. This amendment also should clarify the fact that only sensitive operating manuals and guidelines, the disclosure of which would significantly impede or nullify a proper agency function, should be exempt from disclosure under this subsection.

Subsection (b)(4) should be amended to clarify the intent of Congress that trade secrets and commercial or financial information can be withheld only if they actually are confidential. A general principle should be considered, providing that this exemption shall not apply to information furnished by any person when the purpose of providing the information is to secure a specific financial benefit or privilege from the Federal Government.

Subsection (b)(6) should be amended by substituting the word "records" for "files", thereby prohibiting the Government agencies from commingling nonexempt and exempt records in a single "file" thus claiming that all the records, including publicly available records, constitute an exempt "file"

Subsection (b)(7) should be amended to substitute "records" for "files" as in subsection (b)(6) and to clarify that only "specific" law enforcement purposes are to come within the scope of this exemption. Subsection (b)(7) should be amended to insure that certain categories of information are not to be considered exempt even if contained within an "investigative" record, such as

- (a) scientific tests, reports and data unless otherwise exempt under the act;
- (b) Government inspection reports relating to health and safety; and
- (c) records or information relied upon in public policy statements, rules or regulations.

This subsection also could be amended to provide that investigatory records or information shall be made available to the public once an investigation has ceased and adjudication, or the reasonable prospect thereof, has ended. It could also be amended to apply its provisions clearly to regulatory as well as judicial enforcement proceedings and to make clear that once an investigatory record becomes public information informants' names or identities or such information which would necessarily lead to the identification of such informant may continue to be withheld, although other information they furnished shall not be withheld unless otherwise exempt.

Recommendations to Other Committees

The committee respectfully recommends that the pertinent legislative committees of the House carefully review the record of the hearings and consider amendments to the statutes listed below to assist in efforts to strengthen and improve the overall capability of the public information machinery of the Federal Government.

(1) Because of the documented need to upgrade the public information capability in our representative system and to provide for a legitimate, efficient, nonpartisan public information system within the executive branch; because of the corresponding need to provide recognized status and emphasis on the role of public information officers as the "bridge" between the Government and its citizens, the committee recommends that the appropriate committees of the Congress consider legislation that would repeal section 3107 of title 5, United States Code, a 1913 statute that prohibits the use of appropriated funds "to pay a publicity expert" and which has acted to place dedicated public information personnel within the civil service in a status of illegitimacy. The committee further recommends that the Committee on Appropriations consider the elimination or modification of language included in a number of annual appropriation bills that limits expenditures for "publicity" or similar purposes.

(See hearings, pt. 5, p. 1661; pt. 6, pp. 2155-2156; p. 2159 and pp. 2170-2176; also pp. 48-52 of this report.)

(2) The committee recommends that the Committee on Ways and Means review that portion of the hearings in which the conflict of section 1106 of the Social Security Act (42 U.S.C. 1306) with the Freedom of Information Act is discussed and consider legislation that would clarify section 1106 and the interpretation presently being given to that section by officials of the Social Security Administration, appears to extend it far beyond its original meaning and intent to protect the privacy of those covered under the Social Security Act. (See hearings, pt. 5, pp. 1681-1683.)

(3) The Committee on the Judiciary should consider amending title 18, section 1905, United States Code, since a recent decision of the United States District Court for the District of Columbia has cast doubt on the extent to which section 1905 is itself a statute which specifically exempts records from disclosure (*Schapiro v. Securities and Exchange Commission*, 339 F. Supp. 467 (February, 1972)). This section imposes criminal sanctions on government employees who divulge certain categories of trade and financial information in the course of their official duties. It has often been cited by Federal agencies as a statute prohibiting the release of information. We feel that the suggested amendment should clearly state the purpose of title 18, section 1905, so as to dispel the belief that this section authorizes the withholding of information otherwise available under the FOI Act. (See hearings, pt. 5, pp. 1643-1645, and p. 14 of this report.)

ADDITIONAL VIEWS OF HON. JOHN E. MOSS

I concur with the findings, conclusions and recommendations in this report. The importance of freedom of information is greater than ever today in light of the steady erosion of our Constitution by the Executive branch under all of the wartime administrations of both major political parties. This ominous trend must be reversed.

There are fundamental things which separate our representative system of government from a dictatorship. They include :

- (1) free elections ;
- (2) freedom of information ; and
- (3) faith in the good sense of the people.

The first means nothing without the latter two elements. Thus, it was not by accident that the framers of the Constitution put freedom of expression as the First Amendment to the Bill of Rights. Nations may have all the free elections they want but unless their citizens are truly informed, those elections are largely meaningless. No citizen can adequately judge the performance of his leaders unless he has sufficient facts on which to make an informed judgment.

In dictatorships, the few who rule the many are removed only by death, some form of coup, or revolution. In democracies, the few who govern must account to the electorate—whether it be good news or bad news—and then regularly submit themselves to the judgment of the people at the polls. That judgment determines whether governmental power is to be continued or taken away. Of course, there is no guarantee that the people will make the right decision. There is only the hope they will do so. Dictators have only contempt and distrust for the judgment of the people—in their words, the “many”. For this reason, they control and manipulate information to serve the ends of the ruling few, making certain the people do not become restless enough to revolt. If the few are adroit in their maneuverings—propaganda, secrecy, distortions, omissions and outright lies—they can hold the reins of government for years, even decades and, in some cases, generations. A democracy without a free and truthful flow of information from government to its people is nothing more than an elected dictatorship. We can never permit this to happen in America.

JOHN E. MOSS.

ADDITIONAL VIEWS OF HON. BELLA S. ABZUG

This report performs a needed and valuable service for the American people.

Congress enacted the Freedom of Information Act in the firm belief that a democracy works best when the people have maximum information about their government's activities.

The Freedom of Information Act established the policy that disclosure should be the general rule, rather than the exception—that all persons should have equal rights of access to government information, rather than only a favored few—and that when a citizen requests information from a government agency, the burden of proof should be on the government to justify withholding it, rather than on the citizen to justify its release. The Act gave the citizen who is improperly denied access to government information the right to challenge that denial in court.

Yet the Committee's in-depth examination, which included 41 days of public hearings, shows that government agencies are widely evading these hopes and goals of Congress and the Nation. The report cites several ways in which this evasion occurs. Among these are: excessive delays in responding to requests for information, excessive fees charged for copying documents, deliberate denials of information in the hope that the high cost of litigating every case would frustrate requests for information, and widespread reluctance of government officials to let the people know the truth about what goes on in government.

I commend the Committee for this excellent report.

However, the Committee has failed to note one of the major aspects of the government's rather poor record in achieving the goals of the Freedom of Information Act, namely, the makeup and experience of the people who head and staff the public information offices of Federal Government agencies.

There are, according to the Office of Management and Budget, more than 6,000 full-time Federal Government employees involved in public relations and information work. In addition, many thousands of additional Federal officials and employees spend much of their time making speeches, attending meetings, writing articles, and in other ways explaining the Government's work and program to the public. Fairly extensive studies about their composition and experience have already been conducted by this Committee's Foreign Operations and Government Information Subcommittee, and by the Washington office of the Freedom of Information Center of the University of Missouri.

One of the facts which these studies have disclosed is that Government information offices are almost totally dominated by men. Of the approximately 400 top-level persons working in the public relations operations of the executive department and independent agencies, 97

percent are men and **only 3 percent** are women. This is, indeed, a startling disparity, particularly when we consider that women compose 33.2 percent of the Federal Government's full-time, white-collar employees and 3.9 percent of all employees working with Grades GS-13 and above; that more than 6 percent of the Government's employees working as general attorneys are women; and that in 1970 women in grades GS-13 and above increased by 6.6 percent compared to 3.6 percent for men (Civil Service Commission, "Study of Employment of Women in the Federal Government, 1970"). The subcommittee also advised me that only one woman now has the title of "director" of an agency's information activities, and that the highest level female information officer is an "assistant" to the director of communications for the executive branch.

During the past two years, I have been informed of many instances, some involving information offices, in which qualified women have been discriminated against by Federal agencies in hiring or promotion. In one case, a highly qualified woman applicant for a GS-12 job in an agency's information office was told by its director that "we do not want a woman writer." In another case, cited in hearings before other House committees, an outstanding senior public information employee was denied promotion to the position of director of the information office when the position became vacant. (Hearings on Sec. 805, H.R. 16098, before House Committee on Education and Labor, 91st Cong., June, p. 466; Hearings on H.J. Res. 35, before House Judiciary Committee, 92nd Cong., March-April, 1971, pp. 446-447.)

These data, though they are not comprehensive, indicate that sex discrimination is widely prevalent in Federal Government information offices, and certainly more so than in most other Federal offices involving white-collar professional jobs.

Government information offices have a major role in apprising the people about Government programs. Sex discrimination in such offices inevitably results in distorting, consciously or unconsciously, the type, scope and manner in which Government information is presented to the public. I have noted many times that Government publications or press releases present information involving, for example, Government studies on income, poverty, employment discrimination, education, and other areas of life affected by Government. In many cases, publications and press releases either make little or no reference to women, or include no data by sex showing the disproportionate gaps, losses, or other inadequacies which are sex-based. Such discriminatory information work not only reflects the vast amount of sex-based discrimination which still exists in government employment, but also is partly responsible for continuing the attitudes and myths which cause such discrimination to exist.

I also understand that the Subcommittee's preliminary studies have revealed that a growing percentage of the Government's information employees are being appointed from among persons whose primary background is in public relations and advertising, rather than in journalism, news reporting and editing, or substantive areas such as science, law, education, etc. It is disturbing to see this trend toward Madison Avenue merchandising of Government information.

I hope, and urge, that the Foreign Operations and Government Information Subcommittee will expand its studies, and hold hearings, on the extent to which the Federal Government's information and public relations work is imbued with sex discriminatory and news huckstering methods and practices.

BELLA S. ABZUG,
Member of Congress.

CHAPTER II
**SPECIAL ANALYSIS OF OPERATIONS OF THE FREEDOM
OF INFORMATION ACT (PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE,
LIBRARY OF CONGRESS) ; CONGRES-
SIONAL RECORD, MARCH 23, 1972**

[From the Congressional Record, Mar. 23, 1972, 118 Cong. Rec. 9940-9953]

SPECIAL ANALYSIS OF OPERATIONS OF THE FREEDOM OF INFORMATION ACT,
PREPARED BY THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

(Extension of Remarks by Hon. William S. Moorhead)

Mr. MOORHEAD. Mr. Speaker, the Foreign Operations and Government Information Subcommittee is presently holding a series of hearings on the administration and effectiveness of the Freedom of Information Act (5 U.S.C. 552) as part of its overall investigation of U.S. Government Information Policies and Practices.

In preparation for these hearings, the subcommittee queried executive departments and agencies last year on their experience under the act. Responses to our questionnaire have been tabulated and analyzed by Dr. Harold Relyea and Sharon S. Gressle, analysts in American National Government and public administration in the Government and General Research Division of the Congressional Research Service, Library of Congress. The subcommittee is grateful for the special research assistance provided by CRS in assisting in this and other projects connected with our hearings. The results of the special analysis follow my remarks.

Mr. Speaker, in 1966 the Congress took the first step toward guaranteeing the people's right to know what their government is planning and doing. The Freedom of Information Act was by no means a failure, nor was it an all-out success, but its shortcomings are due more to resistance on the part of the huge bureaucracy than to compromises which are inherent in the legislative process which created the law.

This is apparent from the analysis of the first 4 years of operation under the Freedom of Information Act. For every 17 times citizens used the law to try to get public records, they were denied the information one time.

On the surface, this looks like the Government is leaning over backward—the rate of 17 to 1—to honor the Freedom of Information Act. But the executive agencies granted the public access to public information only because they were pushed over backward—only because the Congress passed a law to require the executive branch to honor the people's right to know. This is obvious when the figures show that, in spite of the law, nearly 2,200 requests for access to public records were denied, completely or in part.

Many Government agencies seem to be doing everything possible to ignore the Freedom of Information Act. Some agencies—and the Air Force is the worst offender—try to make their information operations look good by claiming that thousands of requests for routine Government documents are actually demands for access under the Freedom of Information Act. Other agencies—for example, the Civil Service Commission—keep no records and apparently have no interest in implementing the law.

Mr. Speaker, another indication of the attitude that government business is none of the public's business is the long time it takes an agency to act on a request for information. The major Government agencies took an average of 33 days to even respond to a request for public records under the Freedom of Information Act. And when the initial decision to withhold information was appealed by someone seeking the facts, the agencies took an average of 50 days to respond.

I am not surprised by the fact that corporations and lawyers representing private interests appear to be making the most use of the Freedom of Information Act. Those who can afford the expensive and time-consuming process of fighting for their right to know, will do so. I hope that the Congress can find a means to help the average citizen win his battles against the information bureaucracy.

I am surprised, however, that the reporters, editors, and broadcasters whose job it is to inform the American people have made so little use of the Freedom of Information Act. They were the major supporters of those in Congress who created the law. The free and responsible press is the keystone of an informed, democratic society and it should be the major user of the law designed to guarantee the people's right to know.

Mr. Speaker, the full text of the Freedom of Information analysis as prepared by the Congressional Research Service, Library of Congress.
[The information referred to follows:]

THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

On July Fourth, 1966, the Federal Government's first Freedom of Information Act was signed into law. It became effective one year later, giving the departments and agencies of the Executive branch time to adopt rules explaining the procedures to be followed by any person requesting access to public records.

The Freedom of Information Act became section 552 of title 5 of the United States Code. It was the result of 11 years of investigation by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations (formerly the Special Subcommittee on Government Information). It was also based on studies and investigation during most of the 11 years by Subcommittees of the Senate Judiciary Committee.

The new act repealed the so-called Public Information Section of the Administrative Procedure Act (Section 3) which had permitted Executive branch agencies to withhold government records "for good cause found" and "in the public interest." If no good cause could be found for withholding information, Section 3 permitted the government to release information selectively to persons "legitimately and properly concerned."

To explain the proper procedures for granting access to public records under the new Freedom of Information Act, the Department of Justice prepared a 47 page memorandum for all agencies of the Executive branch. The Attorney General's Memorandum issued in June, 1967 said that the key concerns of the law are—

- that disclosure be the general rule, not the exception;
- that all individuals have equal rights of access;
- that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
- that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
- that there be a change in Government policy and attitude.

After the Freedom of Information Act had been in operation four years, the Foreign Operations and Government Information Subcommittee began a series of studies and investigations to find out whether the new law was living up to the hopes of those who had worked for its creation and enactment for 11 years—and whether the Executive branch was administering the law in the spirit in which it was enacted, a spirit highlighted by the Attorney General's comments on the key concerns for the people's right to know the facts of government. The Subcommittee was mainly interested in the following sections of the Freedom of Information Law (5 U.S.C. 552) which spell out the right of access to public records.

"(3) Except with respect to the records made available under paragraphs (a)(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, 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 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.

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

- "(1) specifically required by 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."

One step in the study and investigation was a series of questionnaires sent to all agencies of the Executive branch of the Federal Government by Congressman William S. Moorhead, chairman of the Foreign Operations and Government Information Subcommittee. The Freedom of Information Act, by its terms, does not apply to the Legislative or Judicial branches. The basic questionnaire covered the first four years of the Act's operations, from July 4, 1967 through July 4, 1971. The following are the questions:

1. How many formal requests for access to records under 5 U.S.C. 552 has your agency received between July 4, 1967, and July 4, 1971?

- a. In how many cases was access granted?
- b. In how many cases was access refused?
- c. In how many cases was access granted in part and refused in part?
- d. How many cases are pending?

2. For each of the cases in which access was *refused*, please provide the following information:

- a. The name and address of the individual or organization presenting the request for access and the date upon which it was presented;
- b. The date upon which access was initially refused;
- c. The section of 5 U.S.C. 552(b) (1) through (9) which was the basis for the refusal;
- d. Whether an administrative appeal was filed against the initial refusal and, if so, the date of the appeal;
- e. The date of the agency action upon the appeal and the title of the individual who took the action;
- f. Whether, before the final refusal, the agency consulted the Department of Justice as requested by the Department's memorandum of December 8, 1969, to General Counsels of all agencies.

3. For each of the requests for access to records which has resulted in court action under 5 U.S.C. 552, please provide the following information:

- a. The case citation and the date court action was initiated;
- b. A *brief* description of the agency records requested;
- c. A citation of the section of 5 U.S.C. 552 upon which the agency relied to refuse access;
- d. A *brief* explanation of the current status of the court action.

4. What legend is used by your agency to identify records which are *not* classifiable under Executive Order 10501 but which are not to be made available outside the government?

Please list each term and explain its application.

5. How many officials of your agency are authorized to classify material "Top Secret" under the terms of Executive Order 10501?

Please identify, by name and title, each individual so authorized.

6. How many officials of your agency are authorized to classify material "Secret" under the terms of Executive Order 10501?

7. How many officials of your agency are authorized to classify material "Confidential" under the terms of Executive Order 10501?

Before the questionnaire was sent formally to all departments and agencies of the Executive branch of the Federal Government, it was pre-tested by discussing possible questions with a number of government officials who would have the eventual responsibility of answering the final questionnaire. Included were some who had participated in hearings while the law was being considered by Congress and others who had participated in drafting the Attorney General's Memorandum.

To analyze the questionnaire answers and assist in the research work necessary to help prepare the Foreign Operations and Government Information Subcommittee members for a series of hearings on United States Government information policies and practices, a special task force was set up by the Congressional Research Service of the Library of Congress. It included legal experts from the American Law Division and government experts from the Government and General Research Division, with the activities coordinated by Samuel J. Archibald of the University of Missouri Freedom of Information Center, serving as a consultant to the Congressional Research Service.

The analysis of the questionnaire answers was conducted by Dr. Harold Relyea and Sharon S. Gressle, analysts in American national government and public administration in the Government and General Research Division.

DATA ANALYSIS

Nature of the data

The nature of the data obtained by means of the Subcommittee's questionnaire must be qualified as to its validity. While the aggregate data provided by the Executive agencies on the number of information requests and their action upon the requests suffers no quality limitation, the sample of individual-requestor cases listed in answers to the questionnaire was biased. Agencies were asked to identify only those requestors who had been denied, either in whole or in part, the material they had sought. The usual characterization of a valid measurement is one which "measures what it purports to measure" or obtains the information being sought. The identification of those denied information under the provisions of the Freedom of Information Act (5 U.S.C. 552), was a major purpose of the questionnaire. On the level of measurement or accomplishment, the questionnaire and the data obtained are valid. Yet data consisting only of denial cases may have a bias. This bias becomes important when certain sociological generalizations are made within the analysis, such as the proportion of one type of requestor vis-a-vis another or averages of time lapses in acting upon requests. It is not, therefore, valid to generalize from the sample analyzed to the total number of requestors seeking information under the Freedom of Information Act. Those denied requests constitute approximately one percent of the total number of requestors. While this figure is skewed by the large number of requests reported by the Department of the Air Force, the total number of denials reaches only five percent of the total number of requestors when the Air Force figures are removed from the computations.

While the percentage of denials appears to be relatively small, such statistics mask the fact that (minus Department of Air Force totals) for approximately every seventeen requests for information under the provisions of the Freedom of Information Act, one request is denied. And even this consideration ignores the quality of information requested, the public interest which might have been served by granting the request, and the basis upon which the public record was denied. Further, certain agencies have higher ratios of refusal than others—some, as will be indicated, denying more requests than they grant. In brief, such statistics demonstrate problems in the administration of an act which was designed to make disclosure the general rule and not the exception and to promote equal rights of access for all requestors.

Nature of the analysis

The focus of the analysis was chiefly upon agencies of the Federal Government which generally affect the public welfare or which, in the preliminary examination of returned questionnaires, indicated areas of special interest. While the overall survey covered some ninety executive departments and agencies, this analysis considers selected respondents.

Certain statistical findings in this analysis utilized available data rather than a total or randomized sample. Averages of lapsed time for action on initial requests or appeals were occasionally computed on less than the total number of reported cases due to incomplete details on each case. It should, therefore, be noted that certain totals of individual or category items listed in the major analytical chart do not coincide with the appropriate number of reported cases.

Quality of data

Responses to the Subcommittee's questionnaire were generally complete and detailed for most agencies, but in certain cases the agencies seemed to misunderstand the questions or they provided otherwise unusable information. The Depart-

ment of Defense for example, acknowledged incomplete records to answer some questions. The Civil Aeronautics Board supplied aggregate information for fiscal year 1968 only. The Federal Highway Administration and the Federal Railroad Administration reported they kept no records on Freedom of Information Act requests.

In a number of instances details were omitted from agency responses. The number of requests for public records was not provided, for example, by the Department of the Army, the Department of Health, Education, and Welfare, the Coast Guard, the Federal Maritime Administration, and the Civil Service Commission, though those agencies did provide information on individual denials. Often no initial request dates were supplied for individual cases or no dates on appeals were given, thus making the computation of time intervals impossible or limited to a few cases. In many responses the titles and citations of relevant court cases were garbled or missing. The Department of the Army, the Department of the Navy, the Department of State, and the Securities and Exchange Commission failed to cite appropriate sections of the Freedom of Information Act as a basis for refusing information.

Frequently, the responding agencies cited court cases which resulted from their refusals to provide materials but they failed to provide details on the administrative procedure which preceded judicial action. While the Air Force was way out of line in claiming to grant 202,714 requests for information under the Freedom of Information Act and to deny only 118 requests, some other agencies also appeared to inflate the figures on requests for information. The Agriculture Department claimed it granted 10,769 requests for information while denying only 137 requests; the Department of Transportation claimed 13,295 grants and 445 denials and the Civil Aeronautics Board claimed that 18,261 requests for information were received and only 33 requests were denied. The grant/denial record of other agencies seemed to be in line with their size and activity.

Those agencies which were out of line might have overstated the number of requests which were granted—counting a request for a routine government publication, for instance, as a demand for public records under the Freedom of Information Act—or the variations in numbers of requests cited may be one more indication that the Freedom of Information Act is held in minimum high regard by the agencies responsible for protecting the people's right to know in a democratic society.

The possibility was considered that agencies might cite many sections of the Freedom of Information Act as authority to refuse requests for information initially, but cite fewer and more defensible sections if challenged in court. The analysis indicates only nine instances where initial citations of authority for refusal differed from citations in court. Nor was the trend within these cases unidirectional; in some instances more sections of the Act were cited at the court stage than at the initial refusal stage.

Computations were made for the average number of days required for each agency to respond to initial requests for information and for the average number of days to respond to appeals of the initial denials. These time spans ranged from an average of 8 days (Small Business Administration) to 69 days (Federal Trade Commission) for responses to initial requests and from 13 days (Department of the Air Force) to 127 days (Department of Labor) for responses to appeals. For those agencies listed in the analytical chart, the average number of days taken to respond to initial requests was 33 (for 27 agencies); the average number of days to respond to appeals was 50 (for 20 agencies). In terms of the average time lapse on initial requests for agencies listed in the analytical chart, 11 agencies exceeded this average; 9 agencies exceeded this average for time on acting on appeals. The Departments of Health, Education, and Welfare, Interior, Justice and the Renegotiation Board exceeded the total average for both stages of the administrative process. Statistically, four agencies seem to be in no hurry to expedite requests for information under the Freedom of Information Act.

Only two agencies reported that they denied more requests than they granted. These are the Department of Justice and the Federal Power Commission, but in the latter case the outcome resulted from a total of only 8 requests. Other agencies indicated high refusal rates in their responses. These refusals are usually not overturned to any general extent when appealed within the agencies or when pressed in court. Of 296 requests which were appealed, 37 were granted and 196 were denied. Those remaining were granted in part, were pending, or results were unknown. Of 99 court cases which were initiated to obtain information denied by the executive agencies, 16 resulted in grants of the material sought and the remaining cases were either denied or appealed to higher courts.

Percent.	(40)	(58)	(2)	(50)	(10)	18	1	1	13	9	8	29
Department of Labor ¹⁹	(5)	33	(5)	28	127	(31)	(6)	2	3	1	13	(4)
Percent.	195	17	9	48	(19)	2	3	2	3	1	13	(4)
Department of State ¹⁹	(87.6)	(6.1)	(4.5)	(24)	(24)	40	29	9	54	1	5	37
Percent.	13,764	295	445	27	(48)	20	59	7	11	6	74	4
Department of Transportation ²⁰	(96.5)	(3.2)	(.08)	(77)	(48)	43	20	59	7	1	11	6
Percent.	1,625	1,175	338	41	(47)	43	20	59	7	1	11	6
Department of the Treasury ²¹	(72)	(21)	(5)	(196)	(47)	43	20	59	7	1	11	6
Percent.	1	0	0	(196)	(47)	43	20	59	7	1	11	6
Environmental Protection Agency	(100)											
Percent.	98	26	7	27	30	13	6	6	6	3	6	18
Federal Communications Commission	(64)	(27)	(7)	(35)	(7)	31	27	6				5
Percent.	8	2	6	6	(3)	6	6	3	3	14	3	20
Federal Power Commission	(25)	(75)		(6)	(3)	11	7	3	3	1	3	14
Percent.	432	388	36	69	(3)	11	7	3	3	1	3	14
Federal Trade Commission	(89.8)	(8.3)	(1.6)	(46)		5	2	1				8
Percent.	37	21	13	48		5	2	1				8
General Services Administration	(57)	(35)	(5)	(3)		6	4	1	2	1	1	7
Percent.	1,019	984	5	41		6	4	1	2	1	1	7
National Aeronautics and Space Administration	(96.5)	(.49)	(.98)	(10)		1						1
Percent.	1	(100)										
Office of Economic Opportunity ²²	3											
Percent.	60	52	5	25		1	1	3	1	2	1	7
Office of Emergency Preparedness	(87)	(8)	(5)	(8)		53	20	3	1	1	2	20
Percent.	40	11	10	52		53	20	3	1	1	2	20
Office of Management and Budget	(27.5)	(25)	(37.5)	(26)	(13)	53	20	3	1	1	2	20
Percent.	(5)	26	14	(9)	55	2	15	2	4	5	12	
Renegotiation Board	(5)	26	14	(9)	55	2	15	2	4	5	12	
Percent.	20	13	5	29		33	1	1	3	4	1	
Securities and Exchange Commission ²³	(65)	(25)	(10)	(5)		8	(4)	1	1	2	1	2
Percent.	10	(40)	(10)	(4)		8	(4)	1	1	2	1	2
Selective Service System	(5)	1	1	(5)		1						1
Percent.	7	5	1	(5)		1						1
Small-Business Administration	(71)	(14)	(14)	36	44	2	3	2	1	3	1	4
Percent.	46	(76)	(20)	(2)		36	44	2	3	2	1	3
U.S. Information Agency				(9)	(3)							
Percent.	254,637	233,969	1,822	373	212	296	196	37	42	99	23	16
Veterans Administration												
Percent.	390	250	85	41	53	13	90	34	547	30	100	206
Totals ²⁴												
Percent.												

See footnotes on p. 106.

¹ The chart is not inclusive of all agencies responding to the questionnaire. The agencies listed were chosen because they generally affect the public welfare or because, in the preliminary examination of returned questionnaires, they indicated areas of special interest for analysis.

² Figures in parentheses are percentages of the total number of formal requests to the agency. Due to rounding the percentages may not equal 100 percent.

³ Incidences of court action do not necessarily reflect the number of appeals lost and brought to court. Many agencies cited court cases and provided no previous administrative action data.

⁴ The figures shown in parentheses are the number of cases on which the average is based.

⁵ Identity of requester (in cases of refusal only) was provided by the agencies. Judgments were made in instances where types were not explicitly stated. Therefore the categories may not be fully illustrative.

⁶ Sections cited are the exemptions written into the Freedom of Information Act. The number of exemptions will not always justify with the number of denials due to multiple citations or lack of citation altogether.

⁷ CAB provided total number of requests for fiscal 1968 only. Kept no records of requests granted. Those refused cover the 4-year period.

⁸ Unknown.

⁹ CAB. Of the 31 cases (initial refusal) computed, 22 received action within 24 hours. On appeal, 3 cases received action in less than 15 days.

¹⁰ CSC has not made it a practice to keep centralized records of requests; therefore no figures were provided. Were able to identify 23 denials through reference to the General Counsel's office. It is possible that other formal requests have been denied.

¹¹ Department of Agriculture response was decentralized. Each constituent agency replied independently. The replies indicated no unified recordkeeping policy.

¹² Department of Commerce cited 10 cases, action on which do not fall into chart categories: 7 were withdrawn before acted upon; 1 was for records at another agency; 1 was nonexistent records; and 1 is unrecorded as to action taken. Of 8 court cases, only 3 were cited as requested. 2 were pending July 4, 1971; the other found for the agency. Of the remaining cases, 1 ordered release of documents (411 F. 2d 696) and 4 were reported as "Suit dropped. Resolve by access." Citations to the Code of Federal Regulations accompanied 5 U.S.C. 552(b) as basis for refusal.

¹³ Department of Defense was decentralized in its replies. The constituent agencies, except Army, Navy, and Air Force, have been combined on the chart. Some question arises as to method of record-keeping, i.e., Air Force reports over 200,000 formal requests for information; Army could give no statistics other than appeals (and no dates for appeal initiation); and Navy estimating that the number of cases would total millions, provided both initial denial and appeal information where possible. Navy provided an estimate for Marine Corps Headquarters: granted 16,804 access requests; denied 960 access requests; and granted in part 50 requests. No departmentwide statistics were charted due to the imbalance created by Air Force figures. Court action: The 2 DOD (combined) cases are pending as are 3 from Navy and 1 from Air Force. Administrative appeal action: Air Force, no record 7; Navy reported 1 appeal pending.

¹⁴ Department of HEW: Of 8 appeals, action was unknown on 2 and 1 is pending. Of 5 court cases, 1 is pending. HEW was irregular in its reporting of basis of refusal. In some instances it referred to only 5 U.S.C. 552(b), not citing specific exemptions and in some instances it relied solely on HEW public information regulations or combined those with code citations.

¹⁵ Department of HUD: Of 7 appeals, 1 is pending.

¹⁶ Department of the Interior interpreted formal requests to be those which were appealed or otherwise considered by the Solicitor. The sole court case was not a result of refusal for information, but rather a refusal to gather, from all field offices, the information together in Washington for plaintiff's perusal. No final action was reported.

¹⁷ Department of Justice: Of 9 court cases, 3 are pending. Appeal action: 6 modified (granted whole or in part); 1 pending and 1 record nonexistent.

¹⁸ Department of Labor keeps no record of requests granted; when requests are initially denied copies of relevant correspondence are filed. The Code of Federal Regulations was also cited as a basis for refusal.

¹⁹ Department of State has no formal appeals process. Of 2 court cases, 1 is pending. 5 U.S.C. 552(b) was general basis of refusal with no specific exemptions cited.

²⁰ Department of Transportation estimated the number of requests received as being over 14,000. Figures shown are those aggregated from the constituent agencies providing data. Of 55 appeals, 1 is pending and 2 have no record of action.

²¹ Department of Treasury: Internal Revenue Service reported denial of access (whole or partial) in 306 instances; information was provided for 130 of those, the remainder being unidentifiable or granted on appeal. Of 8 court cases, 5 are pending.

²² FCC reported 1 court case for which an appeal is pending. Action is unknown on 1 appeal.

²³ FPC reported 2 court cases, both of which are pending.

²⁴ FTC reported 7 court cases, 3 of which are pending.

²⁵ GSA: Of 5 court cases, 4 are pending.

²⁶ OEO reported 1 request which was not refused per se. The Director responded within 4 days stating that the document would be studied for possible release. Suit was filed the day the letter was dated. Before hearing the document was released.

²⁷ Renegotiation Board reported 9 court cases, 5 of which are pending.

²⁸ SEC provided information only on Commission action which constitutes appeal action. No initial refusal or basis for refusal data was provided. Time for appeal was computed from time of initial request. Of 40 appeals, 2 had no action recorded. Of 3 court cases, 2 are pending.

²⁹ Selective Service System reported 7 instances in which requests for information resulted in court action; refusal was sustained in 6 and reversed in 1. No previous administrative data was provided for these cases.

³⁰ SBA reported 1 appeal with action unknown and 1 court case which was declared moot.

³¹ VA: Of 3 court cases, 1 is pending.

³² Individual units may not equal apparent totals due to variations among agencies.

CHAPTER III

A. THE FREEDOM OF INFORMATION ACT AMENDMENTS OF 1974 (P.L. 93-502): A HISTORY OF THE LEGISLATIVE PROCEEDINGS, PREPARED BY THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

B. FREEDOM OF INFORMATION ACT AMENDMENTS CONFERENCE NOTES. PREPARED BY THE STAFF OF THE SENATE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE; INFORMAL NOTES ON MEETINGS OF HOUSE-SENATE CONFEREES ON THE 1974 AMENDMENTS

pt 6

A. THE FREEDOM OF INFORMATION ACT AMENDMENTS OF 1974
(PUBLIC LAW 93-502)

A HISTORY OF THE LEGISLATIVE PROCEEDINGS*

Presuming all Government information should be available to the people other than categories permissively or mandatorily exempted by the law, the Freedom of Information Act (F.O.I. Act) (5 U.S.C. 552) provides the basic authority and procedure for the public to petition the Executive Branch for otherwise unreleased documents in its possession. It derived from eleven years of investigative hearings by the House Government Operations Committee's former Special Government Information Subcommittee¹ (1955-1962) and the Foreign Operations and Government Information Subcommittee, which succeeded it. (Hereafter, the latter will be referred to as the House subcommittee.) The statute was also the product of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure.² (Hereafter, it will be referred to as the Senate subcommittee.) Enacted first in 1966 (80 Stat. 250), it was made part of title 5, U.S. Code in 1967 (80 Stat. 54). It became effective July 4, 1967. The Act was the product of many compromises and political pressures. No Federal department or agency urged passage of the bill; even the President's position seemed uncertain until he approved it.

Oversight of the Freedom of Information Act

During the 92nd Congress, the administration and operation of the Freedom of Information Act came under detailed congressional scrutiny. During the fourteen days of sworn testimony, the House subcommittee heard various government and private witnesses discuss their experiences and difficulties with the public access provisions of the statute.³ The Congressional Research Service of the Library of Congress was asked to prepare an analysis, based largely upon the denial case-load, of administrative problems reflected in information requests over the past four years.⁴ The Administrative Conference of the United States was asked to testify on its studies leading to a recommended model regulation for effective administration of the law.⁵

*For a detailed history of the original 1966 Freedom of Information Act, with data on leading court cases involving the Act, a selected bibliography and articles on the Act, see *Freedom of Information Act Sourcebook; Legislative Materials, Cases, Articles*. U.S. Congress. Senate. Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary. 93d Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1974. 432 p.

¹ See U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information from Federal Departments and Agencies* (17 parts). Hearings 84th-86th Congresses. Washington, U.S. Govt. Print. Off., 1956-1959. 4260 p.; also see Robert Okie Blanchard. *The Moss Committee and a Federal Public Records Law*. Unpublished doctoral dissertation. Syracuse University Graduate School, 1966, 278 p.; Robert O. Blanchard. "A History of the Federal Records Law." *Freedom of Information Center Report No. 189*. Columbia. School of Journalism, University of Missouri, 1967. 12 p.

² In chronological development, see: U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. *Freedom of Information*. Hearings, 88th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1964, 322 p.; ———, *Administrative Procedure Act*. Hearings, 88th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1964, 673 p.; ———, *Administrative Procedure Act*. Hearings, 89th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1965. 572 p.; ———, *Clarifying and Protecting the Right of the Public to Information and for Other Purposes*. Washington, U.S. Govt. Print. Off., 1965. 10 p. (89th Congress, 1st session. Senate. Report No. 813); ———, House. Committee on Government Operations. *Federal public records law*. Hearings, 89th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1965. 328 p.; ———, *Clarifying and Protecting the Right of the Public to Information*. Washington, U.S. Govt. Print. Off., 1966, 14 p. (89th Congress, 2d session. House. Report No. 1497); ———, Committee on the Judiciary. *Codification of Public Law 89-487*. Washington, U.S. Govt. Print. Off., 1967, 8 p. (90th Congress, 1st session. House. Report No. 125).

³ Additional days were devoted to related subjects besides the public access provisions and the series of hearings was published as U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices* (9 parts). Hearings, 92nd Congress, 1st and 2d sessions. Washington, U.S. Govt. Print. Off., 3758 p.; see parts 4-6 regarding public access provisions.

⁴ See *Ibid.* (Part 4), pp. 1333-1343.

⁵ See *Ibid.* (Part 4), pp. 1219-1251; also see Donald A. Giannella. Agency procedures implementing the Freedom of Information Act, a proposal for uniform regulations. *Administrative Law Review*, v. 23, May 1971: 217-270; also see Administrative Conference of the United States. *Recommendations and Reports of the Administrative Conference of the United States* (Vol. 2). Washington, U.S. Govt. Print. Off. [1973], pp. 18-24, 119-196.

In reporting findings with regard to the public access provisions of the F.O.I., the House subcommittee identified the following general problems in the administration of the law: (1) Excessive delays in responding to requests for documents; (2) excessive user fee charges for searching and copying documents; (3) cumbersome and costly legal remedies when pursuing information after the exhaustion of administrative appeal; (4) little involvement of government public information personnel in F.O.I. Act administration and a tendency in many agencies to leave decision-making in this area to legal experts or political officials; (5) little utilization of the law by the news media because of bureaucratic delays in responding to requests and cumbersome appellate procedures, and (6) the lack of positive support or a sense of priority within the departments and agencies for the provisions of the act.⁶ In brief, "the committee finds that the Freedom of Information Act has helped thousands of citizens gain access to . . . information, when they have been able to overcome Government roadblocks."⁷

In terms of specific administrative problems, the report pointed to (1) confusing, inadequate, or deficient agency regulations which conformed neither to the Attorney General's 1967 memorandum of guidance on the law nor to the intent of Congress;⁸ (2) lack of leadership within the Office of Legal Counsel, Department of Justice, with regard to the advisory role it had come to fill for assisting other agencies in the administration of the F.O.I. Act; (3) inadequate records on the volume and processing of requests for public information under the law and accompanying failures to notify individuals denied documents of their right to administrative appeal and court redress; (4) failure to involve public information officials in F.O.I. Act decision-making and policy determinations or to issue clear policy statements and directives placing appropriate priority on compliance with the provisions of the act; (5) failure to provide suitable training or orientation of employees on the meaning, intent, and proper administration of the law; and (6) charging excessive fees for search and reproduction of requested public records.⁹

And, with respect to problems to be resolved through amendatory legislation, the report identified needs to (1) eliminate bureaucratic delay in responding to F.O.I. requests which could be corrected through the adoption of response times recommended by the Administrative Conference; (2) clarify the "identifiable record" requirement of the law to eliminate its use as an excuse for withholding public records; (3) eliminate delay in F.O.I. court proceedings by setting a response time for responsive pleadings by the government; (4) require an annual report from each agency with regard to its operations and activities under the law in the hope that such would "not only improve administration of the act but also permit more effective and systematic legislative oversight"; and (5) clarify certain of the exemptions of the statute.¹⁰ These were the basis of legislative objectives whose consideration was recommended by the committee.¹¹ Provisions to achieve each of these recommended legislative objectives are contained in the Freedom of Information Act amendments of 1974 (P.L. 93-502).

Amending the F.O.I. Act

As a consequence of these findings and recommendations, Rep. William S. Moorhead (D.-Pa.), Chairman of the Foreign Operations and Government Information Subcommittee, introduced a measure (H.R. 5425) at the outset of the 93rd Congress embodying certain of the items suggested in the report as amendments to the basic statute. Other amending provisions, again drawn from the committee's report, were offered (H.R. 4960) by Rep. Frank Horton (R.-N. Y.), long a member of the subcommittee and the ranking Republican on the full Government Operations Committee. Hearings were held on both bills during May of 1973 and various perfecting changes were proposed by both Government and private witnesses.¹² Refinements were then made in an effort to produce a

⁶ U.S. Congress. House. Committee on Government Operations. *Administration of the Freedom of Information Act*. Washington, U.S. Govt. Print. Off., 1972 (92d Congress, 2d session. House. Report No. 1419), p. 8.

⁷ *Ibid.*, p. 9.

⁸ United States Department of Justice. Office of the Attorney General *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*. Washington, U.S. Govt. Print. Off., 1967. 47 p.; also produced in U.S. Congress. House. Committee on Government Operations. *U.S. Government Information Policies and Practices* (Part 4). Hearings, 92nd 2d session. Washington, U.S. Govt. Print. Off., 1972, pp. 1079-1131.

⁹ H. Rep. 92-1419, pp. 9-10

¹⁰ *Ibid.*, pp. 10-11.

¹¹ *Ibid.*, pp. 82, 83.

¹² See U.S. Congress. House. Committee on Government Operations. *The Freedom of Information Act*. Hearings, 93rd Congress, 1st session. Washington, U.S. Govt. Print. Off., 1973. 412 p.

joint measure (H.R. 12080), and a final compromise version (H.R. 12471) was arrived at in January 1974. This proposal was unanimously reported from the Government Operations Committee on February 21.¹³ The bill was considered by the House on March 14 and passed by a 383-8 record vote after a minor amendment was accepted without voiced objection.¹⁴

As reported and adopted, the House version of the F.O.I. Act amendments sought to produce the following changes in the basic statute: A provision was included calling for readily available indexes of agency information, including final opinions and orders made in the adjudication of cases, statements of policy not produced in the *Federal Register*, and administrative staff manuals. The document identification requirement was amended so that a description of an item would be sufficient if it enabled a professional employee of the agency or unit who was familiar with the subject area to locate the record with a reasonable amount of effort. Three time limits were proposed for the basic law through the amendments: A 10-day period for responding to initial requests, a 20-day period for responding to appeals of request denials within an agency, and a 20-day period for responsive pleadings by the Government in F.O.I. cases taken to court. Another provision would grant the recovery of attorney fees and court costs in litigation where the Government failed to satisfy the court in withholding requested materials. Language was also included to grant the courts authority for *in camera* review of classified documents being sought under the act, a provision made to overturn a Supreme Court ruling to the contrary.¹⁵ The House amendments also imposed a required annual report to Congress by the Executive on the administration of the Freedom of Information Act with specific details to be included in same denoted in the law. There was also a clarifying provision expanding the definition of "agency" to insure the Act's coverage of entities within the Executive Office of the President, the U.S. Postal Service, Government corporations or Government-controlled corporations.

Senate action

On March 8, 1973, Sen. Edmund S. Muskie (D.-Maine) introduced a companion version (S. 1142) of the original Moorhead bill (H.R. 5425) amending the F.O.I. Act. Joint Senate hearings on this and other legislative proposals concerning different aspects of government information policy were held by three subcommittees: The Judiciary Committee's Subcommittees on Administrative Practice and Procedure and on Separation of Powers and the Government Operations Committee's Subcommittee on Intergovernmental Relations.¹⁶ These proceedings concluded on June 26. On October 8, Sen. Edward M. Kennedy (D.-Mass.), Chairman of the Administrative Practice and Procedure Subcommittee, offered certain amendments to the basic F.O.I. Act through S. 2543. This bill, which contained important differences from the Moorhead-Muskie proposal pending in each chamber, was subsequently reported on May 16, without hearings.¹⁷

Amended in committee and subsequently sent to the floor with bipartisan support, the reported version of the Kennedy bill required publication "quarterly or more frequently" of indexes of agency information but exempted those units which could establish that such publication would be both unnecessary and impractical in terms of public interest and use. A restructuring of the initial sections of the existing law was proposed to reflect that judicial review is available with regard to any part of the basic law and not just a particular section as was contended, on occasion, by the Government. The bill also sought to interpret

¹³ See U.S. Congress. House Committee on Government Operations. *Amending Section 652 of Title 5, United States Code, Known as the Freedom of Information Act*. Washington, U.S. Govt. Print. Off., 1974 29 p. (93rd Congress, 2d session. House. Report No. 93-876).

¹⁴ See *Congressional Record*, v. 120, March 14, 1974: H1787-1803; the technical amendment pertained to a House rule requiring Executive communications and reports be submitted to the Speaker rather than to a committee as required in the bill; on the presentation and adoption of the amendment see *Ibid.*, p. H1802.

¹⁵ *Environmental Protection Agency et al. v. Patsy T. Mink, et al.*, 410 U.S. 73 (1973). Here the Supreme Court held that a claim under the national defense or foreign policy exemption of the F.O.I. Act was satisfied by affidavit of the Government that the documents in question were classified top secret or secret pursuant to Executive order 10501, that Congress gave the Executive the authority to determine if any information should be so classified, and that Congress did not intend to subject the soundness of Executive security classifications to judicial review—of which *in camera* inspection was a central aspect—at the insistence of any objecting citizen.

¹⁶ See U.S. Congress. Senate. Committee on Government Operations and Committee on the Judiciary. *Executive Privilege, Secrecy in Government, Freedom of Information* (3 parts). Hearings, 93rd Congress, 1st session. Washington, U.S. Govt. Print. Off., 1973. 1482 p.

¹⁷ See U.S. Congress. Senate. Committee on the Judiciary. *Amending the Freedom of Information Act*. Washington, U.S. Govt. Print. Off., 1974. 64 p. (93rd Congress, 2d session. Senate. Report No. 93-854).

"identifiable records" as simply a "request for records which reasonably describes such records." Provision was included directing the Office of Management and Budget to promulgate regulations specifying a uniform schedule of fees for search and copy applicable to all F.O.I. Act requests, as well as criteria for the reduction or waiver of such fees. Language was set forth establishing alternate venue for F.O.I. Act litigation in the Federal courts of the District of Columbia. Such alternate venue would be at the complainant's option, but it recognized the expertise of the D.C. courts in adjudicating F.O.I. Act cases and afforded convenience to Justice Department attorneys who probably would have been involved in initial F.O.I. Act determinations at the administrative level. Provision was also made for such litigation to have "precedence on the docket" and to "be expedited in every way." Although the bill would have allowed *in camera* inspection of classified information by a judge during litigation of an F.O.I. suit on such documents, the court would first attempt to resolve the contest "on the basis of affidavits and other information submitted by the parties." *Ex parte* showing might also occur under the bill's arrangements. Details were also specified as to the maintenance of the classified information during the deliberations (markings, seals, physical protection, etc.).

The bill also would have allowed the courts to assess reasonable attorney fees and other litigation costs against the United States in cases where the complainant had substantially prevailed. In addition, sanctions were provided for the wrongful withholding of information by a Government employee; this would occur through a judicial determination and might result in suspension or other disciplinary action. Response times of 10 days for an initial request and 20 days for an appealed request were proposed, with an extension clause for unusual circumstances.

Language was offered modifying the application of the national defense or foreign policy exemption clause of the basic statute to allow the courts to determine the propriety of a classification marking. Provision was also made for the deletion of an exempt portion of a record so as to allow the remaining portions to be disclosed.

Reporting requirements on F.O.I. Act administration were established in the bill and an expanded definition of agency was offered so as to include the Postal Service and publicly funded corporations established under the authority of the United States Government within the jurisdiction of the statute.

In debating the bill on May 30, 1974, Sen. Muskie offered an amendment (No. 1356) strengthening the provision regarding court review of classified documents in F.O.I. Act litigation. The amendment, adopted by a 56-29 vote, granted the courts authority to examine classified materials *in camera* if the question of their release could not be resolved through affidavit, and it made *ex parte* communications from the government in such disputes subject to the discretion of the courts. The court might also question the propriety of the classification of a document only under the standards established in a statute or by an Executive order on this matter; for example, there can be no alteration of classification standards or procedures in this action.

Senator Birch Bayh (D.-Ind.) offered an amendment to the effect that information released to one individual under the provisions of the F.O.I. Act must thereafter be available, without reservation, to any other party, whether utilizing the Act or merely making a general request. This amendment was agreed to without a vote.

Similarly, Sen. Roman Hruska (R.-Nebr.) offered an amendment specifying that the timeframes attached to the amendments were to be denoted as "working" days.

An amendment (No. 1361) was then offered by Sen. Philip Hart (D.-Mich.) to limit the understanding of the "investigatory files" exemption to records, the release of which would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures. This proposal was subsequently passed on a 51-33 roll-call vote.

With the close of debate on the Senate bill, Sen. Kennedy called the House bill (H.R. 12471) before the chamber for consideration. The House measure was then amended with the language of the Senate's amended bill and the Senate proposal was vacated. The amended House bill was then adopted on a 64-17 roll-call vote.¹⁸

¹⁸ Senate action on the F.O.I. Act Amendments appears at *Congressional Record*, v. 120, May 30, 1974, S9310-S9343.

Conference Action

On June 6, 1974, seven House conferees were named for the deliberations on the F.O.I. Act Amendments: Rep. Chet Holifield (D.-Calif.), Chairman of the full Government Operations Committee; Rep. Moorhead, Chairman of the Foreign Operations and Government Information Subcommittee; Rep. John Moss (D.-Calif.), former chairman of the information subcommittee and principal author of the original F.O.I. legislation in the House. Rep. Bill Alexander (D.-Ark.); Rep. Horton, ranking minority member of the Government Operations Committee; Rep. John Erlenborn (R.-Ill.), ranking minority member of the subcommittee; and Rep. Paul McCloskey (R.-Calif.).¹⁹

Senate conferees were named on June 10 and included: Sen. Kennedy, Chairman of the Administrative Practice and Procedure Subcommittee; Sen. Philip Hart (D.-Mich.), proponent of the "investigative files" exemption amendment; Sen. Birch Bayh (D.-Ind.), proponent of the post-F.O.I. general information availability amendment; Sen. Quentin Burdick (D.-N.D.); Sen. John Tunney (D.-Calif.); Sen. John McClellan (D.-Ark.); Sen. Strom Thurmond (R.-S.C.), ranking minority member of the Administrative Practice and Procedure Subcommittee; Sen. Charles Mathias (R.-Md.); Sen. Edward Gurney (R.-Fla.); and Sen. Roman Hruska (R.-Nebr.), ranking minority member of the full Judiciary Committee.²⁰

The conferees first met on August 6, and at that time they elected Rep. Moorhead, chairman of the deliberations. They agreed to open the proceedings to the public and to follow a draft embodying a number of staff suggestions as the basic working document of the conference.²¹ After certain technical and language alignments were agreed to, the conferees made the following substantive and conforming changes:

Index publication

The House version required the publication and distribution—through sale or otherwise—of agency indexes identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by 5 U.S.C. 552(a)(2) to be made available or published. Items covered by this provision included final orders, opinions, agency statements of policy and interpretations not otherwise published in the *Federal Register*, and administrative staff manuals and agency staff instructions that affect the public. The intent of the amendment was to provide the public with a clearer indication of items available under the Act and to assist in identifying requested materials. Some indexes of this kind are currently being produced by commercial firms; the availability of these tools through an agency would satisfy the requirement.²²

The conference followed the Senate amendment which, although very similar to the House provision, imposed a requirement that agency indexes be updated on a quarterly or more frequent basis. It also allowed an agency to forego publication of such indexes if the agency determined by an order published in the *Federal Register* that such publication would be "unnecessary and impracticable." Further, the conference agreed that, if an agency determines not to publish its index, it shall provide copies to the public upon request at a cost not to exceed the direct cost of duplication.

Identifiable records

The original Freedom of Information Act required that a request for information from an agency be for "identifiable records." Since interpretation of an "identifiable" record in terms of its being retrievable was left to the discretion of the bureaucracy, efforts to obtain documents could be thwarted by premature agency claims that an item could not be located merely from the description given by a requestor and that a sizable search fee might have to be imposed. To correct this condition, a House amendment that a request only "reasonably describe" the material(s) being sought was adopted by the conference.

Search and copying fees

The Senate version of the F.O.I. Act amendments contained a unique provision requiring the Director of the Office of Management and Budget to promulgate regulations establishing a uniform schedule of fees for agency searches and copying of records made available to the public under the F.O.I. law. The conference assigned this function to each agency, requiring it to issue separate regulations

¹⁹ See *Ibid.*, v. 120, June 6, 1974: H4811

²⁰ See *Ibid.*, v. 120, June 10, 1974: S10206.

²¹ See Freedom of Information Act Amendments Conference Notes appended to this narrative.

²² H. Rept. 93-876, *supra*, p. 5.

for the recovery of only the direct costs of search and duplication and not including costs for examination of the records. In addition, the conference retained a Senate provision allowing an agency to furnish documents without charge or at a reduced cost if it determined that such action would be in the public interest. This provision was designed to allow the agencies to facilitate F.O.I. requests made by the indigent or by groups serving the public interest through nonprofit activities. Discretion on such matters would lie with the agencies.

Court review

The conference report states:

"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."²³

Response to complaints

The House version provided that the defendant to a complaint under the F.O.I. law must make a responsive pleading within 20 days after service, unless the court should direct otherwise for good cause shown. The Senate version contained a similar provision but allowed the defendant 40 days. The conference adopted a 30-day responsive pleading timeframe, granting the court discretion to direct otherwise for good cause shown. The desired effect underlying the provision was to expedite litigation with definite time requirements regarding responsive pleadings.

Expedited appeals

The Senate version contained a unique provision to give precedence to appeal cases brought under the F.O.I. law, except as to cases on the docket which the court, in its discretion, considers more important. The conference adopted this provision urging judicial expedition of F.O.I. litigation. The language merely begs court attention for this class of cases and leaves the discretion for quick adjudication with the court.

Attorney fees and costs

The conference adopted language from the Senate version applying to cases in which the complainant had "substantially prevailed" and allowing the court to award costs and attorney fees to the successful litigant. Criteria for the awarding of such monies was eliminated from the final bill by the conference "because the existing body of law on the award of attorney fees recognizes such factors," and it was felt that "a statement of the criteria may be too delimiting and is unnecessary."²⁴ Discretion for such awards lies with the court which, as noted, must be guided by precedents in case law and statutes.

Sanction

The Senate version of the amendments contained a unique provision authorizing the court in F.O.I. cases to impose a sanction that would entail a suspension of no more than sixty days from employment against a Federal employee or official whom the court finds to have been responsible for withholding requested records without a reasonable basis in the law. The conference modified this sanction, authorizing the court merely to determine if an "arbitrary or capricious" withholding by a Federal employee or official did occur and requiring that the Civil Service Commission promptly initiate a proceeding to determine whether dis-

²³ U.S. Congress. House. *Freedom of Information Act Amendments: Conference Report*. Washington, U.S. Govt. Print. Off., 1974. (93rd Congress, 2d session. House. Report No. 93-1380), p. 9.

²⁴ *Ibid.*, p. 10.

ciplinary action is warranted in the event of such a finding. The findings of the Commission and its recommended action are to be submitted to the administrative authority of the agency and to the responsible official or employee, "and the administrative authority shall promptly take the disciplinary action recommended by the Commission."

Administrative deadlines

In an attempt to expedite F.O.I. requests within the Executive Branch agencies, the conference adopted administrative action deadlines recommended by the Administrative Conference of the United States and contained in both versions of the amendments. These timeframes allow 10 days—excepting Saturdays, Sundays, and holidays—for responding to an initial request for records under the F.O.I. law and 20 days for response to an appealed request. In addition, the conference adopted a Senate provision granting a 10-working-day extension for "unusual circumstances," where an agency may be required to retrieve documents from a field facility separate from the office processing the request, where more than one agency may be involved in responding to the request, or where voluminous records are being sought. The 10-day extension may be invoked only once during the course of action on a request—at either the initial or the appellate stage.

Modification of national defense and foreign policy exemption (5 U.S.C. 552(b)(1))

The conference adopted language from both the House and Senate versions of the amendments which would 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 such Executive order." The conference report explains that both procedural and substantive criteria are intended.

The statement in the conference report goes on to declare:

"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."²⁵

Investigatory records

The Senate version of the amendments contained a unique provision added on the Senate floor by Sen. Hart during debate of the proposal. This language pertained to exemption (b)(7) regarding law enforcement files. As adopted by the conference, the provision would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that their production would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life or physical safety of law enforcement personnel. The conference added language also protecting confidential information compiled from a confidential source by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation.

²⁵ *Ibid.*, p. 12.

The attempt here was to protect Federal Bureau of Investigation records, Central Intelligence Agency records, and the files of other Federal law enforcement agencies. Safeguards were extended to law enforcement personnel and informants aiding law enforcement agencies. "National security" was to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" was intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units authorized to perform such functions.

Segregable portions of records

The conference adopted another unique Senate provision specifying that any segregable portion of a sought record shall be provided after deletions of portions that may be withheld under the exemption of section 552(b).

Annual reports of F.O.I. activity

The conference adopted language from both versions of the amendments, essentially requiring from each agency an annual report on activity and operations under the F.O.I. Act and specifying certain details that must be included in the report.

Expansion of agency definition

Adopting language from the House version, the conference expanded the definition of "agency" for F.O.I. Act matters expressly to cover those entities encompassed by 5 U.S.C. 551 and others, including the U.S. Postal Service and the Postal Rate Commission, as well as Government corporations or Government-controlled corporations now in existence or created in the future.

"With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result 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."²⁶

With these differences resolved,²⁷ the report of the conference was made to each chamber.²⁸ The report was adopted by voice vote in the Senate on October 1²⁹ and the House followed on October 7 with a 349-2 roll call vote in favor of adoption.³⁰ The following day the bill was sent to the Chief Executive for signature.

Presidential veto

In the midst of the conference deliberations, President Nixon had resigned his office. Vice President Gerald Ford, succeeding to the Presidency, had sent a letter to the conferees indicating his reservations with regard to certain provisions of the bill.³¹ On October 17 he returned the bill to the House without his approval. The Chief Executive's accompanying message opposed three main provisions of the bill: (1) Allowing courts to inspect classified documents, (2) abridgement of confidentiality in law enforcement records, and (3) defining specified timeframes for action in F.O.I. Act requests. In addition, the President called the bill "unconstitutional and unworkable."³²

Veto overridden

In an attempt to meet the objection of the President to the F.O.I. Act Amendments, the Senate Minority Leader, Sen. Hugh Scott (R.-Pa.), offered a revised bill (S. 4172) on November 19.³³ Efforts to override the veto, however, were already underway at this time. On November 20 the House voted 371-31 to override, and with a two-thirds vote in favor thereof, the President's objections were rejected.³⁴ The Senate completed action on the matter on November 21, voting 65-27 to override.³⁵ The bill thereby became a public law (P.L. 93-502), the amendments becoming effective on February 19, 1975.

²⁶ *Ibid.*, p. 15.

²⁷ On the deliberations and efforts to resolve differences between the two versions of amendments see Freedom of Information Act Amendments Conference Notes appended to this narrative.

²⁸ U.S. Congress. House. Committee of conference. *Freedom of Information Act Amendments*. Washington, U.S. Govt. Print. Off., 1974. 15 p. (93rd Congress, 2d session. House. Report No. 93-1380); in the Senate (93rd Congress, 2d session. Senate. Report No. 93-1200).

²⁹ *Congressional Record*, v. 120, October 1, 1974: S17828-17830, S17971-S17972.

³⁰ *Ibid.*, v. 120, October 7, 1974: H10001-H10009.

³¹ *Ibid.*, v. 120, October 1, 1974: S17829; also *Ibid.*, v. 120, October 7, 1974: H10002-H10003.

³² See *Ibid.*, v. 120, November 18, 1974: H10705; U.S. Congress. House. *Vetoing of H.R. 12471, Amend Freedom of Information Act: Message from the President of the United States* . . . Washington, U.S. Govt. Print. Off., 1974. 5 p. (93rd Congress, 2d session. House. Document No. 93-388); *Weekly Compilation of Presidential Documents*, v. 10, October 21, 1974: 1318.

³³ *Congressional Record*, v. 120, November 19, 1974: S19531-S19535.

³⁴ *Ibid.*, v. 120, November 20, 1974: H10864-H10875.

³⁵ *Ibid.*, v. 120, November 21, 1974: S19806-S19823.

B. CONFERENCE NOTES—THE FREEDOM OF INFORMATION ACT AMENDMENTS

[INTRODUCTORY NOTE: During the course of the conference proceedings, no official transcript was made. However, notes were taken by a staff member of the Senate subcommittee and are added to this narrative as unofficial staff observations. They do not constitute approved conference committee minutes and their inclusion in this document does not mean that they have been officially approved by either Subcommittee or either House or Senate Committee.]

On March 14, 1974, the House passed by a record vote of 383 to 8, H.R. 12471, amending the Freedom of Information Act (Volume 120, Congressional Record, H 1802-1803). On May 30, 1974, the Senate passed an amendment in the nature of a substitute to H.R. 12471 by a vote of 64 to 17 (Volume 120, Congressional Record, S 9343).

The House requested a conference on the legislation, and House Conferees were named on June 6, 1974 (Volume 120, Congressional Record, H 4811): (Holifield, Moorhead, Pa., Moss, Alexander, Horton, Erlenborn, McCloskey). Senate Conferees were named on June 10, 1974 (Volume 120, Congressional Record, S 10206): (Kennedy, Hart, Bayh, Burdick, Tunney, McClellan, Thurmond, Mathias, Gurney, Hruska).

The conferees met on August 6, 13, 20, and 21. At the first meeting Congressman Moorhead was elected conference chairman, and the conferees agreed to open their meeting to the public.

At the initial conference session the conferees agreed to use a series of draft staff compromise suggestions as the basic document of the conference. It was discussed in detail on August 6, certain changes were agreed to, and the conferees reached agreement on all issues under discussion with the exception of the sanction section contained in paragraph (4)(F) of the Senate version. No roll call votes were taken.

On August 13 the conferees met to discuss the sanction provision. An amendment in the nature of a substitute to paragraph (4)(F) was offered by Mr. McCloskey, but failed to be adopted by either side. Telephone calls from the Attorney General and the Deputy Attorney General to conference committee members requesting a delay on final action were relayed to the conferees, and the conference recessed for one week on motion of Senator Kennedy. (The delay was requested to provide President Ford time to review the previous agreements reached by the conferees, since President Nixon had resigned on August 9 and Ford was sworn in that day).

On August 20 Mr. McCloskey and Mr. Kennedy proposed various alternative sanction provisions. The House conferees agreed to a modified McCloskey proposal, but the Senate conferees by a divided vote (5-5) failed to adopt the McCloskey provision and again by a divided vote to adopt a Kennedy amendment to the McCloskey provision.

Also at the conference session on the 20th Senator Kennedy and Congressman Moorhead received letters from President Ford raising specific concerns with five issues in the proposed conference bill. The conferees scheduled a meeting the following day to complete action on the sanction provision and to consider the issues raised by the President's letter. (At this meeting, the conferees agreed to permit television coverage of the committee deliberations by the Westinghouse Group W Network). On August 21 the House conferees voted 4-3 to propose a revised McCloskey compromise on the sanction provision. The Senate conferees unanimously agreed to accept this compromise if modified in three respects, pursuant to amendments proposed by Senator Kennedy. The House conferees accepted the modifications and the final language of paragraph (4)(F) of H.R. 12471 was agreed to.

The conferees then opened discussion on the issue of *de novo* review of classification provided under section (b)(1) of the new law, as amended. Since there was no basic disagreement among the two houses in the bills as passed, the conferees considered themselves bound to the original language. However, the conferees agreed that language relating to this issue as proposed by Senator Hruska should, with some modifications, be included in the Joint Statement of Managers.

The Conferees proceeded to discuss the language of the seventh exemption which had been agreed to at the first conference session. To accommodate the President's request, the conferees reopened discussion on this provision and agreed to amend the language of the exemption further by amending clause (C)

by changing "a" to "an" and deleting the word "clearly" and by amending clause (D) to exempt from disclosure confidential information in investigatory records in narrowly drawn circumstances.

During the course of the four conference sessions, the conferees agreed that, in addition to the language proposed by Senator Hruska on the *de novo* provision, language should be included in the Joint Statement of Managers as follows:

(1) Language similar to that deleted from paragraph (4)(E) of the bill, relating to standards for the court in the discretionary award of court costs and attorney fees to plaintiffs in Freedom of Information cases.

(2) A discussion that the "denial" of records be interpreted as including both the initial denial, as well as subsequent denials on appeal.

(3) An explanation and intent of the conferees of the language in section 2(a) of the bill, relating to the amendment to subsection (b)(1) of the Act—the national defense and foreign policy exemption.

(4) A discussion excluding the President's personal staff from the definition of "agency" in section 3(e) of the bill.

(5) A discussion of intent that agencies adhere to the objectives of the Bayh amendment in the Senate version, making public those documents ordered disclosed which involve matters of general public concern.

Reference to the President's concern with inflexible time limits was made in the final conference, pursuant to which the conferees subsequently agreed to the reinclusion of Senate language that courts may retain jurisdiction to allow agencies additional time to respond in particular situations.

Further technical changes were made in the report, and upon the initiative of the House Conferees, clause (D) of the amended seventh exemption was further extended and clarified.

The Conference Report and Joint Statement of Managers on H.R. 12471 was subsequently agreed to by all House Conferees and by a majority of Senate Conferees. It was filed by Congressman Moorhead in the House on September 25, 1974 (Report No. 93-1380) (Volume 120, Congressional Record, H 9525) and by Senator Kennedy in the Senate on October 1, 1974 (Volume 120, Congressional Record, S 17828). The Senate acted first, agreeing to the Conference Report by voice vote on October 1, 1974 (Volume 120, Congressional Record, S 17971). The House agreed to the Conference Report by roll call vote of 349 to 2 on October 7, 1974 (Volume 120, Congressional Record, H 10008), and the following day H.R. 12471 was sent to the President.

CHAPTER IV
H. Rept. 93-876
AMENDING SECTION 552 OF TITLE 5,
UNITED STATES CODE, KNOWN AS
THE FREEDOM OF INFORMATION ACT

(119)

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 recom-
mends that the bill do pass.

DIVISIONS OF THE REPORT

Introduction.

Committee vote.

Summary and background.

Discussion:

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Identifiable records.

Time limits.

Attorney fees and court costs.

Court review:

In camera review.

National defense and foreign policy exemption.

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Section-by-section analysis.

Changes in existing law made by the bill, as reported.

Appendixes:

Appendix 1.—Agency views.

Appendix 2.—Text of bill.

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 subcommittees³ 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, 1956, 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-6(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

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * *

§ 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.*

* * * * *

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. Schwyler*, 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

93^D CONGRESS
2^D SESSION**H. R. 12471**

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1974

Mr. MOORHEAD of Pennsylvania (for himself, Ms. ABZUG, Mr. ALEXANDER, Mr. ERLBORN, 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

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

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

1 place, fees to the extent authorized by statute, and proce-
2 dure to be followed," and inserting in lieu thereof the
3 following: "upon any request for records which (A) rea-
4 sonably describes such records, and (B) is made in ac-
5 cordance with published rules stating the time, place, fees to
6 the extent authorized by statute, and procedure to be
7 followed."

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

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

13 "(A) determine within ten days (excepting Sat-
14 urdays, Sundays, and legal public holidays) after the
15 date of such receipt whether to comply with the request
16 and shall immediately notify the person making the re-
17 quest of such determination and the reasons therefor, and
18 of the right of such person to appeal to the head of the
19 agency any adverse determination; and

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

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

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

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

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

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

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

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

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

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

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

23 “(3) a copy of every rule made by such agency re-
24 garding this section;

25 “(4) a copy of the fee schedule and the total

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

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

5 “(e) Notwithstanding section 551 (1) of this title, for
6 purposes of this section, the term ‘agency’ means any exec-
7 utive department, military department, Government cor-
8 poration, Government controlled corporation, or other
9 establishment in the executive branch of the Government (in-
10 cluding the Executive Office of the President), or any
11 independent regulatory agency.”

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

CHAPTER V
S. Rept. 93-854
AMENDING THE FREEDOM OF INFORMATION ACT

(151)

AMENDING THE FREEDOM OF INFORMATION ACT

MAY 16, 1974

Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2543]

The Committee on the Judiciary, to which was referred the bill (S. 2543) to amend section 552 of title 5, commonly known as the Freedom of Information Act, having considered the same, reports favorably thereon, with amendment, and recommends that the bill do pass. Committee action on the bill was unanimous.

PURPOSE

S. 2543 would amend the Freedom of Information Act (FOIA) to facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA, to strengthen the citizen's remedy against agencies and officials who violate the Act, and to provide for closer congressional oversight of agency performance under the Act.

The committee recognizes that the meaning of the substantive exemptions in subsection (b) of the FOIA has been subject to conflicting interpretations and may not be altogether clear, but the committee has concluded that the primary obstacles to the Act's faithful implementation by the executive branch have been procedural rather than substantive. For this reason S. 2543 does not amend the substance of the exceptions to disclosure spelled out in subsection (b) of section 552, which have been clarified substantially through numerous reported court decisions.

BACKGROUND

Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the

Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively all their First Amendment rights, the people must know what their government is doing.

The first congressional attempt to formulate a general statutory plan to assist free access to government information was contained in section 3 of the Administrative Procedure Act, enacted in 1946. This section provided that certain information shall be published "except to the extent that there is included (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." Soon after this enactment, however, it became clear that despite Congress' original intent to promote disclosure, section 3—along with the federal "housekeeping" statute (5 U.S.C. § 301) allowing each agency head "to prescribe regulations" for "the custody, use, and preservation of records, papers, and property appertaining to" his agency—was becoming widely used as a basis for withholding information.

In 1958 the federal "housekeeping" statute was amended (P.L. 85-619) to provide that it did not authorize withholding information or records from the public. And in 1966 Congress enacted the Freedom of Information Act.

The specific objectives of the FOIA were set out by this committee in its Report on the legislation (S. Rept. No. 813, 89th Congress, 1st Session, October 4, 1965, at 11 (hereinafter *1965 Senate Rept.*)) :

(1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld.

(2) It eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know.

(3) The revised section 3 gives to any aggrieved citizen a remedy in court.

Although the Act was hailed by President Johnson in 1966 as deriving from the essential principle that "a democracy works best when the people have all the information that the security of the Nation permits," many observers at the time recognized the difficulties in administering and interpreting the new law. Courts have since recognized deficiencies in the legislation, and testimony last year before the Subcommittee on Administrative Practice and Procedure pointed out clearly a number of areas that require congressional action to insure more faithful agency compliance with the law. Witnesses sug-

gested that the act has become a "freedom from information" law, with the curtains of secrecy still tightly drawn around the business of government.

The House Foreign Operations and Government Information Subcommittee held 14 days of oversight hearings in the 92nd Congress relating to administration of the Freedom of Information Act by federal agencies, following which the House Subcommittee identified 6 "major problem areas":

1. The bureaucratic delay in responding to an individual's request for information—major Federal agencies took an average of 33 days with such responses; and when acting upon an appeal from a decision to deny the information, major agencies took an average of 50 additional days;

2. The abuses in fee schedules by some agencies for searching and copying of documents or records requested by individuals; excessive charges for such services have been an effective bureaucratic tool in denying information to individual requestors;

3. The cumbersome and costly legal remedy under the act when persons denied information by an agency choose to invoke the injunctive procedures to obtain access; although the private person has prevailed over the Government bureaucracy a majority of the important cases under the act that have gone to the Federal courts, the time it takes, the investment of many thousands of dollars in attorney fees and court costs, and the advantages to the Government in such cases makes litigation under the act less than feasible in many situations;

4. The lack of involvement in the decisionmaking process by public information officials when information is denied to an individual making a request under the act; most agencies provide for little or no input from public information specialists and the key decisions are made by political appointees—general counsels, assistant secretaries, or other top-echelon officials;

5. The relative lack of utilization of the act by the news media, which had been among the strongest backers of the freedom of information legislation prior to its enactment; the time factor is a significant reason because of the more urgent need for information by the media to meet news deadlines. The delaying tactics of the Federal bureaucrats are a major deterrent to more widespread use of the act, although the subcommittee did receive testimony from several reporters and editors who have taken cases to court and eventually won out over the secrecy-minded Government bureaucracy; and

6. The lack of priority given by top-level administrators to the full implementation and proper enforcement of Freedom of Information Act policies and regulations; a more positive attitude in support of "open access" from the top administrative officials is needed throughout the executive branch. In too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid admin-

istrative mistakes, waste of funds, or political embarrassment. (H.R. Rept. No. 92-1419, Administration of the Freedom of Information Act, Committee on Government Operations, p. 8 (hereinafter cited *House Report*).

In March 1973 legislation was introduced in the House and Senate, reflecting the findings and recommendations of the *House Report*, which proposed a number of procedural and substantive changes in the law. These bills (S. 1142 and H.R. 5425) were the subject of hearings in both Houses of Congress. Discussion thus moved from identifying problems of administering the FOIA to developing appropriate remedial legislation.

During the spring of 1973, three Senate subcommittees joined together to take an intensive look at various aspects of government secrecy, including freedom of information, executive privilege, and the classification system. The three subcommittees were the Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward M. Kennedy; the Subcommittee on Separation of Powers, chaired by Senator Sam Ervin; and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, chaired by Senator Edmund S. Muskie. The subcommittees conducted 11 days of hearings, heard from over 40 witnesses, and amassed over 850 pages of record.*

Seven of the 11 days of joint hearings were devoted to issues involving the Freedom of Information Act. Witnesses representing the media (National Newspaper Association, Radio-Television News Directors Association, the New York Times, Joint Media Committee and Sigma Delta Chi), the bar (American Bar Association), public interest groups (Center for Study of Responsive Law, Common Cause, American Civil Liberties Union, Consumers Union), government agencies (Department of Agriculture, Department of Defense, Department of Justice), and labor (Oil, Chemical and Atomic Workers International Union), together with members of Congress (Senator Chiles, Congressman Moorhead, Congresswoman Mink) and practicing attorneys, analyzed the shortcomings of the present law and proposed varying solutions. Reports on legislative proposals were received from 23 government agencies, and additional views were received from interested parties. S. 2543 reflects, in addition to the views expressed at the public hearings, extensive analysis of the agency practices and of the court decisions under the FOIA.

The committee amended S. 2543, as introduced, and unanimously voted to report favorably the committee amendment on May 8, 1974. The committee amendment contains various changes and additions to the original bill. In the Explanation portion of this report below, "the bill" and "S. 2543" are used for simplicity to refer to the committee amendment as reported.

*Hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittees on Separation of Powers and Administrative Practice and Procedure of the Committee on the Judiciary, vol. I (April 10, 11, 12, May 8, 9, 10, and 16, 1973), and vol. II (June 7, 8, 11, and 26, 1973). Witnesses testified on the FOIA proposals on April 11, 12, May 9, June 7, 8, 11, and 26. References to testimony are cited hereinafter as *Hearings*. Volume III contains secondary materials related to the issues considered in the hearings. Agency reports on S. 1142 are collected in *Hearings*, vol. II at 280-325.

In 1966 President Johnson, upon signing the FOIA into law, said "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." When President Nixon issued a new Executive Order in 1972 governing classification and declassification of government information he observed:

Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies. (*Fed. Reg.*, vol. 37, No. 48, March 10, 1972, p. 5209.)

In introducing S. 2543, the bill's sponsor, Senator Kennedy, observed that "secret government too easily advances narrow interests at the expense of the public interest," and re-emphasized the importance to democracy of a free flow of information from the government to the public:

We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. If the people of a democratic nation do not know what decisions their government is making, do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy.

EXPLANATION

The Freedom of Information Act was enacted in July 1966, became effective in July 1967, and was codified in June 1967 as section 552 of title 5, United States Code. The Act contains 3 basic subsections. The first (§ 552(a)) sets out the affirmative obligation of each agency of the federal government to make information available to the public, with certain information required to be published and other information merely required to be made available for public inspection or copying. This subsection contains remedies for noncompliance: no person may be adversely affected by any matter (*e.g.* regulations, policies, decisions) required to be published and not so published, and any person improperly denied information requested or required to be published under the section may go to court to require its production.

The second subsection of the FOIA (§ 552(b)) contains the so-called "exemptions" to the general rule of mandatory disclosure contained in the previous subsection. These relate to matters that are:

- (1) Specifically required by 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, or 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.

Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only *permissive*. They merely mark the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate—as well as that the intent of the exemption relied on allows—that the information *should* be withheld. The Attorney General reemphasized the point in his memorandum explaining the FOIA to government agencies:

Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions. (Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at 2-3 (hereinafter cited as *A. G. Memorandum*).

A number of agencies have by regulation adopted this position that, notwithstanding applicability of an FOIA exemption, records must be disclosed where there is no compelling reason for withholding. (*E.g.*, Interior—43 C.F.R. § 22; HEW—45 C.F.R. § 5.70; HUD—24 C.F.R. § 15.21; DOT—49 C.F.R. § 7.51.) This approach was clearly intended by Congress in passing the FOIA.

Finally, the third subsection (§ 552(c)) provides that the FOIA authorizes only the withholding “specifically stated” and that it “is not authority to withhold information from Congress.”

One commentator has observed that the legislative history of the Freedom of Information Act “is even more confusing than the act itself.” (*Freedom of Information Act: Access to Law*, 36 *Fordham L. Rev.* 756, 767 (1968).) In the first commentary on the FOIA, Professor Kenneth Davis pointed to numerous ambiguities and inconsistencies in the language of the new law and the committee reports on it, and courts have subsequently grappled with this language. (Davis, *Information Act: A Preliminary Analysis*, 34 *Chicago L. Rev.* 761 (1967).) Most of the problems have arisen with regard to the nine exemptions in subsection (b) of the Act, and a variety of proposals to

amend the language of the exemptions was considered by the committee. Some witnesses at subcommittee hearings proposed the complete elimination of certain exemptions, while others advocated expanding the areas in which information may be withheld from disclosure.

The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the FOIA, and the increasing acceptance by courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendments to the language of the exemptions. All federal agencies have promulgated regulations under the FOIA, many of which attempt to clarify the meaning of the exemptions, and there have been over 200 court cases involving the Act. From these cases has grown a full body of case law, resolving ambiguities and settling upon interpretations generally consistent with the spirit of disclosure reflected by the passage of the FOIA and with the specific intent of Congress in drafting the law. The substance of the exemptions contained in the Freedom of Information Act thus remains unchanged by S. 2543, although by leaving it unchanged the committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which unduly constrict the application of the Act.

S. 2543 does, however, make procedural changes in the statute. Many of these procedural changes were opposed by federal agencies in their testimony before the subcommittee and reports on similar legislative proposals on the grounds that these changes would be costly, burdensome, and inflexible to administer.

The committee recognizes that procedural requirements of any kind are subject to these criticisms. For instance, affording due process of law to criminal defendants is inevitably going to add to governmental costs and burdens in criminal prosecutions, but the Bill of Rights clearly resolves the conflict between administrative convenience and individual rights in favor of the latter. By the same token, in 1966 Congress faced the problem of balancing the interest of the government in keeping some matters confidential and in maintaining administrative efficiency with the interest of the public in free access to government information. As this committee observed at that time, "Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." (1965 Senate Rept. at 3.) The Freedom of Information Act embodied what the Congress believed to be a workable formula. The committee likewise presently believes that S. 2543 reflects the same balancing process, emphasizing the public's need for speedier, freer access to information without unduly burdening agencies.

It should be remembered that the agencies and officials of the executive branch uniformly opposed the Administrative Procedure Act in the 1940's and the Freedom of Information Act in the 1960's. But on each occasion Congress concluded that administrative due process and public access to information outweighed administrative inconvenience, and laws were passed accordingly.

As an illustration: In its report on proposed Freedom of Information legislation in 1965, the Defense Department stated that in order to comply with the public information requirements (which were to

become the FOIA provisions), it would be necessary in each component of the Department of Defense to build a large staff whose duty would be to determine the availability of records and information, to facilitate its collection from a variety of storage sites, and to assist in defending against suits in U.S. district courts anywhere in the United States. Such an organizational requirement would be exceedingly costly. (See Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 89th Cong., 1st Sess. on S. 1160, etc., May 12, 13, 14 and 21, 1965, at 412.)

Yet in responding to a question concerning the situation at DOD since passage of the FOIA, a departmental representative replied that "the net effect has been beneficial." (*Hearings*, vol. II at 88.) Similar statements concerning benefits derived from the FOIA have been made by officials of other agencies, notably the FTC, FDA, and EPA. It is expected that despite the possible additional burdens and marginal added costs which S. 2543 may place on federal agencies in carrying out their public information responsibilities, the net effect will be beneficial.

Publication of Indexes

Subsection 1(b) of S. 2543 is designed to provide greater accessibility to each agency's index. The index provides identifying information for the public regarding matters issued, adopted, or promulgated by the agency and required to be made public by section 552(a)(2) of the Freedom of Information Act. This new publication requirement is neither overly burdensome nor expensive, but it should provide the public—especially through institutions and libraries—with more readily available access to what its government is doing. As the Common Cause spokesman told the Subcommittee, "If the existence of a document is unknown, disclosure of its contents will never be requested." (*Hearings*, vol. I at 140.)

A publication requirement should also encourage agencies to maintain their indexes in a current manner. Some agencies, like the Federal Communications Commission, are already in compliance with this requirement and have experienced no apparent problems in this regard. (*Hearings*, vol. II at 300.)

Some agencies (*e.g.*, Railroad Retirement Board, Small Business Administration) questioned whether there was sufficient interest in their indexes to justify mass routine publication. The committee thus excepted from required publication agency indexes whose publication would be *both unnecessary and impractical*. The committee believes that photocopy reproduction of indexes will constitute adequate "publication" for those agencies for whom there is insufficient interest in their indexes in these situations to justify printing. The cost, if any, of such photocopied indexes should, however, reflect not the actual cost of reproduction but the equivalent per-item cost were the indexes printed in quantity.

To avoid possible problems in interpreting a requirement that such indexes be "currently" published, the new publication requirement would require only a "quarterly or more frequently" publication of these indexes—a modification adopted from a suggestion of the Federal Power Commission. (*Hearings*, vol. II at 312.) Publication of

supplements rather than republication of the entire index would fulfill this requirement. Publication by a commercial service, such as the Commerce Clearing House, Prentice-Hall, or the Bureau of National Affairs, would fulfill the requirements of this section. Duplicative publication would serve no useful purpose and is certainly not intended by the provision, but in instances where agencies rely on commercial services, those agencies would be expected to maintain the commercial services at the agency offices or reading rooms and to make them available for public inspection.

Some confusion appears to persist among government agencies concerning which materials are subject to the indexing requirement of section 552(a)(2) and concerning the type or form of index which complies with congressional intent under that section. The committee believes that a comprehensive review of agency indexing practices under the FOIA is desirable, since the efficacy of the publication requirement imposed by S. 2543 is in large part dependent on the adequacy of existing records-maintenance and index-compilation practices. The committee will therefore request the General Accounting Office, with such support and assistance from the General Services Administration as the Comptroller General deems appropriate, to undertake such a comprehensive review.

Revision of Subsection (a)(3)

Subsection 1(b) of S. 2543 contains a number of amendments to subsection (a)(3) of the Freedom of Information Act (5 U.S.C. § 552(a)(3)). Subsection (a)(3) has been divided into two parts with the elements of each placed in separate subparts. This is intended not only for clarity but to emphasize the original intent of Congress in enacting subsection (a)(3)—that the judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552, as well as under subsection (a)(3).

On occasion, the Department of Justice has argued in litigation that judicial review of a denial of information requested under subsections (a)(1) and (a)(2) was not available under the FOIA, but courts have uniformly rejected this argument. (See, e.g., *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (1969): "Congressional intent (although not spelled out directly anywhere) seems to have been that judicial review would be available for a violation of any part of the Act, not merely for subsection (3).") In one remarkable instance, the government even contended that an "agency determination that material sought falls within one of the nine exemptions" in subsection (b) "precludes the broad judicial review provided by subsection (a)(3)." (*Epstein v. Resor*, 421 F.2d 930, 932 (1970).) This contention was properly rejected by the court.

The restructuring of subsection (a)(3) should lay this issue to rest, making it clear that de novo judicial review is available to challenge agency withholding under any provision in section 552.

Identifiable Records

Presently the provisions of the Freedom of Information Act are predicated upon "a request for identifiable records" (section 552(a)(3)). S. 2543 would change this language to refer simply to a "request for records which reasonably describes such records." This change

again reflects the intent of the original drafters of the FOIA, for in explaining the term "identifiable," the 1965 Senate Report on the Act said:

The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government ployee to locate the requested records (1966 Senate Rept. at 8.)

While many agencies view this language as the presently operative interpretation of the "identifiable" requirement, cases nonetheless have continued to arise where courts have felt called upon to chide the government for attempting to use the identification requirement as an excuse for withholding documents. (*Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970); *National Cable Television Ass'n v. FCC*, 479 F.2d 183 (D.C. Cir. 1973).) In one case the government had the temerity to argue that the request being resisted was not for "identifiable" records, even though the court specifically found that the agency in question had known all along precisely what records were being requested. (*Legal Aid Society of Alameda Cnty. v. Schultz*, 349 F. Supp. 771, 778 (N.D. Cal. 1972).)

While the committee does not intend by this change to authorize broad categorical requests where it is impossible for the agency reasonably to determine what is sought (see *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972)), it nonetheless believes that the identification standard in the FOIA should not be used to obstruct public access to agency records. Agencies should continue to keep in mind, as specified in the *A. G. Memorandum* (p. 24), that "their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records."

Subsection (b)(1) of S. 2543 makes explicit the liberal standard for identification that Congress intended and that courts have adopted, and should thus create no new problems of interpretation.

Search and Copy Fees

S. 2543 would add a new subsection (4)(A) to section 552(a) requiring the Office of Management and Budget to promulgate regulations specifying a uniform schedule of fees applicable to all FOIA requests, and setting out criteria for reduction or waiver of those fees.

Section 552(a)(3) of the FOIA originally provided that agencies could by published rules set "fees to the extent authorized by statute" for service performed in complying with FOIA requests—that is, for searching and copying requested documents. 5 U.S.C. § 483(a) authorizes agencies to charge fees, as the agency head determines to be "fair and equitable." As set out in Circular No. A-25 of the Office of Management and Budget concerning "User Charges," "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." (*Hearings*, vol. III at 469.) The circular outlines broad guidelines to be used in determining the costs to be recovered, and agencies have followed by setting fee schedules for search and copying in response to FOIA requests.

The 1972 *House Report* observed the "real possibility that search fees and copying charges may be used by an agency to effectively deny public access to agency records, and witnesses before the subcommittee illustrated this observation.

Mr. Harding Bancroft reported a demand that the N.Y. Times guarantee fees to search for documents that might not be released even when found, and observed that the Times finally paid for search and copying of documents that turned out to be classified European newspaper clippings. (*Hearings*, vol. I at 160.)

Mr. Harrison Wellford suggested that fees "have become toll gates on public access to information." He described how he had been put in a "Catch-22" situation by the Department of Agriculture:

The only way I could make my request specific was to get access to the indexes by which those files were recorded. When I asked for access to the indexes, I was told they were internal memoranda, and not available to me. Therefore, I had to make my request in a broad fashion and they came back with a bill for \$85,000 which we regretfully had to turn down. (*Hearings*, vol. II at 97.)

Mr. Wellford also told of receiving "frequent complaints from citizens who have been charged search fees and xeroxing costs for information which an agency made freely available to its regular clients." (*Hearings*, vol. II at 103.)

Finally, Mr. Ronald Plessner indicated that in one instance FDA asked a requestor to make a prepayment for \$20,000 just for a preliminary search without even knowing which documents existed. (*Hearings*, vol. I at 205.)

The Administrative Conference of the United States conducted a study on agency implementation of the FOIA and found that copying charges ran from 5 cents a page at the Department of Agriculture to \$1 a page at the Selective Service System, while clerical search charges varied from \$3 an hour at the Veterans' Administration to \$7 an hour at the Renegotiation Board. Similar variations were found in a study submitted to the Subcommittee by Mr. Ronald Plessner. (*Hearings*, vol. I at 205.)

The Administrative Conference, in a formal recommendation, proposed that a fair and equitable fee schedule be established by each agency. "To assist agencies in this endeavor," the Administrative Conference recommended establishing a committee which was to include representatives of the Office of Management and Budget, the Department of Justice, and the General Services Administration. The Office of Management and Budget was prompted by this recommendation to initiate a study of the possibility of uniform charges under the Freedom of Information Act, but this study was dropped before completion and no further action on this matter has been undertaken. (*Hearings*, vol. I at 204-6; vol. II at 97.)

S. 2543 proposes that the fee schedule to be set "shall be limited to reasonable standard charges for document search and duplication." This standard would provide a ceiling and prevent agencies from using fees as barriers to the disclosure of information which should otherwise be forthcoming. Under this standard, and with the provisions for

waiver and reduction of fees, it is not necessary that FOIA services performed by agencies be self-sustaining. Recovery of only direct costs would be provided for search and copying, while no costs would be assessed for professional review of the requested documents if necessitated.

With respect to agency records maintained in computerized form, the term "search" would include services functionally analogous to searches for records that are maintained in conventional form. Difficulties may sometimes be encountered in drawing clear distinctions between searches and other services involved in extracting requested information from computerized record systems. Nonetheless, the committee believes it desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide—for example, using its computer to identify records. With reference to computerized record systems, the term "search" would thus not be limited to standard record-finding, and in these situations charges would be permitted for services involving the use of computers needed to locate and extract the requested information.

Proposals have been advanced that fees received by agencies for FOIA services performed be allocated to each agency receiving them and not treated as general revenue. The committee believes that this could unduly encourage the charging of excessive fees by agencies, effectively taxing public access even more. Since the fees will not go to the agency involved, the fee charged need not directly relate to the agency's actual costs, nor should the public pay more when dealing with an inefficient agency.

Finally, S. 2543 allows documents to be furnished without charge or at a reduced charge where the public interest is best served thereby. This public-interest standard should be liberally construed by the agencies; it is borrowed from regulations in effect at the Departments of Transportation and Justice. In addition to establishing the general rules, the amendment specifies that fees shall ordinarily not be charged whenever the person requesting the records is indigent, when the aggregate fee would amount to less than \$3, when the records requested are not found, or when the records located are withheld.

Venue

S. 2543 would establish venue in the District of Columbia concurrent with that already set forth in the Freedom of Information Act "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated."

A number of present federal statutes provide for exclusive venue in the United States District Court for the District of Columbia (Voting Rights Act, 42 U.S.C. § 1973(c)) or in the D.C. Circuit Court of Appeals (FCC Orders, 47 U.S.C. § 402(b); Clean Air Act of 1970, 42 U.S.C. § 1857(h)—5(b)(1); Noise Control Act of 1972, 42 U.S.C. § 4915(a)). Others provide for alternate or concurrent venue in the District of Columbia federal courts. (Consumer Product Safety Act of 1972, 15 U.S.C. § 2060(a); Hobbs Act, 28 U.S.C. § 2343; review of FCC orders—15 U.S.C. 717(r), NLRB—29 U.S.C. § 160(f), SEC—15 U.S.C. §§ 77(i), 78(y), CAB—49 U.S.C. § 1486(b).) Over one-

third of reported FOIA cases have thus far been brought in the District of Columbia, and the courts of that district have gained substantial expertise in this area. Since attorneys in the Justice Department in Washington, D.C. will have been involved in initial FOIA determinations at the administrative level (*Hearings*, vol. II at 217; 38 Fed. Reg. 19123, July 18, 1973), defense of litigation in the District of Columbia would be more convenient from the government's vantage point.

District of Columbia venue would not be exclusive but only as an alternative, at the complainant's option. Concurrent venue will remain where he resides or has his business or where the agency records are situated.

Expedition on Appeal

The Freedom of Information Act presently provides that proceedings brought under the Act in the district court shall "take precedence on the docket" and "be expedited in every way." (5 U.S.C. § 552(a) (3).) While the D.C. Circuit Court of Appeals has adopted this mandate and has usually given appeals of FOIA cases precedence, other circuits have apparently not yet followed suit. S. 2543 would make this practice of expediting FOIA cases on appeal as well as in the trial court uniform throughout the federal courts of appeals, reflecting congressional intent to have FOIA cases decided with the least possible delay.

One example of extraordinary delay which came to the committee's attention involved the case of *Morgan v. FDA* (D.C. Cir. No. 17-1709), where the plaintiff sued to obtain FDA disclosure of certain clinical and toxicological tests submitted to the agency in connection with applications for approval of new drugs. The appeal was docketed September 2, 1971; Appellants reply brief was filed September 28, 1972; the case was argued February 22, 1973; and as of May 1, 1974 no decision had been handed down. While one of first impression, this case has far-reaching implications for both the public and the drug industry, as well as for the agency, and the FDA has postponed finalizing new FOIA regulations pending a final decision in the case.

It should be noted that expedition of FOIA cases on appeal as well as at the trial level may well work to the advantage of the government. For the Supreme Court, although not applying its conclusion to the case before it, held that the FOIA confers jurisdiction on the courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings. (*Renegotiation Bd. v. Bannercrest Clothing Co.*, 415 U.S.—(1974).) Thus additional delays in related administrative proceedings may be avoided by expedition of judicial determinations in FOIA cases.

In Camera Inspection and De Novo Review

Presently when most Freedom of Information Act cases reach the federal district courts, the judge has authority to examine the requested documents in order to ascertain the propriety of agency withholding. This procedure has not, however, been held to apply to records withheld under the first exemption of the Act—subsection 552(b) (1).

In *Environmental Protection Agency v. Mink* (410 U.S. 73 (1973)) Congresswoman Patsy Mink attempted to obtain documents relating to the projected effect of the underground atomic test at Amchitka from the Environmental Protection Agency. The Supreme Court held that in all cases *except* those dealing with information which is claimed to be specifically required by executive order to be kept secret in the interest of national defense and foreign policy, de novo review by the district court—as provided for in the FOIA—allows an in camera inspection of the records requested. The Court ruled that in that inspection, the court is to determine whether claimed exemptions apply in fact and whether non-exempt materials can be severed from exempt materials and be released.

While legislative proposals have been made to require automatic in camera examination of disputed records in every case, the Supreme Court observed:

Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material [not exempt from disclosure]. The burden is, of course, on the agency resisting disclosure, 5 USC § 552(a) (3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. (410 U.S. at 93.)

One proposal considered by the committee (in S. 1142) would have *required* in camera inspection of records in FOIA cases. While the court should be able to require submission of documents for in camera inspection when it determines such procedure to be desirable and appropriate, the court should also, in the testimony of the American Bar Association spokesman John Miller, “be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in any manner that it chooses, including through the use of affidavits or oral testimony.” (*Hearings*, vol. II at 156.)

Thus to the extent that a judge can rule on the government’s claim that material requested is exempt from disclosure under the FOIA *without* an in camera inspection of that material, such an examination is not mandated. This approach was preferred by the Attorney General in his testimony. (*Hearings*, vol. II at 218.)

There is, of course, an inherent disadvantage placed upon the complainant when material is submitted for in camera examination, since the court’s decision will not be the product of an adversary process. Private attorneys with experience in litigating FOIA suits have emphasized this disadvantage. One testified that in one case an agreement was reached where he was permitted full access to Treasury Department files under an agreement that only information ultimately ordered disclosed by the court would be publicly revealed. (*Hearings*, vol. II at 117.) Another indicated that in every FOIA case he filed he requested the court to require the government to file a memorandum explaining why withheld materials were exempt, so that he could respond to the explanation. (*Hearings*, vol. II at 100.) These types of

procedures providing for the utilization of the adversary process in in camera proceedings are to be encouraged whenever possible. (See *Hearings*, vol. II at 127, 142.)

On August 20, 1973, the D.C. Circuit Court of Appeals observed that in cases in which in camera examination is warranted:

[I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought. . . . In a very real sense, only one side of the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . .

[T]he present method of resolving FOIA disputes actually encourages the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed. (*Vaughn v. Rosen*, 484 F.2d 820, 823, 826 (D.C. Cir. 1973).)

The court ordered that, in those situations calling for in camera inspection, the government must provide a detailed analysis of the withheld information and the justifications for withholding it, and must formulate a system of itemizing and indexing those documents that would correlate statements by the government with the actual portions of each document. The committee supports this approach which, with the use of a special master where voluminous material is involved, was intended by the court to "sharply stimulate what must be in the final analysis the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt." (*Vaughn v. Rosen*, 484 F.2d 820, 828 (1973).)

The Supreme Court in *Mink*, however, held that the FOIA does not permit an attack on the merits of an executive decision to classify information. Since the fact of classification was not in issue, in camera examination could serve no purpose. The practical result of this decision is that in camera inspection of documents withheld under exemption (b) (1) will generally be precluded in cases brought under the FOIA. S. 2543 would amend the Act to permit such in camera examination.

The bill does establish some specific procedures governing the handling of in camera inspection of documents withheld under the authority of exemption (b) (1)—that is, documents specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy. In these cases the court must determine, under the language of exemption (b) (1) as amended by this bill, whether the documents in question are *in fact* covered by the Executive order or statute involved.

In making this factual determination, the court must first attempt to resolve the matter "on the basis of affidavits and other information submitted by the parties." If it does decide to examine the contested records in camera, the court may consider further argument by both

parties, may take further expert testimony, and may in some cases of a particularly sensitive nature decide to entertain an *ex parte* showing by the government.

During the pendency of a case involving documents claimed to be exempt under section 52(b)(1) the agency is entitled to a protective order sealing the contested documents and such supporting material as the judge shall determine. Upon final decision all documents ordered sealed by the court should be returned by the courts to the agency.

If an affidavit by the head of the agency is filed with the court, the affidavit should specify which information is required to be kept secret in the interest of national defense or foreign policy and explain the reasons for this conclusion. The court may allow this particularization or part thereof to be provided *in camera*.

Where the head of the agency has certified by affidavit his personal determination that the documents should be withheld under the criteria established by a statute or Executive order, then the court must resolve whether, in its view, the determination by the agency head is in fact a reasonable or unreasonable determination within the authority granted by the applicable statute or Executive order. The criteria referred to include both substantive and procedural criteria.

This standard of review does not allow the court to substitute its judgment for that of the agency—as under a *de novo* review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released.

Where particularly sensitive material is involved and so identified by the agency, the court should consider limiting access by court personnel to those obtaining appropriate security clearances. The court, where it deems appropriate, may appoint a special master who may be required by the court to obtain such security clearance as had been previously required for access to the contested documents. The government should expedite any background investigation necessary to the award of such clearances.

By statute certain special categories of sensitive information—Restricted Data (42 U.S.C. § 2162), Communication Intelligence (18 U.S.C. § 798), and Intelligence Sources and Methods (50 U.S.C. § 403 (d)(3) and (g))—must be given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under section 552(b)(3), “specifically exempted from disclosure by statute,” and (b)(1), “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.” The Committee believes that these categories of information will be adequately protected under S. 2543. If such information is ever subject to court review, the review will be conducted *in camera* under the procedures established in the bill for information exempt under section 552(b)(1), which has been amended to include matters specifically required to be kept secret “by an Executive Order or statute.” It is also expected that in such cases the court will recognize that such information is inherently sensitive and that

the latitude for discretion permitted under Executive Order 11652 does not apply to such information.

The specific procedures delineated in section 552(a)(4)(B)(ii) apply only to cases where exemption (b)(1) is invoked.

It should be noted that on at least two occasions, however, the government has taken the position that the seventh exemption (subsection (b)(7) relating to disclosure of investigatory files also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. (*Stern v. Richardson*, No. 179-73, D.C. Cir., Sept. 25, 1973; *Weisberg v. Department of Justice*, No. 71-1026, D.C. Cir., reargued en banc.) By expressly providing for in camera inspection regardless of the exemption invoked by the government, S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

S. 2543 also indicates that the court shall make its determination whether the requested records or files “or any part thereof may be withheld under any of the exemptions.” The spokesman for the American Bar Association suggested in the hearings that “it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information.” The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. (See also page Pr: presently p. 29 (new § beginning “*Deletion of segregable . . .*”) below, concerning the government’s responsibility to release documents after deletion of segregable exempt portions.)

Assessment of Attorney’s Fees and Costs

S. 2543 would permit the courts to assess reasonable attorneys’ fees and other litigation costs against the United States in cases where the complainant has substantially prevailed. (These fees and costs would be payable from the budget of the agency involved as party to the litigation.) Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act’s mandates. Too often the barriers presented by court costs and attorneys’ fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law. “If the government had to pay legal fees each time it lost a case,” observed one witness, “it would be much more careful to oppose only those areas that it had a strong chance of winning.” (*Hearings*, vol. I at 211.)

The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:

An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has

decided against making information available. This is probably the most undermining aspect of existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by the Committee. (*Hearings*, vol. II at 34.)

The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by the Congress in legislation.

The Supreme Court has recognized the role of statutory allowance of attorneys' fees to plaintiffs in encouraging individuals "to seek judicial relief" for the purpose of "vindicating national policy." (*Northcross v. Memphis Board of Education*, 412 U.S. 427 (1973).) Congress has in fact included in past legislation specific provisions allowing the award of attorney's fees to the prevailing party in litigation. (Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k); Emergency School Aid Act of 1972, 20 U.S.C. § 1617; Clean Air Act of 1970, 42 U.S.C. § 1857(h)-2(d); Fair Housing Act of 1968, 42 U.S.C. § 3612(c); Truth in Lending Act, 15 U.S.C. § 1640.)

In one case involving the nonstatutory award of attorneys' fees against the federal government, the judge observed that "a private attorney general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." (*La Raza Unida v. Volpe*, 57 R.F.D. 94 (N.D. Calif. 1972).) Nonetheless, it is generally held that attorneys' fees may not be awarded against the government absent explicit statutory authority. (See 28 U.S.C. § 2312; *West Central Mo. Rural Dev. Corp. v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).)

Congress has established in the FOIA a national policy of disclosure of government information, and the committee finds it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorneys' fees against the government where the plaintiff prevails in FOIA litigation. Further, as observed by Senator Thurmond:

We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted. (*Hearings*, vol. I at 175.)

Even the simplest FOIA case, according to testimony, involves legal expenses of over \$1,000 (*Hearings*, vol. I at 211; vol. II at 96.) "Only the most affluent organizations might decide to challenge the Government in courts," said Theodore Koop of the Radio-Television News Directors Association. (*Hearings*, vol. II at 24.)

The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law. However, the bill specifies four criteria to be considered by the court in exercising its discretion: (1) "The benefit to the public, if any deriving from the case"; (2) "the commercial benefit to the complainant"; (3) "the nature of" the complainant's "interest in the records sought"; and (4) "whether the government's withholding of the records sought had a reasonable basis in law."

Under the first criterion a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.

Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

Finally, under the fourth criterion a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester. Whether the case involved a return to court by the same complainant seeking the same or similar documents a second time should be considered by the court under this criterion.

In the above situations there will seldom be an award of attorneys' fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorneys' fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA. The court should not ordinarily award fees under this situation unless the government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior.

It should be noted that the criteria set out in this subsection are intended to provide guidance and direction—not airtight standards—for courts to use in determining awards of fees. Each criterion should be considered independently, so that, for example, newsmen would ordi-

narly recover fees even where the government's defense had a reasonable basis in law, while corporate interests might recover where the withholding was without such basis.

Courts have assumed inherent equitable powers to award fees and costs to the defendant if a lawsuit is determined to be frivolous and brought for harassment purposes; this principle would continue, as before, to apply to FOIA cases.

Answer Time in Court

Section 1(b)(2) would give the government 40 days to answer in court a complaint which challenged the withholding of information contrary to the Freedom of Information Act. The Act recognizes the importance of the time element to the public seeking information, and requires that FOIA litigation take precedence on court dockets and be expedited. The Act specifies:

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. (5 U.S.C. § 552(a)(3).)

In normal litigation in the federal courts, the defendant is given 20 days to answer the complaint. (Fed. Rules Civ. Proc., Rule 12.) Under present rules, however, the federal government is given 60 days to answer. Although many of the answers in FOIA suits are peremptory, the hearings indicated that the government often obtains extensions beyond the 60-day period and on occasion has taken over twice the time to respond to a complaint. (See *Hearings*, vol. II at 121.)

Before any FOIA case reaches court, the agency from which the records were first requested would already have had time—both initially and in an administrative appeal—to determine the legal and practical implications of its withholding. (Section 1(c) of the bill would provide specific time periods for the initial agency response and administrative appeal consideration.) One attorney who has participated in FOIA cases, Mr. Peter Schuck, observed that “the legal positions are very clear by the time that the matter emerged from the agency.” (*Hearings*, vol. II at 60.) Another FOIA litigator, Mr. Robert Ackerly, agreed:

The Government does not need 60 days to answer one of these cases. The request has to be made to the agency and an appeal taken. The agency has their file on the case. They shift it to the Department of Justice and an answer can be filed promptly. In addition the Department habitually files a general denial. They don't even need to see the documents. They come in and admit jurisdiction and deny everything else. It is hard to get the case at issue. We do file motions for in-camera inspection but the Government objects to that because they want time to answer.

(*Hearings*, vol. II at 109.)

Furthermore, under an order recently promulgated by the Attorney General, the Justice Department will be consulted before any final denial of a request for information is issued by any agency. (38 Fed. Reg. 19123, July 18, 1973.) Thus the 40-day requirement should not constitute an undue burden on the government. In special circumstances, the court could direct, for good cause, an extension of time beyond 40 days for the government's answer.

Sanction for Violation

There are numerous provisions in federal law containing sanctions against unauthorized disclosure of certain kinds of information to the public. For example, 18 U.S.C. § 1905 makes it a federal crime for government employees to reveal trade secrets. Numerous other laws and regulations prohibit disclosure of financial or medical information, tax returns, census data, or various applications for government assistance. (*E.g.*, 42 U.S.C. § 1306: crime to disclose information in files of Social Security Administration; 18 U.S.C. § 798: crime to disclose classified information; 13 U.S.C. § 214: prohibits census employees from divulging census information; 42 U.S.C. § 2000(e)-5: crime to make information public in violation of Equal Employment Opportunities Act.)

But nowhere in the federal law are there effective sanctions for government employees who violate the law by withholding information. Although general administrative sanctions are available against government employees who violate classification requirements (*e.g.* E.O. 11652, sec. 13; 5 Foreign Aff. Man. § 992.1-4), Congressman Moorhead reported that his investigation of the numerous sanctions against employees for disclosure of classified matter revealed that "not one case in 2,500 involved discipline for overclassification." (*Hearings*, vol. I at 187.)

The new subsection 552(a)(4)(F) added by S. 2543 includes a procedure for a judicial determination whether the federal employee responsible for wrongfully withholding information from the public has acted without a reasonable basis in law. If the court so determines, it is authorized to order the responsible employee's appropriate supervisor to suspend him for a period up to 60 days or take other disciplinary or corrective action. Provisions are included elsewhere in the bill (section 3) for identifying those individuals responsible for the decision to withhold information requested under the Act.

Before any sanction could be imposed against the responsible employee under S. 2543, he must be served with notice and be given an opportunity to appear before the court, and the court must find that his action in withholding the documents in question was "without reasonable basis in law." The committee does not intend this standard to imply that a responsible government employee will be held liable under this section in the ordinary case where, for example, advice of counsel is sought and followed and where there may be a reasonable difference of opinion on application of the law to the material sought. The standard would apply to extraordinary and egregious cases where an official ignored or refused to follow the mandates of the law.

The "reasonable basis in law" standard is, as thus explained, neither

vague nor uncertain. In fact, it is substantially more specific than language presently in the law and regulations governing the conduct of employees and officials of the executive branch. For example, Executive Order 11222, section 202(c) provides that:

It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection a, which might result in or create the appearance of (1) using public office for private gain; (2) giving preferential treatment to any organization or person; (3) impeding government efficiency or economy; (4) losing complete independence or impartiality of action; (5) making a government decision outside official channels; or (6) affecting adversely the confidence of the public in the integrity of government. (See also 5 C.F.R. § 735.201a.)

Also prohibited by Civil Service Commission Regulations is an employee's engaging in "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, or other conduct prejudicial to the government." (5 C.F.R. § 735.209.) Surely withholding of information from the public in violation of the FOIA and without a "reasonable basis in law" is more precise and identifiable conduct than "affecting adversely the confidence of the public in the integrity of the government" or engaging in "conduct prejudicial to the government." Under existing law, violation of these prohibitions opens an employee to liability up to permanent dismissal from government service.

Under the proposed sanction provision the court, before imposing the sanctions required, would have an opportunity to consider the recommendation of an appropriate official of the agency involved in the case. This recommendation could include reference to comparable Civil Service sanctions possible in similar situations. This recommendation should be given considerable weight but would not, however, be binding on the court.

know be guaranteed. (*Hearings*, vol. II at 175.)

The need for statutory incentive against secrecy was spelled out by one witness before the subcommittee:

One major reason the bureaucratic attitude "when in doubt, withhold" is so entrenched is that it is rooted in legal self-protection. An official is held individually accountable under criminal statutes for releasing trade secrets or other confidential information but faces no sanction at all if he illegally withholds information from the public. (*Hearings*, vol. II at 105.)

Mr. Ralph Nader testified that "The great failure of the Freedom of Information Act has been that it does not hold federal officials accountable for not disclosing information." (*Hearings*, vol. I at 209.) "There is presently no incentive whatever in the act to comply," said another witness. (*Hearings*, vol. II at 59.) Mr. Nader told the subcommittee of an employee of the Office of Economic Opportunity who was suspended because he had released allegedly confidential information. OEO later released that same information when sued under the

Freedom of Information Act, but it still refused to lift its suspension of the employee. (*Hearings*, vol. I at 209.)

Mr. Ronald Plesser, referring to this same example, said:

If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after federal employees are held accountable for their action under this law will the people's right to know be guaranteed (*Hearings*, vol. II at 175.)

The inclusion of a sanction for violation of the Freedom of Information Act would clearly indicate Congress' commitment to openness, not secrecy, on the part of every officer and employee in the federal government.

A number of states have enacted freedom of information statutes which include penalty provisions for violation of those statutes. Removal from office is provided in two states (Fla. Stat. Ann., ch. 119, sec. 02; Kans. Stat. Ann., sec. 45-203), and others impose fines and even jail terms. A comprehensive list of the relevant state statutory provisions and language is contained in the Appendix. The sanction proposed in S. 2543 is more precise and, in fact, more lenient than these state statutes.

Administrative Deadlines

Section 1(c) would establish time deadlines for the administrative handling of requests for information under the FOIA. It would require the agency to determine within 10 days after the receipt of any request whether to comply with that request, and would give the agency an additional 20 days to respond to an appeal of its initial denial. Agencies could, by regulation, shift time from the appeal to the initial reply period. With each notification of denial to the requester, the agency would have to outline clearly the subsequent steps that could be taken to challenge the denial.

The study by the Administrative Conference, testimony by government witnesses, and the pattern set by present agency regulations suggest flexibility in responding to requests for information, even where specific time deadlines are set. Proposals by governmental witnesses have been made that this matter be left entirely to each agency's regulations, so that the agency could determine the flexibility and discretion it needed to deal with requests. (*Hearings*, vol. II at 82, 217-18).

Witnesses from the public sector, however, uniformly decried delays in agency responses to requests as being of epidemic proportion, often tending to be tantamount to refusal to provide the information. Media representatives, in particular, identified delay as the major obstacle to use of the FOIA by the press and urged strict guidelines for agency responses. (*Hearings*, vol. II at 23, 27. Too often agencies realize that a delay in responding to a press request for records can often moot the story being investigated and will ultimately blunt the reporter's desire to utilize the provisions of the Act: "In the journalistic field, stories that cannot be run when they are newsworthy often cannot be run at all," observed New York Times Vice President Harding Bancroft.

"Reluctant officials are all too aware of this." (*Hearings*, vol. I at 162.) Senator Chiles, testifying before the subcommittee, pointed out the findings of a special Library of Congress study that found:

That the major Government agencies took an average of 33 days to even respond to a request for public record under the Freedom of Information Act. And an average of 50 days to respond when the initial decision to withhold information was appealed by someone looking for the facts. (*Hearings*, vol. II at 14-15.)

Almost every public witness at the hearings brought out specific examples of inordinate delays encountered following initial requests for information. Senator Thurmond observed in his opening statement, "often the lapse of time or unjustified delay renders the information useless." (*Hearings*, vol. I at 176.) And Mr. Ralph Nader told the subcommittee that "Above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right." (*Hearings*, vol. I at 210.) And one commentator noted, "delay is the agency's one predictable defense to a request which it doesn't wish to honor." (Elias & Rucker, "Knowledge is Power: Poverty Law and the Freedom of Information Act," Legal Serv. Clearinghouse, May 1972, reprinted in 120 Con. Rec. 5834, Jan. 30, 1974, daily ed.)

Mr. Anthony Mazzocchi, representing the Oil, Chemical and Atomic Workers International Union, placed a compelling perspective on agency delays in responding to requests for information relating to health and safety of workers. He testified:

Now, a great deal of the time we find not outright refusal, just dilatory tactics being used where we don't hear for many months or they don't answer our request for this information. It is left hanging so to speak. . . . In those cases where we have been successful in securing the [inspector's] report, the average delay from the issuance of the citation to receipt of the report has been 3 months. . . .

Obviously, when dealing with information that is vital to the health of workers, such delays and denials are unconscionable. . . . So to be dilatory on an antitrust action is an inconvenience but to be dilatory where health is concerned may doom an individual to early death. (*Hearings*, vol. II at 67, 69.)

Frequent instances of agencies' failing to follow their own regulations militate against allowing them to govern their own performance. For example, on August 2, 1972, a request was made to the Department of Justice for certain business review letters issued by the Antitrust Division. The initial denial was dated November 24, 1972—over three months after the initial request—from which an appeal was taken to the Attorney General on December 6. Although the requestor filed suit on February 21, 1973, the final agency response was not forthcoming until April 19. That response denied access to the documents under longstanding departmental policy. Thus, a period of over 4 months elapsed before the administrative appeal was decided.

(*Hearings*, vol. I at 210; vol. II at 165, 172.) And, ironically, in the interim the Department proposed regulations effective March 1st under which the responsible agency official will respond to any request for information within ten days, and under which the "Attorney General will act upon the appeal within 20 working days." (38 Fed. Reg. 4391, Feb. 14, 1973.)

Mr. John Shattuck, testifying for the American Civil Liberties Union, provided further examples involving requests to the Justice Department:

In one ACLU case, we made a request by letter to the Justice Department's Internal Security Division. Two months after we requested information by letter we were informed that we had to complete the proper form. After we sent a completed form, more than two additional months elapsed before we were informed that the record we requested did not exist. In another case, involving the United States Parole Board, more than two months passed after we had made several telephone requests for a new set of parole criteria being used by the Board before we were orally informed that we would not receive the criteria. A demand letter was sent to the Board's counsel, threatening suit if we did not receive the information within twenty days. On the twentieth day, the Board's counsel by telephone informed us that he was almost certain we would be provided with a copy, but that he needed a couple of more weeks to clear release with others in the agency. Among the "reasons" given for this delay, the counsel stated that the Department of Justice was having difficulty deciding which office should handle our request, since it did not wish to concede that the Parole Board was an "agency" within the meaning of the Act. (*Hearings*, vol. II at 53.)

Added another witness: "If 'Justice delayed is justice denied,' how much more pernicious is the denial when *Justice* does the delaying." (*Hearings*, vol. II at 63.)

It should be obvious that most persons requesting information from the government ordinarily will not go to court if their requests are not answered within the short time provided in this subsection. As Mr. Robert Ackerly responded to a question whether attorneys will run into court before agencies have been found the records requested:

That rarely happens. We have made that implied threat to the agencies saying, look, it has been a month or 6 weeks and if we don't get a positive response we will treat it as a denial. But if you are really interested in getting the information and if you believe that the agency tells you they are trying to locate it, you will work with the agency to try to get the information.

I don't think these suits have been brought for the fun of bringing law suits or for practice. I think most people are sin-

cere in their requests. And we want to get the documents and not litigation.

So I think, I don't know what the agency's experience is but my experience is that we work with the agencies and I have not yet brought a suit without a final denial although I may have one with EPA now because I am losing patience with them. (*Hearings*, vol. II at 112.)

On the other hand, an agency with records in hand should not be able to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester. Therefore, the time limits set in section 1(c) of S. 2543 will mark the exhaustion of administrative remedies, allowing the filing of lawsuits after a specified period of time, even if the agency has not yet reached a determination whether to release the information requested. Where there are "exceptional circumstances," the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Such "exceptional circumstances" will not be found where the agency had not, during the period before administrative remedies had been exhausted, committed all appropriate and available personnel to the review and deliberation process. This final court-supervised extension of time is to be allowed where the agency is clearly making a diligent, good-faith effort to complete its review of requested records but could not practically meet the time deadlines set pursuant to S. 2543.

For those agencies which believe that 10-day deadlines are simply unworkable, the recent address by Federal Energy Office Administrator William Simon to the National Press Club should be instructive. Despite the extraordinary number of inquiries received by his office, Mr. Simon told journalists:

Within 24 hours of our receiving your requests for information, we will issue an acknowledgment, or grant the request. Within ten working days, I personally guarantee that you will get the information you seek, or have the opportunity to appeal. Appeals will be ruled upon within no more than ten days.

A 10-day limit for the initial response to an information request is also provided by regulation for the Defense Supply Agency. (32 C.F.R. § 1260.6(b)(3).)

The committee has added a novel certification provision to the section on administrative time deadlines to take care of a small class of special and rare situations where the agency finds—and the Attorney General agrees—that an initial response time of 10 days is generally inadequate to locate documents and where transfer of time from the appeal period to the initial response period would leave the agency with insufficient appeal time to adequately review an initial denial. The Immigration and Naturalization Service provides an example of this specialized situation. The INS processes an average of 90,000 formal requests for records each year, most of which seek access to one or more of the 12 million individual files dispersed among and frequently transferred between 57 widely scattered Service offices and 10 Federal Records Centers. When the Justice Department early in 1973 revised its FOIA regulations and imposed a 10-day time limit on initial

responses by other parts of the Department, the Immigration Service indicated that the proposed limit would be frequently unattainable, pointing out that in addition to the factors described above, the files follow the subjects, who often move from one immigration district to another, and that there are often inaccuracies in the information furnished by the requester. The certification provision would allow the Service, or parts of other agencies demonstrating an exceptional situation similar to that of the Service, to take up to 30 days to respond to an initial request. Agencies that simply processed large volumes of requests or frequently faced novel questions of legal interpretation could not avail themselves of this procedure. Nor could agencies or parts of agencies utilize this certification procedure simply because they had been unable to regularly meet standard deadlines, without a showing of the geographical and other concrete obstacles to the location of files or records present in the INS example.

Under subsection (a) (6) (C) an agency may, by notifying the requester, obtain a limited extension of the 10- or 20-day time limits prescribed in subsection (a) (6) (A). If the agency has, for the class of records sought, certified a longer period of time for its initial response under the provisions of subsection (a) (6) (B), however, no further extension of time may be obtained for the initial response.

Where an extension of time is obtained for the initial response to a request, no further extension will be available on appeal. And in no circumstance will the extension of time exceed 10 days.

Furthermore, extensions up to 10 days will be allowed only in four defined types of "unusual circumstances," and only to the extent "reasonably necessary to the proper processing of the particular request." The need to research for and collect records from field facilities or "other establishments that are separate from the office processing the request" does not permit an extension while such an office obtains the records from the agency's own file, records, or administrative division when located in the same city as the processing office. Rather, this is intended to cover the collection of records from other cities, or from a federal records center or other facility which is not part of the agency.

The need for consultation does not permit an extension for routine intra-agency consultation between the involved operating unit, the legal unit, and the public information unit, since any such consultation that may be needed should occur within the basic time limits. While it would permit necessary consultation between two operating units of an agency with different functions, routine clearances among various units with a possible interest in the record—such as occur on almost every request processed by the Internal Revenue Service—would not provide a basis for extensions of time.

Consultation outside the agency is intended to include situations where the request is of substantial subject-matter or policy concern to another agency, for example, a request for records of the Justice Department's Antitrust Division on particular international business matters that are of concern to the State Department. It does not include, however, cases where an agency contemplating denial of an administrative appeal needs the time to consult the Justice Department's Freedom of Information Committee, since it is expected that such consultation will be completed within the prescribed time limits.

The *House Report* observed that "Very few of the agencies make an effort to inform requestors that they can appeal the initial decision . . . Thus, in most agencies the regulations state that an initial refusal may be appealed to a top official in the agency, but agencies seldom make a point of its appellate procedure in the letters denying the initial request." Section 1(c) of S. 2543 therefore adds to the FOIA the requirement that upon an initial denial of a request for information the agency shall notify the person making the request "of the right of such person to appeal to the head of the agency any adverse determination." Likewise, when a denial is upheld on appeal the agency "shall notify the person making such request of the provisions for judicial review of that determination." Intermediate appeals are not contemplated under S. 2543, nor would the administrative time limitations make such appeals practicable.

During the subcommittee hearings Senator Kennedy proposed that "administrative appeals from information denials not go through the agency initially refusing access, where egos and self-protective instincts remain in full force, but to an independent agency with special expertise." (*Hearings*, vol. II at 2.) A similar suggestion was made by a spokesman for the Consumers Union. (*Id.* at 58.) A form of this proposal was instituted administratively by the Attorney General, when he announced at the hearings:

I will immediately remind all federal agencies of the Department's standing request that they consult our Freedom of Information Committee before issuing final denials of requests under the Act.

In this connection I will order our litigating divisions not to defend freedom of information lawsuits against the agencies unless the committee has been consulted. And I will instruct the committee to make every possible effort to advance the objective of the fullest responsible disclosure. (*Hearings*, vol. II at 217.)

This procedure has been written into departmental regulations. (38 Fed. Reg. 19123, July 18, 1973.) The committee supports this step and believes that data should be developed regarding its effectiveness before legislative action is taken to legislate mandatory outside consultation.

Exemption (b) (1)

One change in the exemption language having primarily procedural implications is proposed in section 2(a) of S. 2543: Subsection (b) (1) of section 552 is changed to except from the disclosure provision matters that not only are on their face "specifically required by an Executive Order"—or statute—"to be kept secret in the interest of national defense or foreign policy," but also matters that are in fact found to be within such an executive order or statute. This change is responsive to the invitation of the Supreme Court in the *Mink* case (410 U.S. 732) that Congress clearly state its intentions concerning judicial review and in camera inspection of records claimed exempt by virtue of statute or executive order under section 552(b) (1).

Before January 23, 1973, it was generally believed that the de novo review required in section 552(a) (3) applied to documents withheld

under all nine exemptions of the Freedom of Information Act—that is, that documents withheld under any exemption could be examined by a court in camera. But on that day the Supreme Court, in the *Mink* case, ruled 5 to 3 (Justice Rehnquist not participating) that any information specifically classified pursuant to executive order and withheld under section 552(b) (1) is exempt from disclosure whether or not it should have been classified under the relevant standards, and that courts are not entitled to review the propriety of the agency decision to classify the information. Given the extensive abuses of the classification system that have come to light in recent years (see, e.g., Executive Classification of Information, H.R. Rept. 93-221, Committee on Government Operations, 93rd Cong., 1st Sess., May 22, 1973, p. 40) the courts at the least should be vested with authority to review security classification where an agency acted without reasonable grounds to assign a classification to a particular document. The proposed amendment to section 552(b) (1) is designed to give the courts that authority by permitting them to examine the documents in light of the Executive order or statute cited to justify withholding.

The Supreme Court indicated that the existing language of exemption (b) (1) does not permit in camera inspection of withheld documents, if classified, even to sift out “nonsecret components.” The court then observed:

Obviously this test was not the only alternative available. But Congress chose to follow the Executive’s determination in these matters and that choice must be honored. (410 U.S. at 81.)

In concurring with the majority decision in *Mink*, Justice Potter Stewart stated that Congress “has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document ‘secret’, however cynical, myopic, or even corrupt that decision might have been.” He said further that Congress “in enacting section 552(b) (1) chose . . . to decree blind acceptance of executive fiat.” (410 U.S. at 95.) As Congresswoman Mink observed in her testimony before the subcommittee, “Under the slipshod and illicit procedures devised by the executive to withhold information under the national defense exemption, an army of bureaucrats have been allowed to classify and withhold information at will.” (*Hearings*, vol. I at 370.)

New York Times vice president Harding Bancroft put the position of the press thusly:

It is of fundamental importance that a court have the power to review the contents of records sought by newspaper reporters and that courts not be bound by a security classification placed upon documents up to 30 years ago by a cautious civil servant—let alone a “cynical, myopic, or even corrupt” one. (*Hearings*, vol. I at 162.)

Other witnesses, including Senator Harold Hughes, retired Air Force analyst William Florence, Professor Earl Callen, and Dr. Daniel Ellsberg, also attacked existing practices as harmful both to public knowledge of government policy and to expert inquiry into

scientific matters. (*Hearings*, vol. I at 259-68, 285-308, 421-70.) And as Congressman Moorhead said, "In our many days of hearings on classification we saw many cases where the use of the classification stamp was simply ridiculous." (*Id.* at 180.)

Such abuse of security rationales to forestall or prevent disclosure was not the intent of the authors of the FOIA in 1966, and S. 2543 makes it clear that such is not the intent now. The addition of the words "and are in fact covered by such order or statute" to the present language of section 552(b)(1) will necessitate a court to inquire during de novo review not only into the superficial evidence—a "Secret" stamp on a document or set of records—but also into the inherent justification for the use of such a stamp. Thus a government affidavit certifying the classification of material pursuant to executive order will no longer ring the curtain down on an applicant's effort to bring such material to public light.

Some proposals that have been made to amend subsection (b)(1) would require the court to analyze whether the document withheld would, if disclosed, endanger the national defense or interfere with foreign policy. Under this approach, any classification of the document under an Executive order or statute would be irrelevant. Congress could leave ultimate classification decisions to the courts, under only a general national-defense or foreign-policy standard, but the committee prefers to rely on de novo judicial review under standards set out in Executive orders or statutes.

The courts, in order to determine that the information actually is "covered" by the order or statute, will ordinarily be obliged by S. 2543 to inspect the material in question and, from such an inspection, to determine whether or not the classification was imposed by an official authorized to impose it and in accordance with the standards set forth in the applicable executive order. Moreover, courts facing a (b)(1) exemption claim will have to decide whether or not a classification imposed some time in the past continues to be justified.

A Department of Defense witness told the subcommittee:

I do not believe that the Department of Defense would object to permitting the judge in some circumstances, rare circumstances, I would hope, to examine such a document should he have reason to believe, grounds to believe, or probable cause to believe, that there may have been an improper classification, but we would think that it would be in the court's interests as well as in the interests of everyone, including the executive branch, not to involve the courts in a wholesale review of classified documents. (*Hearings*, vol. II at 87.)

The American Civil Liberties Union spokesman observed on this point:

I don't think there is a danger the courts will be flooded with litigation. To the contrary, what this statute would do, I think, together with Congress' movement in the classification area in general, would be to place a realistic deterrent on over-classification. Those few litigants who were able to go into court and demonstrate that a document was improperly classified should be entitled to compel its release, but I don't think you will have a flood of persons going in. (*Hearings*, vol. II at 37.)

The committee realizes that such an examination of sensitive, and quite probably, complex material may impose an additional burden on judges. And the committee would expect judges, in such circumstances, to give consideration to any classification review of the material being sought already conducted within the executive branch. An interagency committee to conduct such reviews has been established pursuant to Executive Order 11652 of March 8, 1972, and courts judging the propriety of classification in a given case should be able to accord the deliberations of that committee—to which requests for declassification are supposed to be appealed—appropriate consideration.

It is essential, however, to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations—are the only forums now available in which such review can properly be conducted.

The judgments involved may often be delicate and difficult ones, but someone other than interested parties—officials with power to classify and conceal information—must be empowered to make them. It is the committee's conclusion that the courts are qualified to make such judgments. Unless they do, citizens cannot be assured that the system for classifying information is not, as Justice Stewart suggested it could be, "cynical, myopic or even corrupt."

Deletion of Segregable Portions of Record

A new paragraph is proposed to be added to section 552(b) requiring that where only a portion of a record is determined to be exempt from disclosure, the record must be disclosed with the exempt portion deleted. The direction expressed by the paragraph is consistent with one of the recommendations of the Administration Conference and with court interpretations of the FOIA.

"It is a violation of the Act to withhold documents on the ground that parts are exempt and parts nonexempt." In that event, "suitable deletion may be made," observed one court. (*Welford v. Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970).) "The statutory history does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information," said another. (*Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F. 2d 578, 580 (D.C. Cir 1970).) And again: "The court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure." (*Bristol Meyers Co. v. FTC*, 424 F.2d 935, 939 (D.D.C. 1968).)

Some agency regulations also require severability of exempt information. For example, HEW regulations provide:

In the event that any record contains both information which is discloseable and that which is not discloseable under this regulation, the undiscloseable information will be deleted and the balance of the record disclosed. (38 Fed. Reg. 22232, Aug. 17, 1973.)

Under HEW's regulations "Disclosure will be made whether or not the balance of the record is intelligible." (*Id.* at 22231.) This same

approach should be taken under the language of the new amendment.

In light of this new provision courts will have to look beneath the label on a file or record when the withholding of information is challenged. Courts have already held that where intra-agency memoranda are requested, opinion must be severed from purely factual material, with the latter being discloseable. (*Environmental Protection Agency v. Mink*, 410 U.S. 73, 89, 91 (1973).)

The FOIA itself directs that "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details" when it makes information public. (§ 552 (a) (2); see *Roses v. Department of the Air Force*, — F.2d — (2d Cir., March 29, 1974, No. 73-1264).) So also where files are involved will courts have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply.

This provision would apply if, for example, there were a request for a record in a file that had been opened in the course of an investigation that had long since been closed, but which file contained the name of an informer or raw data on innocent persons or confidential investigative techniques. Section 2(b) emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it or the file it was in contained such exempt information, since deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt.

The language originally proposed in S. 2543 as introduced provided that "if the deletion of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions." The amended language is intended to encompass the scope of this original proposal but apply the deletion principle to all exemptions.

Reporting Requirements

Section 3 of S. 2543 contains certain reporting provisions designed to facilitate congressional oversight of agency administration of the Freedom of Information Act.

A number of witnesses at the hearings indicated that a primary problem with agency compliance with the FOIA is the absence of significant continuing pressures towards liberal disclosure of information. At the same time there is a tendency for bureaucratic self-preservation that strongly leans toward oversecrecy. Almost all witnesses suggested the importance of congressional oversight in keeping agencies in compliance with the directions of the FOIA.

Periodically, but irregularly, over the past six years the Subcommittee on Administrative Practice and Procedure has asked for reports by agencies on denials of information under the FOIA. (*E.g.*, *The Freedom of Information Act: Ten Months Review*, Senate Sub-

committee on Administrative Practice and Procedure, May 1968.) The committee believes that the collection and analysis of these reports, providing the occasion for the Congress to identify recalcitrant agencies, recurring misinterpretations of the mandates of the FOIA, and undue delays can go a long way toward encouraging adherence to the Act. The committee thus concludes that reporting should be regularized.

A requirement that the government officials responsible for denying FOIA requests should be identified on the record is included in section 3. This was proposed at the hearings by Senator Kennedy, who suggested

that every Government official involved in deliberations leading to a denial of information be identified on the public record. Just as the proposed legislation's requirement that denials be collected allows for an assessment of an agency's responsiveness to Freedom of Information Act requests, so also should the track record of each individual official at every level be open to public evaluation. (*Hearings*, vol. II at 2.)

The reporting requirement also implies a specific role that the Justice Department should play in monitoring and encouraging agency compliance with the FOIA by requiring the Attorney General to submit an annual report including "a listing of the number of cases arising" under the FOIA, "the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed."

In testimony before the subcommittee the Attorney General agreed that "there are some steps that the Justice Department can take immediately to encourage better administration of the act." (*Hearings*, vol. II at 216.) S. 2543 thus requires the Attorney General to include in his report "a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section."

Expanded Definition of Agency

Section 3 expands on the definition of agency as provided in section 551(1) of title 5. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with the substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. (*Soucie v. David*, 44 F.2d 1067, 1073 (1971).)

Nonetheless, the U.S. Postal Service has taken the position that without specific inclusionary language, amendments to the FOIA "would not apply to the Postal Service." (*Hearings*, vol. II at 323.) To assure FOIA application to the Postal Service and also to include publicly funded corporations established under the authority of the United States, like the National Railroad Passenger Corporation (45 U.S.C. § 541), section 3 incorporates an expanded definition of agency to apply under the FOIA.

Authorization for Appropriations

The authorization for appropriations in section 4 is *not* for such sums as may be necessary to carry out the purposes of the bill and the Act which it amends, but is rather for such sums as may be necessary "to assist in" carrying out those purposes. This language is used advisedly, to assure that no agency can cite a failure to receive funds which the bill authorizes as an excuse for not complying with the letter of the FOIA in every respect.

Since its enactment, the processing of requests under the FOIA has been charged against an agency's funds for general salaries and expenses. This arrangement is intended basically to continue, despite increases in workload, because most of the personnel, units, and facilities involved in administering the Act are the same as those involved in performing other agency functions. Such commingling is largely inevitable since all parts of agencies maintain records which may be the subject of requests under the FOIA.

The objectives of the FOIA call for making available supplementary resources to agencies which may experience special problems under its mandates. These supplementary resources might be for special services involving research, training, coordination and review, internal audit, planning, and coping with unusual surges in agency request processing workloads. These services would typically be performed by personnel assigned full time, nearly full time, or for large portions of their time, in contrast to the generally irregular or infrequent involvement in Freedom of Information work of other agency personnel, although it is contemplated that agencies will generally continue to administer the Act adequately with resources made available on the same basis as in the past.

Many agencies have in the past allocated funds appropriated for public information activities to public-relations type programs. Thus the public may be deluged by unwanted agency-sponsored puffery, while specific requests for information go unheeded by the agency. Agencies can therefore expect congressional scrutiny of their public information and publicity-related budgets as a precedent to appropriation of funds under this authorization.

Effective Date

The amendments to the Freedom of Information Act contained in S. 2543 are to become effective on the ninetieth day after the date of enactment.

Congressional Access to Information

The Freedom of Information Act presently states that the Act shall not be used as "authority to withhold information from Congress." This basically restates the fact that the FOIA, which controls *public access* to government information, has absolutely no effect upon *congressional access* to government information.

As clear as this section may seem, the Act has incredibly been cited in correspondence from federal agencies to congressional committees as a basis for denying certain information to those committees. In recent months both the Internal Revenue Service and the Federal Power Commission have purported to rely on the FOIA to refuse congressional access to information.

Proposals have been made to expand section 552(c) to impose on the executive branch an affirmative obligation to respond to the congressional requests for information. The committee believes that the nonapplicability of the FOIA to Congress cannot be overstated; at the same time, however, the committee prefers to see legislation relating to executive privilege developed independently from any revision of the FOIA. In fact, during the first session of the 93rd Congress the Senate passed legislation (S. 2432, S. Rept. No. 93-612; S. Con. Res. 30, S. Rept. No. 93-613) dealing with executive privilege, making inclusion of provisions relating thereto in S. 2543 unnecessary.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, 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 *italic*, and existing law in which no change is proposed is shown in roman) :

UNITED STATES CODE

TITLE 5.—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

CHAPTER 5.—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER II.—ADMINISTRATIVE PROCEDURE

* * * * *

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

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

* * * * *

(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 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. Each agency shall 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 publish, quarterly or more frequently, each index 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 comparable to that charged had the index been 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, shall make the records promptly available to any person.]

(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 reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of search and duplication. Documents may 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. But such fees shall ordinarily not be charged whenever—

(i) the person requesting the records is an indigent individual;

(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than \$3;

(iii) the records requested are not found; or

(iv) the records located are determined by the agency to be exempt from disclosure under subsection (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, 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 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.】

(B) (i) *On complaint, the district court of the United States in the district in which the complainant resides, or has his principle 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 consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may 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.*

(ii) *In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b) (1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.*

(C) *Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within forty 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.*

【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.】

(D) *Except as to causes 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 causes 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. In exercising its discretion under this paragraph, the court*

shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the government's withholding of the records sought had a reasonable basis in law.

(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

(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.

[(4)] (5) 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.

(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 such 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 part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (3) of this subsection.

(B) Upon the written certification by the head of an agency setting forth in detail his personal findings that a regulation of the kind specified in this paragraph is necessitated by such factors as the volume of requests, the volume of records involved, and the dispersion and transfer of such records, and with the approval in writing of the Attorney General, the time limit prescribed in clause (i) for initial determinations may by regulation be extended with respect to specified types of records of specified components of such agency so as not to exceed thirty working days. Any such certification shall be effective only for periods of fifteen months following publication thereof in the Federal Register.

(C) In unusual circumstances as specified in this paragraph, the time limits prescribed in clauses (i) or (ii), but not those prescribed

pursuant to subparagraph (B), may be extended by written notice to the requester 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 10 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 assign professional or managerial personnel with sufficient experience to assist in efforts to locate records that have been requested in categorical terms, or with sufficient competence and discretion to aid in determining by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions;

(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 interests therein, in order to resolve novel and difficult questions of law or policy; and

(iv) the death, resignation, illness, or unavailability due to exceptional circumstances that the agency could not reasonably foresee and control, of key personnel whose assistance is required in processing the request and who would ordinarily be readily available for such duties.

(D) Whenever practicable, requests and appeals shall be processed more rapidly than required by the time periods specified under (i) and (ii) of subparagraph (A) and paragraphs (B) and (C). Upon receipt of a request for specially expedited processing accompanied by a substantial showing of a public interest in a priority determination of the request, including but not limited, to requests made for use of any person engaged in the collection and dissemination of news, an agency may by regulation or otherwise provide for special procedures or the waiver of regular procedures.

(E) An agency may by regulation transfer part of the number of days of the time limit prescribed in (A) (ii) to the time limit prescribed in (A) (i). In the event of such a transfer, the provisions of paragraph (C) shall apply to the time limits prescribed under such clauses as modified by such transfer.

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.

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

- (1) specifically required by an Executive order or statute to be kept secret in the interest of [the] national defense or foreign policy and are in fact covered by such order or statute;
- (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.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection.

(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 the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which 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) *a copy of every rule made by such agency regarding this section;*
- (5) *the total amount of fees collected by the agency for making records available under this section; and*

(6) a copy of every certification promulgated by such agency under subsection (a) (6) (B) of 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) (3) (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" means any agency defined in section 551(1) of this title, and in addition includes 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.

COST

Passage of S. 2543 would entail some additional cost to the federal government through the imposition of attorneys fees and court costs where the complainant substantially prevails in court and where the judge makes such findings on the criteria stated in the new section 552(a) (4) (E) as he deemed requisite to the award of these fees to the complainant. Some additional administrative and salary expenses may also ensue from the index publication, time deadline, and annual report requirements of the proposed legislation. It is expected that for the most part the cost of these items can be absorbed by the agencies' present operating budgets. Some supplemental cost may be incurred by the Justice Department in its expanded role, as contemplated under the bill. No estimate has been provided the committee by the Department on this item, however.

It is impossible to estimate the cost of assessing attorneys' fees against the government because of the variable factors. Data show that the numbers of FOIA cases decided for the past four years are approximately: 1970—8; 1971—20; 1972—28; 1973—16. (Between 30 and 40 FOIA cases were filed in 1973.) Many of these cases are dismissed on motions or summary judgments. The government, of course, prevails in a number of cases. Some go to the appellate courts for final decision. Many cases involve corporate plaintiffs seeking information relating to negotiations or a competitor. And the government may likely disclose more information to avoid suits in the first place (offsetting the additional suits that may be filed by complainants who previously could not afford to litigate).

Projecting an average of 30-40 cases *decided* in one year, assuming that in every case an indigent public-interest plaintiff substantially prevails (clearly an unwarranted assumption but giving maximum-impact results), and multiplying this by the basic cost involved in a FOIA case—estimated by private attorneys to be \$1,000 (see *Hearings*, vol. I at 211, vol. II at 96)—the total maximum projected cost of S. 2543 would be \$40,000 per year.

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED

5 U.S.C. Section 552

Proposed Amendment

Comment

§ 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.

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. Section 552

Proposed Amendment

Comment

(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, and 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

The proposed amendment adds the requirement of quarterly publication and also the requirement of distribution.

Each agency shall maintain and

agency also shall maintain and make available for public inspection and copying 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, shall make the records promptly available to any person. On complaint, the district court of the

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 publish, quarterly or more frequently, each index 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 comparable to that charged had the index been published.

(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 reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.

The proposed amendment states that the request shall “reasonably” describe the records desired. Provisions relating to judicial action are included in a new section.

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. Section 552

Proposed Amendment

Comment

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 complaint. In such a case the court shall determine the matter de novo 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.

(4) (A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of search and duplication. Documents may 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. But such fees shall ordinarily not be charged whenever—

- (i) the person requesting the records is an indigent individual;
- (ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than \$3;
- (iii) the records requested are not found; or

The proposed amendment concerning fees requires O.M.B. to promulgate a uniform fee schedule. It also specifies certain situations in which fees should not be charged or should be reduced.

(iv) all of the records located are determined by the agency to be exempt from disclosure under subsection (b).

(B) (i) 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 consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may 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.

(ii) In determining whether a document is in fact specifically required by an Executive order or

The proposed amendment is similar to language currently found in 5 U.S.C. sec. 552(a)(3). It provides additionally, however, that the district court of the District of Columbia shall have jurisdiction under the Act. Also, the phrase "with such in camera examination of the requested records as it finds appropriate" is added.

statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by statute or Executive order referred to in subsection (b) (1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within forty days after the

The proposed amendment adds a time limit for the defendant to submit an answer or other pleading.

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. Section 552

Proposed Amendment

Comment

service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to causes 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 causes 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. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the

The proposed amendment specifically covers "appeals."

The proposed amendment expressly permits the assessment of attorney fees and litigation costs.

records sought, and whether the government's withholding of the records sought had a reasonable basis in law.

(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of in which to respond thereto, and shall the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

The proposed amendment permits the court after an appropriate hearing, to require sanctions against persons withholding information without reasonable basis in law.

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. Section 552

Proposed Amendment

Comment

(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.”

The proposed amendment is substantially identical to language found in section (a)(3) of the current law.

(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.

The proposed amendment does not change the present section but it is renumbered as paragraph (5).

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

The proposed amendment adds a new paragraph setting a fifteen day time limit for agencies to respond to requests for records under the Act, with a fifteen day time limit on administrative appeals.

(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 re-

spect to such 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 part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (3) of this subsection.

(B) Upon the written certification by the head of an agency setting forth in detail his personal findings that a regulation of the kind specified in this paragraph is necessitated by such factors as the volume of requests, the volume of records involved, and the dispersion and transfer of such records, and with the approval in writing of the Attorney General, the time limit prescribed in clause (i) for initial determinations may by regulation be extended with respect to specified types of records of specified components of such agency so as not to exceed thirty working days. Any such certification shall be effective only for periods of fifteen months following publication thereof in the Federal Register.

(C) In unusual circumstances as specified in this subparagraph, the time limits prescribed in clause (i) or (ii), but not those prescribed pursuant to subparagraph (B), may be extended by written notice to the requester 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 10 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 assign professional or managerial personnel with sufficient experience to assist in efforts to locate records

that have been requested in categorical terms, or with sufficient competence and discretion to aid in determining by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions;

(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 interests therein, in order to resolve novel and difficult questions of law or policy; and

(iv) the death, resignation, illness, or unavailability due to exceptional circumstances that the agency could not reasonably foresee and control, of key personnel whose assistance is re-

quired in processing the request and who would ordinarily be readily available for such duties.

(D) Whenever practicable, requests and appeals shall be processed more rapidly than required by the time periods specified under (i) and (ii) of subparagraph (A) and paragraph (B) and (C). Upon receipt of a request for specially expedited processing accompanied by a substantial showing of a public interest in a priority determination of the request, including but not limited, to requests made for use of an individual or other person engaged in the collection and dissemination of news, an agency may by regulation or otherwise provide for special procedures or the waiver of regular procedures.

(E) An agency may by regulation transfer part of the number of days of the time limit prescribed in (A) (ii) to the time limit prescribed in (A) (i). In the event of such a transfer, the provisions of paragraph (C) shall apply to the time limits pre-

scribed under such clauses as modified by such transfer.

Any persons 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 agency 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 every officer or employee of any agency who participated substantively in the agency's decision to deny such request. Any

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. 552

Proposed Amendment

Comment

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

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

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.

(1) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute;

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of those portions which are exempt under this subsection.

(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 the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which shall include—

(1) the number of determinations made by such agency not

The proposed amendment adds the language “and are in fact covered by such order or statute.”

The proposed amendment adds a new sentence after exemption (9) providing that segregable nonexempt portions of a requested file should be released after deletion of exempt portions.

The proposed amendment requires agencies to submit a report annually to Congress containing specific information about its operation under the Freedom of Information Act.

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

(5) the total amount of fees collected by the agency for making records available under this section;

(6) a copy of every certification promulgated by such agency under subsection (a)(6)(B) of this section; and

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

SECTION-BY-SECTION ANALYSIS OF S. 2543, AS AMENDED—(Continued)

5 U.S.C. 552

Proposed Amendment

Comment

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 breakdown 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) (3) (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' means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, The Postal Rate Commission, and by other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

SEC. 4. There is hereby authorized to be appropriated such sums as may

The proposed amendment provides that agencies defined in 5 U.S.C. sec. 551(1), the United States Postal Service, the Postal Rate Commission, and any other corporate governmental authority receiving appropriated funds are covered by this section.

be necessary to assist in carrying out the purposes of this Act and of section 552 of title 5, United States Code.

SEC. 5. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

The proposed amendment specifies that all amendments shall become effective ninety days after the date of enactment.

APPENDIX

STATE STATUTORY SANCTIONS AGAINST VIOLATION OF FREEDOM OF INFORMATION PROVISIONS

Alabama.—Code of Alabama, title 41, section 146 (1945). “Any public officer, having charge of any book or record, who shall refuse to allow any person to examine such record free of charge, must, on conviction, be fined not less than fifty dollars.”

Arkansas.—Arkansas Statute Annotated, section 12-2807 (1947). “Any person who wilfully and knowingly violates any of the provisions of this Act shall be guilty of a misdemeanor and shall be punished by a fine of not more than \$200, or 30 days in jail, or both.”

Colorado.—Colorado Revised Statutes, chapter 113, article 2, section 6 (1963). “Any person who wilfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment.”

Florida.—Florida Statute Annotated, chapter 119, section .02 (1972). “Any official who shall violate the provisions of § 119.01 shall be subject to removal or impeachment and in addition shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.”

Illinois.—Illinois Revised Statute, chapter 116, section 43.27, (1972). “Any officer or employee who violates the provisions of Section 3 of this Act is guilty of a Class B misdemeanor.”

Indiana.—Burns Indiana Statute Annotated, chapter 6, title 57, section 606 (1970 Supplement). “Any public official of the state, or of any political subdivision thereof, who denies to any citizen the rights guaranteed to such citizen under the provisions of section(s) 3 and 4 of this chapter, . . . shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) to which may be added imprisonment in the county jail for a term not to exceed thirty (30) days.”

Kansas.—Kansas Statute Annotated, section 45-203 (1957). “Any official who shall violate the provisions of this act shall be subject to removal from office and in addition shall be deemed guilty of a misdemeanor.”

Louisiana.—Louisiana Revised Statute, title 44, section 37, (1950). “Any person having custody or control of a public record, who violates any of the provisions of this Chapter, or any person . . . who . . . hinders or attempts to hinder the inspection of any public records declared by this Chapter to be subject to inspection, shall upon first conviction be fined not less than one hundred dollars, and not more

than one thousand dollars, or shall be imprisoned for not less than one month, nor more than six months. Upon any subsequent conviction he shall be fined not less than two hundred fifty dollars, and not more than two thousand dollars, or imprisoned for not less than two months, nor more than six months, or both."

Maine.—Maine Revised Statute Annotated, title 1, chapter 13, section 406 (1964). "A violation of any of the provisions of this subchapter or the wrongful exclusion of any person or persons from any meetings for which provision is made shall be punishable by a fine of not more than \$500 or by imprisonment for less than one year."

Maryland.—Annotated Code of Maryland, article 76A, section 5 (Supplement 1972). "Any person who willfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars (\$100.00)."

Nebraska.—Revised Statute of Nebraska, chapter 84, section 712.03 (1967). "Any official who shall violate the provisions of sections 84-712 to 84-712.03 shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and shall upon conviction thereof, be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding three months."

Nevada.—Nevada Revised Statutes, title 19, chapter 293, section .010 (1967). "Any officer having the custody of any of the public books and public records described in subsection 1 who refuses any person the right to inspect such books and records as provided in subsection 1 is guilty of a misdemeanor."

New Mexico.—New Mexico Statutes Annotated, 1953, chapter 71, article 5, section 3. "If any officer having the custody of any state, county, school, city or town records in this state shall refuse to any citizen of this state the right to inspect any public records of this state, as provided in this act (71-5-1 to 71-5-3), such officer shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than two hundred and fifty dollars (\$250.00) nor more than five hundred dollars (\$500.00), or be sentenced to not less than sixty (60) days nor more than six (6) months in jail or both such fine and imprisonment for each separate violation."

Ohio.—Ohio Revised Code Annotated, (Page's 1969) section 149.99. "Whoever violates section 149.43 or 149.351 (149.35.1) of the Revised Code shall forfeit not more than one hundred dollars for each offense to the state. The attorney general shall collect the same by civil action."

Tennessee.—Tennessee Code Annotated, title 15, section 306, cumulative supplement 1970. "Any official who shall violate the provisions of §§ 15-304—15-307 shall be deemed guilty of a misdemeanor."

CHAPTER VI

Conference Report—H. Rept. 93-1380 (S. Rept. 93-1200 identical)

FREEDOM OF INFORMATION ACT AMENDMENTS

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, 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 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 recommenda-

tions 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. ERLBORN,
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. ERLNBORN,
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.

CHAPTER VII
HOUSE AND SENATE DEBATE
ON FREEDOM OF
INFORMATION ACT AMENDMENTS OF 1974

**A. HOUSE DEBATE AND VOTE, MARCH 14, 1974;
PP. H1787-H1803**

PROVIDING FOR CONSIDERATION OF H.R. 12471, FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. MATSUNAGA. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 977 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 977

Resolved, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act. After general debate, which shall be confined to the bill and shall continue not to exceed one hour, to be equally divided and controlled by the chairman and ranking minority member of the Committee on Government Operations, the bill shall be read for amendment under the five-minute rule. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit.

The SPEAKER. The gentleman from Hawaii (Mr. Matsunaga), is recognized for 1 hour.

Mr. MATSUNAGA. Mr. Speaker, I yield 30 minutes to the gentleman from California, Mr. Del Clawson, pending which I yield myself such time as I may consume.

(Mr. Matsunaga asked and was given permission to revise and extend his remarks.)

Mr. MATSUNAGA. Mr. Speaker, House Resolution 977 provides for consideration of H.R. 12471, which, as reported by our Committee on Government Operations, would strengthen the procedural aspects of the Freedom of Information Act by amendments to that act. The major amendments would accomplish the following: First, clarify language in the act regarding the authority of the courts, relative to 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 code; second, amend language pertaining to national defense and foreign policy matters, in order to bring that exemption within the scope of matters subject to an in camera review; and third, add a new section to the act to provide for mechanism to strengthen congressional oversight in the administration of the act by requiring annual reports to House and Senate committees on requests and denials of requests for information.

Mr. Speaker, House Resolution 977 provides for 1 hour of general debate, to be equally divided and controlled by the chairman and ranking minority member of the Committee on Government Operations,

after which the bill would be read for amendment under the 5-minute rule. At the conclusion of the consideration of the bill for amendment, the committee would rise and report the bill to the House with such amendments as may have been adopted. The previous question shall then be considered as ordered on the bill and amendments thereto to final passage, without any intervening motion except one motion to recommit.

The committee report estimates that costs required by the bill should not exceed \$50,000 in fiscal year 1974 and \$100,000 for each of the succeeding five fiscal years.

Mr. Speaker, H.R. 12471 represents the first changes recommended to the Freedom of Information Act since that landmark law was enacted by this Congress in 1966. The changes and clarifications proposed in this bill are modifications recommended by a unanimous vote of the Government Operations Committee. Its members in their wisdom have clearly determined that a pressing need exists to lift the secrecy which continues to shroud our Federal agencies. The aim of this measure is to correct the dangerous inadequacies revealed by thorough investigative hearings conducted by the committee's Foreign Operations and Government Information Subcommittee during 1972, as well as through frustrating personal experiences of many in this hall in their dealings with Federal agencies.

Many of the proposed amendments are procedural in nature yet crucial to the intended purposes of the act. The amendments would improve the currently confusing and inadequate indexes of information now available in some agencies. It would correct the procedures for identification of records required by the act. It would require prompt agency responses to requests and provide for reasonable legal cost incurred by aggrieved plaintiffs who are refused mandated agency action on their legitimate requests. This provision would help cover their actions in Federal court to compel uncooperative agencies to release information which properly should be open to public inspection.

There are three more substantive provisions in the bill which warrant our full deliberation. One provision would clarify existing language regarding the authority of the courts to examine the content of agency records alleged by their custodians to be exempt from disclosure under section 552(b) of the code. Another provision would permit in camera review by the courts of matters pertaining to national defense and foreign policy, as defined by criteria established by Executive order. This will permit such matters to be included with the existing provision in the act which currently allow in camera review in nine delineated areas. I refer to section 552(b) of the code.

The third major provision would strengthen the mechanism for congressional oversight in the administering of the act. This amendment would require the filing of annual reports by the agencies to House and Senate committees. These reports would delineate statistical data and other information on denials of requests under the act, administrative appeals of denials, rules promulgated by the agencies, and fee schedules and funds collected for searches and reproduction of requested information.

Mr. Speaker, the purpose of this bill is to insure that the people's right to know what their Government is doing will be protected and that their access to legitimate information will be unimpeded. The

Freedom of Information Act was intended to help make the democratic process work by assuring that the conduct of Government in our republic would remain open for all to view, except where genuine national security and foreign policy concerns would be jeopardized. The intent was, and is, to assure that our people will remain an informed and enlightened citizenry.

Experience has taught us, however, that the scope of this legitimate shield which was provided by the act could be stretched to suit particular partisan or personal purposes. It could be extended to veil matters unfavorable to the custodian agency or embarrassing to the officials therein.

What this bill would do is require those agencies which have resisted proper public scrutiny to produce to a Federal judge valid reasons based on compelling national security and foreign policy interests explaining why the American people should not know of the agency's activities or policies. All of this would be done in the strictest secrecy in the closed chambers of a Federal judge. Those agencies which claim the need for secrecy will have their confidentiality safeguarded, unless, of course, the court finds their claim unreasonable. The public, including the press and the Congress, will be assured that the determination of what should be kept secret will be decided by an impartial party, not by the whim of an overly protective bureaucrat or agency official who may, under the present law, cast the cloak of national security over every detail of agency business. The bill, in brief, provides for the fullest measure of protection for legitimate Government secrets while allowing for disclosure of that which the public is entitled to know.

Mr. Speaker, as a cosponsor of this measure and of the original act, I firmly believe that this bill, the product of months of intensive investigation and review by the respected members of the Government Operations Committee, offers a sensible and workable compromise between the requirements of a democratic Government and the appropriate needs of Government and national security.

I congratulate the most distinguished chairman of the committee, my dear friend and colleague from California, Chet Holifield, and the hard-working principal sponsor of this bill, my respected colleague, Bill Moorhead, for their reasoned approach to this vital legislation.

Mr. Speaker, I urge the adoption of House Resolution 977 in order that H.R. 12471 may be considered and passed overwhelmingly.

Mr. DEL CLAWSON. Mr. Speaker, I yield myself such time as I may consume.

(Mr. Del Clawson asked and was given permission to revise and extend his remarks.)

Mr. DEL CLAWSON. Mr. Speaker, the gentleman from Hawaii (Mr. Matsunaga) has explained the bill thoroughly, also the resolution, but let me just summarize very quickly:

Mr. Speaker, House Resolution 977 is the rule providing for consideration of H.R. 12471, the Freedom of Information Act Amendments. This is an open rule with 1 hour of general debate.

The purpose of H.R. 12471 is to provide easier access to Government documents for the public.

The bill sets rigid time limits on the agencies for responding to information requests, shortens substantially the time for the Govern-

ment to file its pleadings in Information Act suits, and authorizes the award of attorney's 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.

The committee report estimates the cost of this bill at \$50,000 for the remainder of fiscal year 1974, and \$100,000 for each of the succeeding five fiscal years.

Mr. Speaker, I urge the adoption of this rule in order that the House may begin debate on H.R. 12471.

Mr. Speaker, I have no requests for time, and I reserve the balance of my time.

Mr. MATSUNAGA. Mr. Speaker, I have no requests for time.

Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The resolution was agreed to.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks and include extraneous material on the bill that we are about to consider, H.R. 12471 (to amend the Freedom of Information Act).

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The SPEAKER. The question is on the motion offered by the gentleman from Pennsylvania (Mr. Moorhead).

The motion was agreed to.

IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill H.R. 12471, with Mr. Eckhardt in the chair.

The Clerk read the title of the bill.

By unanimous consent, the first reading of the bill was dispensed with.

The CHAIRMAN. Under the rule, the gentleman from Pennsylvania (Mr. Moorhead) will be recognized for 30 minutes, and the gentleman from Illinois (Mr. Erlenborn) will be recognized for 30 minutes.

The Chair recognizes the gentleman from Pennsylvania (Mr. Moorhead).

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield myself such time as I may consume.

(Mr. Moorhead of Pennsylvania asked and was given permission to revise and extend his remarks.)

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I will be brief in my remarks explaining the bill, which has the bipartisan support of the membership of our committee and which was reported unanimously by the Government Operations Committee last month.

H.R. 12471 is a bill to insure the right of the public to ask for and receive information about what their Government is doing. It contains amendments, essentially procedural in nature, to the Freedom of Information Act, for the most part setting ground rules by which the Federal agencies must respond to inquiries from the public.

The major substantive provision of this bill clarifies the original intent of Congress that executive agency decisions to withhold information from the public may be reviewed by the judicial branch of Government.

Amendment No. 3—Section 1(c)7 Time limits:

Sets a fixed time of 10 working days for response, 20 working days for administrative appeal and 20 days for a responsive pleading to a complaint in a district court.

Amendment No. 4—Section 1(e) Attorney fees and court costs:

Allows the court at its discretion to award reasonable attorney fees and costs to plaintiffs who prevail in freedom of information litigation.

Amendment No. 5—really two amendments—Section 1(d) and section 2, Court review:

Would, among other things, overrule the Supreme Court decision in EPA against Mink, by first making it clear that a court may review records in camera and,

Second, authorizing a court to look behind a security classification label to see if a record deserved classification under the "criteria" of an Executive order.

Amendment No. 6—Section 3 Reports to Congress:

Requires affected agencies to submit annual reports to the appropriate committees of the Congress on their freedom of information activities.

Amendment No. 7—Section 3 Definition of "agency":

Expands the definition of agency for the purposes of the Freedom of Information Act to include the Executive Office of the President, Government corporations, and Government controlled corporations, as well as those establishments already recognized as Federal agencies.

The amendments to the Freedom of Information Act provided for in H.R. 12471 would take effect 90 days after enactment.

Mr. Chairman, I want to stress again the bipartisan nature of and support for this bill. It is a carefully drafted piece of legislation which I feel strikes the proper balance between efficient Government operations and the public's "right to know."

This bill has been unanimously approved by the Foreign Operations and Government Information Subcommittee and the full Government Operations Committee and merits the support of this House.

Mr. VAN DEERLIN. Mr. Chairman, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to my friend, the gentleman from California (Mr. Van Deerlin).

Mr. VAN DEERLIN. Mr. Chairman, I am one of an overwhelming majority of this House who will be in support of the legislation before us this afternoon. I will confess to some sense of trouble over the portion of the bill to which the able subcommittee chairman has just referred, the definition of agencies and organizations to be affected by the amendments.

The reference to Government-controlled corporations in the legislation itself raises no red flags. I am, however, troubled by the report accompanying the bill which reads on page 8 as follows:

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).

The Corporation for Public Broadcasting, as the gentleman knows, was created by Congress as a means of pumping Federal money into broadcasting without having Federal control over broadcasting. It seems to me that this arrangement very happily met the first amendment requirements for this type of organization. We wanted to find some way of providing Federal assistance to educational and public broadcasting needs—which includes the coverage of public events and often political subjects. There have been ongoing efforts to find a means of financing this organization which would keep Congress, which would keep the executive branch, and which would keep politicians at any level out of policymaking in public broadcasting.

I think that this administration, while it was chided by our Committee on Interstate and Foreign Commerce many times for what we thought was its slowness in coming up with long-range financing plans, did act in good faith and out of the same sense of responsibility we all felt in Congress for maintaining the independence of this very sensitive broadcasting operation.

This was by no means intended to be a Government information agency or a Government broadcasting agency. I know the gentleman in the well feels as strongly as I do the necessity of protecting the Corporation for Public Broadcasting against the intrusion of political action.

Would the chairman be kind enough to comment on this phase of the legislation?

Mr. MOORHEAD of Pennsylvania. I would say to the gentleman that if in fact of law the Public Broadcasting Corporation is not a Government-controlled corporation, then the words of the statute and not the words of the report would control. I would also say to the gentleman that this is not a bill to provide Government access to information but it is for the people, the individual citizens across this country. I think the language of the statute would control over the language of the report.

Mr. VAN DEERLIN. If the gentleman will yield further, the right of the individual inquiry is backed up by the majesty of Government through this legislation. Where it would concern an organization such as Amtrak, I would say hooray.

But I do raise the question in regard to the CPB, and I am glad for the opportunity the chairman of the subcommittee has provided to make legislative history of this. In my opinion there would never be a question on which the Corporation for Public Broadcasting would seek to hide information. They have always testified freely before both our committee and the Committee on Appropriations, but I think we must be ever mindful of the necessity for guarding a sensitive agency such as this against political inquiry.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield to the gentleman from Texas.

Mr. WHITE. Mr. Chairman, I appreciate the gentleman yielding to me. On page 4 of the bill, the bill does recite that on or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year, and then names the specific committees to receive the reports.

I wanted to advise the gentleman that I intend to offer an amendment that in accordance with rule XXIV of the House the submission of reports would be to the Speaker of the House and to the President of the Senate, who would then submit it to the appropriate committees.

Would the gentleman have any objection to the submission?

Mr. MOORHEAD of Pennsylvania. At first blush, I would not. I would like to submit it to my colleague on the other side of the aisle.

I want to stress again the bipartisan noncontroversial nature of this legislation. It had unanimous approval of the subcommittee and the full committee. I urge its adoption.

Mr. ERLBORN. Mr. Chairman, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. Can the gentleman yield on his own time?

Mr. ERLBORN. I wanted to know if the gentleman would yield for a question.

Mr. MOORHEAD of Pennsylvania. Of course, I yield to the gentleman.

Mr. ERLBORN. The question has been asked by Members on this side of the aisle as to the meaning of two definitions of agencies to include the Executive Office of the President.

I want to ask the gentleman if it is not correct, as it states in the report of the committee, that the term "establishment in the Executive Office of the President" as it is contained in this bill means functional entities, such as the Office of Telecommunications Policy, the Office of Manager of the Budget, the Council of Economic Advisers and so forth; that it does not mean the public has a right to run through the private papers of the President himself?

Mr. MOORHEAD of Pennsylvania. No, definitely not. I think the report is crystal clear on that. I thank the gentleman for bringing it up.

Mr. ROUSSELOT. Mr. Chairman, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman.

Mr. ROUSSELOT. I thank the gentleman for yielding. Does this legislation mean that foreign governments or individuals from foreign governments will have the same kind of access as any American citizen, or is it just limited to American citizens?

I am referring especially in the case where an individual has to go to a court suit.

Mr. MOORHEAD of Pennsylvania. The legislation says any person; that would exclude foreign governments.

Mr. ROUSSELOT. What about a foreign ambassador or a foreign alien, say the Russian Ambassador?

Mr. MOORHEAD of Pennsylvania. I would think if he had standing in a court as an individual, not as an ambassador, that he would have the same rights in connection with this; subject, of course, to the limitations provided in the original act.

Mr. ROUSSELOT. So the interpretation of the gentleman would be that foreign citizens residing here could, in fact, have the same kind of access to Government agencies as a U.S. citizen.

Mr. MOORHEAD of Pennsylvania. Whatever the situation, I would say to the gentleman from California it is not changed by the legislation before us. He would have to go back to the original 1966 act to determine that, but we are not changing that. We are not increasing the coverage of the bill to additional people.

Mr. ROUSSELOT. Except in this legislation we say that "the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section."

So, in fact, foreign citizens and aliens, I was thinking particularly of alien groups that reside here, if they would decide to go to court and the court could, in fact, assess the U.S. Government for their legal fees.

Mr. MOORHEAD of Pennsylvania. Of course, it is conceivable; but first the plaintiff has to prevail, and even if he prevailed, the courts will grant it only at their discretion.

Mr. ROUSSELOT. But it is clearly possible the way the courts are today, they are very lenient with our money. I wondered if this is not a possible flaw in this legislation.

Mr. MOORHEAD of Pennsylvania. I think this section is important because there is often no monetary involvement in this field of litigation and it does discourage individuals from bringing suits.

Mr. ROUSSELOT. Except it says the court may assess against the United States for attorney fees.

So, it is another form of legal fee at the expense of the U.S. Treasury.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I might point out to the gentleman that in this kind of litigation, the plaintiff gets no monetary award from winning the case. He is serving all of the people by making Government more open if he prevails.

Mr. ROUSSELOT. Except that he may keep it in court by trying to persuade the judge or the court itself to pay his fees.

Mr. MOORHEAD of Pennsylvania. Only, I say to the gentleman, if the court finds the Government has improperly withheld material.

Mr. ROUSSELOT. Mr. Chairman I appreciate the gentleman's comments.

Mr. Moss. Mr. Chairman, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield to the gentleman from California.

Mr. Moss. Mr. Chairman, I was merely going to make the point that in order for such a person to prevail, the original withholding would have had to have been an improper act, or otherwise he could not prevail.

Mr. ROUSSELOT. Mr. Chairman, where does the language say that?

Mr. MOSS. The original act is to prevent the improper withholding.

Mr. ROUSSELOT. But, where in this is it?

Mr. MOSS. The court here examines in camera and determines whether or not the information meets the test for privilege or whether it is going to be released.

Mr. ROUSSELOT. But the court has the real decisionmaking power to decide?

Mr. MOSS. The court has the decisionmaking power.

Mr. ROUSSELOT. It is not necessarily what the agency feels and/or the Congress; it is the court.

Mr. MOSS. It is the court, because it is a matter that is being tried in the courts in this case.

Mr. ROUSSELOT. Well, my concern is in the case of aliens and foreign people and others who have all kinds of reasons to try to attack agencies of our Federal Government. This appears to me to be a substantial loophole, if you will, in the legislation, for them to get free court costs. That is my only concern.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I would say to the gentleman that in the 7-year history of the act, we know of no case where an alien or foreign official has brought action. It could be brought under existing law, and it is not changed by this bill.

Mr. ROUSSELOT. However existing law does not provide for the court to assess the U.S. Government, does it? Does the present law provide for this?

So, this is really new law on the books, and that was my point.

Mr. MOORHEAD of Pennsylvania. Of course, it is new law.

Mr. ROUSSELOT. Mr. Chairman, I thank the gentleman.

The CHAIRMAN. The chair recognizes the gentleman from Illinois (Mr. Erlenborn).

Mr. ERLENBORN. Mr. Chairman, I yield myself such time as I may consume.

(Mr. Erlenborn asked and was given permission to revise and extend his remarks.)

Mr. HORTON. Mr. Chairman, will the gentleman yield?

Mr. ERLENBORN. Mr. Chairman, I yield to the gentleman from New York.

Mr. HORTON. Mr. Chairman, I want to commend the gentleman in the well, the gentleman from Illinois (Mr. Erlenborn) and the chairman of the subcommittee, the gentleman from Pennsylvania (Mr. Moorhead) for their leadership in bringing this bill to the floor. I am one of the sponsors of the bill, and I certainly hope that the House will enact this legislation.

Mr. Chairman, I rise in support of H.R. 12471, a bill to strengthen the people's right to be informed of their Government's activities. Our form of government—in fact the foundations of our society—rest on an informed citizenry. Nothing could be more essential than measures like the one before us now to the safeguarding of our democratic ideals.

As the ranking minority member of the Committee on Government Operations, I am very fortunate to have participated in writing laws in this area. Eight years ago, I voted in favor of the original Freedom of Information Act. For 5 years, I served on the Foreign Operations

and Government Information Subcommittee, which investigated the performance of Federal agencies under the act. Last February, I introduced, along with several of my colleagues on the committee, a bill to improve the administration of this law. And today, I will vote for a measure which fulfills that same objective.

Almost every provision of H.R. 12471 is similar, if not identical, to a provision of H.R. 4960, the bill I sponsored and testified upon before the subcommittee. I am happy to see these points in the legislation we are now considering.

This measure requires agencies to perform many functions which will directly aid citizens in obtaining Government documents. It stipulates that agencies publish indexes of their material, respond to requests that reasonably describe records and decide whether to comply with those requests within specific periods of time. The bill also imposes several obligations which will indirectly assist individuals. Under H.R. 12471, courts could review agency classification of material which was allegedly made for national security reasons and could force the Government to pay attorney fees and other litigation costs in suits where the Government does not prevail. Agencies would have to respond to court suits quickly and report to congressional committees annually on how they fulfilled their responsibilities under the Freedom of Information Act.

Mr. Chairman, all these changes in the law will advance the people's right to know what their Government is doing. I commend their enactment to all Members.

(Mr. Horton asked and was given permission to revise and extend his remarks.)

Mr. YOUNG of Florida. Mr. Chairman, will the gentleman yield?

Mr. ERLNBORN. Mr. Chairman, I yield to the gentleman from Florida.

Mr. YOUNG of Florida. Mr. Chairman, I would ask that the gentleman from Illinois, during his comments, might give some specific comments concerning page 7 of the report, the paragraph entitled, "National Defense and Foreign Policy Exemption," which refers to the language on page 5 of the bill. This is the concern I have, and I would appreciate very much a discussion of that subject.

Mr. ERLNBORN. Mr. Chairman, I will be happy to do that, and I will be happy to answer any further questions the gentleman from Florida may have.

Mr. Chairman, I am happy to join with the chairman of the Foreign Operations and Government Information Subcommittee, Mr. Moorhead of Pennsylvania, in advocating H.R. 12471.

This bill would amend the Freedom of Information Act in several ways, all designed to ease the public's access to Government documents. It is the product of bipartisan effort by our subcommittee. We began our consideration of the Freedom of Information Act with two bills, one by Mr. Moorhead and one by Mr. Horton—the ranking minority member of the Government Operations Committee—and myself. H.R. 12471 combines features of both those measures and has the unanimous support of both the Foreign Operations and Government Information Subcommittee and the full Government Operations Committee.

Mr. Chairman, the Freedom of Information Act became law on July 4, 1966, and took effect exactly 1 year later. I am proud to have played a part in securing its passage in the House, along with the gentleman from California (Mr. Moss) and our former colleague from Illinois, Don Rumsfeld. The act's guiding principle is that public access to Government information should be the rule, to be violated only in the specific areas which Congress believes are in the national interest to exempt.

In the few years that the act has been in existence, the executive branch of Government has become far more open to citizens of this country. Government officials and employees are to be congratulated for generally adopting attitudes which are in conformity with the act, but very different from the previous policy of nondisclosure.

The record of compliance with the law has not been perfect, however. In extensive investigative hearings over the past 3 years, our subcommittee has discovered many instances of failure to respond to the dictates of this act and many efforts to frustrate them by delaying release of public material.

The bill before us now is intended to remedy problems we have found.

Some individuals have experienced difficulty in learning what types of documents are in the files of various agencies. Section (1)(a) of H.R. 12471 requires agencies to publish their indexes of materials.

Some citizens have had requests for information denied on the grounds that they did not identify precisely the documents they wanted. The act was meant to require individuals to describe records reasonably, not identify them by specific number. Section (1)(b) makes this original intent clear.

Some people have had to wait excessive periods of time for responses to their requests. Section (1)(c) requires agencies to live up to the spirit, as well as the letter, of disclosure by answering requests promptly.

The Supreme Court has held that courts may not permit citizens to view matters which have been classified for reasons of national defense or foreign policy, and that courts may not examine those documents to see whether they have been properly classified. Sections (1)(d) and (2) of H.R. 12471, taken together, permit courts to examine material in chambers and determine whether it truly falls within the exemption for national defense or foreign policy classified matter. This change should persuade agencies to consider more carefully whether to classify material.

In addition, H.R. 12471 mandates that the Government respond quickly to complaints filed under this act and, at the discretion of courts, pay attorney fees and other litigation costs incurred by victorious plaintiffs. The measure also establishes that agencies shall report annually to the Congress on their performance under the act. All these provisions are designed to stimulate agencies to comply more completely and promptly with the law, and on close questions, to decide in favor of disclosure of information to the public.

Before closing, I would like to comment about an omission in H.R. 12471. H.R. 4960, which Mr. Horton and I introduced and on which the subcommittee held hearings, included a title establishing an independent Freedom of Information Commission.

Our belief was that the existence of the Commission, authorized to review negative responses to information requests, would have been an incentive for positive agency responses. With authority to examine classified material, the Commission could have relieved judges of the burden of in camera inspection of information. Although the Commission's rulings would have been advisory rather than mandatory, its rulings would have constituted prima facie evidence of improper withholding of records. Thus, we anticipate fewer FOI cases would end up in the courts.

The decision not to establish a commission does not render H.R. 12471 defective. We can establish such a commission at a later time, if need be. I mention it only to serve notice that we are serious about making the Freedom of Information Act work.

Mr. Chairman, all the changes which the bill before us makes in procedures of the Freedom of Information Act are beneficial. They will lead, I believe, to fuller and timelier sharing of information by the Government with the people of this country. The objective is worthy, and the means of achieving it are fair. I urge approval of this bill.

Mr. ARCHER. Will the gentleman yield?

Mr. ERLBORN. I will be happy to yield to the gentleman.

Mr. ARCHER. Do I correctly understand this legislation is to require the prompt distribution to any individual in this country by sale or otherwise of Government documents that are not otherwise classified as being in the national security? Is that basically correct?

Mr. ERLBORN. Yes. That is basically correct. The present law requires that. The Freedom of Information Act on the books requires that, with certain exemptions that are spelled out in the act.

Mr. ARCHER. There is one existing practice that troubles me already. I wonder if this bill would increase that, that is, the sale by the Federal Government of a list of names that they accumulate which are then used by the purchaser for the purpose of solicitation or mass mailings or harassment of some nature or another. I have legislation that I have introduced which would prohibit the Federal Government from selling these lists of names to various people in this country. I wonder what this act does about it.

Mr. ERLBORN. We considered that problem in the subcommittee and we had testimony from interested individuals as well as the agencies involved. I must confess to the gentleman that we found it difficult to resolve the problem to everyone's satisfaction and, therefore, it is not included here in this legislation.

I am sensitive to the problem, as is the gentleman from New York (Mr. Horton) who has also introduced legislation similar to that to which the gentleman refers. As an example, I understand that the Department of the Treasury has made available the names of all those who are listed as collectors of or dealers in guns and weapons, which made it possible for those with sticky fingers and the ability to break into a person's home to find out where such weapons might be available, where they could identify people who were collectors of guns. It was not the intent of the act, and I hope we find a way of resolving that problem.

Mr. YOUNG of Florida. Will the gentleman yield?

Mr. ERLBORN. I yield to the gentleman.

Mr. YOUNG of Florida. I thank the gentleman for yielding.

On the point I had originally raised, the language of the report on page 7 seems to me to give the court the privilege to examine now in camera any information or documents that might be relevant to the national defense. It is a change from the existing law. That is new law, then.

Mr. ERLNBORN. Yes. That is one of the purposes of this bill; namely, to change existing law in this respect. It is the result of the decision in the Mink case mentioned by the chairman of the subcommittee, Mr. Moorhead. In that case the Supreme Court said that the courts were not invested with authority to go behind the stamped document. Therefore, the decision of any person in the executive branch who puts a stamp of "secret" or "classified" or whatever it might be on a document could not be reviewed by the Court. It is clearly the intention of the committee to make these documents subject to inspection in camera and in chambers, not in public, by the judge, who can then decide as to whether the classification is proper under the Executive order authorizing such classification.

Mr. YOUNG of Florida. Will the gentleman yield further?

Mr. ERLNBORN. I yield to the gentleman.

Mr. YOUNG of Florida. I have a serious concern about that very point, and I wonder if the gentleman will respond to this question. Just what is it that makes the judge an expert in the field and one who would have sufficient knowledge so that he can make a determination as to what is or is not to be made available and what should be prohibited from public distribution?

Mr. ERLNBORN. The only way I can answer the gentleman is it is the same thing that makes judges experts in the field of patent law and copyright law or all of the other laws on which they have to pass judgment. There are no specific qualifications for a judge in these areas; a judge is a judge. I have the same concern as the gentleman has. That is why I recommended, along with Mr. Horton, the creation of the Freedom of Information Commission which could develop expertise in this area and act as a master in chancery or an adviser to the court. I expect, as I said in my prepared remarks today, that after we have some experience under this new provision others may agree that we need a Freedom of Information Commission.

Mr. YOUNG of Florida. Will the gentleman yield further?

Mr. ERLNBORN. I yield to the gentleman.

Mr. YOUNG of Florida. Let me respond to the gentleman's statement by saying that in the cases you mentioned the judge does have written law and precedents on which to base a decision, but in the case of classification and in the case of making the decision of whether a matter is relevant to national defense and national security he does not have this basis on which to make such a decision.

Mr. Chairman, I still think that insofar as the international community is concerned, that perhaps the judge might consider something to be unimportant to a possible potential enemy whereas it might be very, very important to that potential enemy, and where the judge has no special background or expertise to be able to make a reasonable judgment in that regard.

Mr. ERLNBORN. The gentleman is accurate in saying that there is no law that establishes the criteria. We learned as a result of the Ellsberg case that there is no official secrets act in this country, even though in other countries, England, for one, there are. Therefore, what we operate under in the field of classification is the Executive order. We have an amendment in this bill to paragraph 1 of the list of exemptions so as 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.

This will give direct attention of the court to the Executive order rather than the law, since we have none. The Executive order that establishes the criteria in such an instance would be used by the court to pass judgment on whether the criteria in the Executive order has been made by some flunky in the Department of Defense, and who has improperly classified such document.

Mr. YOUNG of Florida. Mr. Chairman, if the gentleman will yield further, I have one more question.

Mr. ERLNBORN. I am happy to yield to the gentleman from Florida.

Mr. YOUNG of Florida. Mr. Chairman, I want to compliment the gentleman in the well and the leadership of the committee for the work that they have done in bringing out the Freedom of Information Act amendments. Freedom of information is something which I do agree with very, very strongly. I believe that our people have the right to know what the Government is doing, or is not doing. But again I must register my objection, and my strong concern about this particular matter as it relates to our national defense, and as to who might be making important decisions relative to our national security matters.

Mr. McCLOSKEY. Mr. Chairman, if the gentleman will yield, just by way of responding to the inquiries of the gentleman from Florida (Mr. Young), because I believe this matter is one that should be made clear insofar as the legislative history is concerned: The framework of the committee's consideration of this bill was against the recent decision in the Sirica case, where the Circuit Court of Appeals in the District of Columbia did provide for in camera inspection of documents upon which the President claimed executive privilege. I think it is clear from the language in that decision that the court was prepared to bend over backward to honor the executive claims of privilege; in fact, the import in that decision was that only if the need for such revelation of the information to the grand jury outweighed the national interest in protecting the information would the court order that it be disclosed to the grand jury in that case. And all of the other decisions which we have before us in this field indicate the great reluctance of the court to overrule a contention that the national security interests are paramount. And we pass this into law with the confidence that any court will examine very closely the matter of national security interest as against a citizen seeking disclosure of information, and that the court is going to be very reluctant to override an administrative decision which exists in the mind of the administration relative to declassification of such information. And what we have done in this bill, I think, reaches a compromise that the committee has

in the language of this bill that, insofar as the safeguards of our national security are concerned, that should not alone be the single criteria that would compel a court not to override such an Executive order supposedly only because of national security.

Mr. ERLÉNORN. Mr. Chairman, I thank the gentleman from California (Mr. McCloskey) for his contribution, and I agree with what the gentleman has said. There will certainly be a strong presumption in favor of declassification. I say this because of the testimony before our committee which indicated that the power to classify has been abused considerably by various agencies of this Government.

As I say, we had plenty of testimony that would lead us to believe that documents have been improperly classified in the first place and, second, not declassified within a reasonable period of time.

As an historical example, there is the so-called Operation Keelhaul in which documents have been kept secret for 25 or 30 years, and which still are classified, to keep information from the public about what apparently was a very black day in the history of the United States. We really do not know why the secrecy has been kept, even though there have been attempts by historians to get at them. The documents relate to events which occurred in 1946, immediately after World War II. The fact that they are still classified, raised questions in one's mind as to whether they are properly classified and should still be kept from the public today, in 1974.

Mr. YOUNG of Florida. I do not deny that at all. There are classifications that probably have been the result of someone being overly cautious in their classification. I would make the point though that if we are going to make a mistake, it might be better to consider making that mistake in the interest of a strong national security.

The second point, in response to the gentleman from California, I recognize the attempts of impartiality of the courts, and I believe that from the standpoint of their sincerity they certainly could be trusted with this program. But I am also aware, as is he, of the vast number of unauthorized leaks of information, leaks in fact that are contrary to the law that have come from some of these courts that the gentleman has mentioned.

Mr. Chairman, I rise in opposition to H.R. 12471, amending the Freedom of Information Act of 1966. I am certainly not opposed to the principle of streamlining the act through certain procedural changes, but I have grave reservations over the contents of one change which strikes at the heart of our national security.

My record in support of freedom of information cannot be challenged. As a Florida State Senator, I was one of the primary supporters of Florida's landmark "Government in the Sunshine" law. Since coming to Congress, my legislative activities have included legislation to open House committee meetings to the public, and H.R. 1291, a bill to amend the Freedom of Information Act to require public disclosure of records by recipients of Federal grants. My bill requires that a willingness to provide full public disclosure be made a condition to receiving a Federal grant; that complete records must be kept on how these funds are spent; and that refusal to make these records public will result in the grant being withdrawn.

I support the bill before us today in its efforts to speed public access to agency information and to require agencies to provide this informa-

tion in a timely fashion. These procedural changes would be helpful in carrying out the intent of the original act.

However, section 552(b)(1) of the United States Code clearly states that the Freedom of Information Act does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. This is the first of nine specific exemptions from the provisions of the act.

My distinguished colleagues of the Government Operations Committee, however, have included in their so-called procedural amendments a change in the language of section 552(b)(1) which could effectively negate our national security classification system. Taken in conjunction with language elsewhere in the bill, it permits the courts to examine in camera the contents of agency records to determine if a national security exemption has been properly applied.

This is a specific grant of authority to the courts to second-guess security classifications made pursuant to an Executive order and thus constitutes a clear threat to our national defense. As the Justice Department noted in their report to the Congress on this legislation:

No system of security classification can work satisfactorily if judges are going to substitute their interpretation of what should be given a security classification for those of the government officials responsible for the program requiring classification.

My distinguished colleague from Illinois, the ranking minority member of the Government Operations Committee, Congressman Erlenborn, himself has admitted in our colloquy earlier today:

That there will certainly be a strong presumption in favor of declassification.

This does not bode well for top secret documents on our national defense or foreign policy should some judge decide it would be more in the interest of the Nation to make them available to the world.

Both my distinguished colleague from Illinois and my colleague from California (Mr. McCloskey) have pointed out some of the defects of the existing classification system, especially with regard to older defense materials. To which I would respond that these defects have already been recognized and an accelerated effort put underway to remedy them.

In Executive Order 11652, dated March 8, 1972, President Nixon not only recognized the problems of overclassification and the denial to historians and other interested parties of decades-old war records and foreign policy documents, he ordered the implementation of an accelerated declassification program. Since that time, the National Archives and Records Service has sifted through close to 100 million documents and reclassified most of them so that they are available to the public. According to the President's timetable, anything over a certain age is automatically declassified; other documents of a later date are subject to review. Eventually, anything over 6 years of age will be subject to automatic review and declassification unless the classifying agency can prove that the materials still fall under the national security aegis.

Therefore, because this procedure is now in effect, it is clear that the thrust of the committee amendment is against current defense and foreign policy secrets.

Mr. Chairman, I do not believe that the American people want a judge to decide what national defense and foreign policy information

should be publicized. In the Sixth Congressional District of Florida which I have the privilege of representing in Congress, 86.2 percent of those responding to my March 1972 congressional questionnaire stated that they did not believe that the news media should have the right to publish or broadcast secret Government information dealing with national security.

As a former member of the House Armed Services Committee and as one who has long been concerned over the erosion of our national defense and national security standards, I cannot stand by and see this legislation breeze through the House without drawing attention to its one glaring defect. Mr. Chairman, with this exception, I support the legislation and its purposes, but will vote against it on final passage to register my concern over the weakening of our national security, and hope that our colleagues in the other body will eliminate this invidious provision so that I can enthusiastically support the bill in its final form.

Mr. ERLBORN. I thank the gentleman for his comments.

I now yield to the gentleman from Nebraska (Mr. Thone).

Mr. THONE. I thank the gentleman for yielding.

(Mr. Thone asked and was given permission to revise and extend his remarks.)

Mr. THONE. Mr. Chairman, having assisted in the authorship of an open records bill in Nebraska and the open meetings law we have in that State, and the partially open court law, I strongly endorse the legislation.

Mr. Chairman, I rise in support of H.R. 12471, a bill of which I am proud to be a cosponsor.

For many years, I have advocated openness in Government. We must make certain the public's business is conducted in public. Before I came to Congress, I helped to draft and worked for passage of Nebraska's open meetings and open records laws. As a member of the Foreign Operations and Government Information Subcommittee, I have been impressed with the part the Freedom of Information Act has played in making Government more accessible to the people. Our hearings last year showed, however, that there is a need for improvement of this law.

The hearings demonstrated that if there is a way that a law can be interpreted to promote secrecy and to deny the public access to public records, some Government officials will find that way. For example, the present law states that agencies must respond to any request to look at "identifiable records." Some agencies have interpreted this language so that a citizen can obtain a document only if he or she knows the precise title or the file number. To prevent such pettifoggery, we propose to amend the law so that agencies will have to respond to any request which "reasonably describes such records."

Here is another example of the bureaucratic urge for secrecy. The present law states that an agency must make nonclassified Federal records "available for public inspection by copying." Some agencies have interpreted this language to mean that a citizen can find out the language in a public document only if he comes to the agency headquarters with pencil and paper and copies what is in the record.

To correct this, the proposed language declares that with such nonclassified information, agencies shall "promptly publish and distribute—by sale or otherwise—copies."

Information is available only if it is timely. Therefore, there are several amendments to the Freedom of Information Act in the bill before you that would require the Government to act more expeditiously. If an agency is in doubt as to whether a record should be made available to the public, it must notify the person asking for the information within 10 days whether his request will be answered, and if not, the reason for the refusal. The citizen may then appeal to the head of that agency, and a reply must be forthcoming in 20 days.

We also want to correct a time element that is unfair. If a citizen sues to get access to Government records, under present law his attorney must respond to Government motions within 20 days. The Government, however, is given 60 days to reply to motions by the other side. Our bill would amend the law to put both sides on equal footing, with a 20-day limit for replying.

A recent Supreme Court decision has left a citizen with no place to turn if an agency classifies material which the citizen believes should be nonclassified. At present, courts can only determine if the mechanics of the law and Executive orders were faithfully followed in classifying a document. Our amendment would give the courts the authority to examine a document in camera to determine if the information in dispute actually falls within the criteria of an Executive order.

The Federal Government has sometimes gone to great expense of litigation to deny citizen access to requested information.

On at least one or two occasions, Government officials have displayed an attitude that could be interpreted as saying to a citizen, "If you want this information, sue the Government." To make Federal officials think twice about engaging in litigation when the Government does not have a strong case, our bill would provide that the Federal Government may pay "reasonable attorney fees and other litigation costs" of citizens who win cases under the Freedom of Information Act.

One of the most beneficial amendments being proposed to this law, in my opinion, is one requiring annual reports to Congress. Each agency shall tell Congress each year how many times it has determined not to comply with requests for records, how many appeals there have been, the results of the appeals, a copy of each rule made regarding the Freedom of Information Act, and a copy of the fee schedule and the fees collected for making records available. Through these reports, we will be able to determine which agencies are responsive to the public and which are not.

I salute the gentleman from Pennsylvania (Mr. Moorhead), the chairman of the Foreign Operations and Government Information Subcommittee, and the gentleman from Illinois (Mr. Erlenborn), the ranking minority member of the subcommittee. They have carefully written amendments to the Freedom of Information Act worthy of your approval. It was a pleasure to be associated with them in producing this legislation. I urge its adoption.

Mr. ERLENBORN. I now yield to the gentleman from Virginia (Mr. Parris).

Mr. PARRIS. Mr. Chairman, I should like to pursue the response the gentleman made a moment ago to the inquiries from the gentleman from Florida (Mr. Young). Did I understand the gentleman to say that in an in camera inspection by the court of information that the

gentleman assumes hypothetically, for the purposes of this colloquy, has to do with national security, that the court in this legislation would look to the provisions of the Executive order that classifies that material under the national security exemption rather than to the material itself?

Mr. ERLBORN. No. I am afraid the gentleman misunderstood. The amendment that we have on the bill says that the material must be classified under criteria established by the Executive order, and this is the authority for classifying the material. The court will look at the material and see whether or not it properly falls within the area established by the Executive order for classification, if it fits the criteria of the Executive order, so the court would be looking to the material itself.

Mr. PARRIS. If the gentleman would yield further, let us perhaps try to draw an analogy here where some individual wants to determine some information from the Department of Defense, and the Department of Defense comes back and says under this statute, if it is law, that this particular material has some sensitive national security aspects to it. Would it then presumably not deliver that material, and the process would go on, and there would be an inspection in camera, a judicial proceeding?

Mr. ERLBORN. Might I interrupt the gentleman at that point? Once there has been a refusal, the matter is moot unless the party seeking the information takes the next affirmative step of instituting suit.

Mr. PARRIS. I understand, and I have gone by that step. That material that has been determined by the appropriate Government agency or Government official within the Department of Defense would then presumably be delivered or made in some way available to the court for examination, so that the court itself would review the documents, or whatever the case may be, and determine that that was in fact sensitive national security information.

Mr. ERLBORN. The court could. The court would not be required to. We say that the court may inspect in camera. That is one device that would be made available to the court. The court is not required to.

Mr. PARRIS. Would it not be a reasonable presumption that if the court is going to make an intelligent decision about the sensitivity, it is going to have to look at the material?

Mr. ERLBORN. Not necessarily. It may be that the description of the document itself would be sufficient. If someone were asking, for instance, for the plans for a new weapons system, or something like that, it would be quite apparent on the face of the request that this material is properly classified.

Mr. McCLOSKEY. Mr. Chairman, would the gentleman yield for a supplement to that response?

Mr. ERLBORN. I yield to the gentleman from California.

Mr. McCLOSKEY. I thank the gentleman for yielding.

Again, we examined this matter against the Sirica case decision. There the Court of Appeals ruled that if the President offered a statement to the court as to the reasons why the documents were being withheld, the court would hear arguments on those issues, and only if the arguments were not satisfactory to the court would the court then order that the documents be produced for in camera

inspection. Using this authorization under criteria established by the Executive order, if that circuit court decision which remains law is followed, we would assume that the court would not order the production of the documents unless the arguments as to the documents themselves were not persuasive.

And the executive branch under the Executive order, having the power to classify matters as "Top Secret," "Secret," or "Confidential," we would assume the court would apply very strict rules before applying the in camera examination of the documents themselves.

Mr. WRIGHT. Mr. Chairman, will the gentleman yield?

Mr. ERLNBORN. I yield to the gentleman from Texas.

Mr. WRIGHT. Mr. Chairman, I thank the gentleman from Illinois for yielding, and I congratulate the gentleman in the well for his leadership as well as that shown by the chairman of our subcommittee, the gentleman from Pennsylvania (Mr. Moorhead) for bringing a very well-constructed and very well-balanced piece of legislation before the House.

It is necessary, I think, to point out that most of the changes which this bill would make in existing law are procedural in nature but they are of considerable significance in the administration.

Mr. TREEN. Mr. Chairman, will the gentleman yield?

Mr. ERLNBORN. I yield to the gentleman from Louisiana.

Mr. TREEN. Mr. Chairman, regarding the national defense issue which the gentleman from Florida and the gentleman from Virginia have talked about, do I understand that the in-camera review by the judge would be solely for the purpose of determining whether the material had been classified consistent with the criteria or does the judge have the right to question the criteria? Before responding I would appreciate it if the gentleman will direct his attention to the language in the bill which says:

Authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy.

My question is whether or not the judge can question whether those criteria were established in the interest of the national defense or foreign policy.

Mr. ERLNBORN. I have no hesitation in answering the gentleman that the court would not have the right to review the criteria. The court would only review the material to see if it conformed with the criteria. The description "in the interest of the national defense or foreign policy" is descriptive of the area that the criteria have been established in but does not give the court the power to review the criteria.

Mr. TREEN. I thank the gentleman.

If the gentleman will yield further, does the chairman of the subcommittee concur in that interpretation, that the criteria themselves may not be reviewed?

Mr. MOORHEAD of Pennsylvania. If the gentleman will yield, the court must accept the language of the Executive order as it was written.

Let me say to the gentleman what we were concerned about is a statement in the Supreme Court construing the Freedom of Information Act. Justice Potter Stewart said:

Instead the Congress has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "Secret" however cynical, myopic or even corrupt the decision might have been.

But it is that kind of thinking of the Court which we wanted to alter.

Mr. REGULA. Mr. Chairman, will the gentleman yield?

Mr. ERLNBORN. I yield to the gentleman from Ohio.

Mr. REGULA. Mr. Chairman, I thank the gentleman for yielding. Mr. Chairman, I, too, support the amendments to the Freedom of Information Act contained in H.R. 12471. These amendments will, in my estimation, improve the administration of the act by stimulating Federal agencies to disclose more Government information to the public and to disclose it more quickly.

When we think of the Freedom of Information Act and providing access to Government information, I know that most people think in terms of affording entry to material in the city of Washington. We often forget that the Federal Government has offices in communities all round the country, and that each of these offices also maintains information which is important to many citizens. As we decentralize Government further, we will have more of these offices, and they will maintain increasing amounts of important data.

The Freedom of Information Act applies to matters which are in these local Federal offices, as well as those which are at the seat of Government. Regrettably, many officials and employees at these offices are not familiar with the provisions of the act. Requests for information made to them must often be referred to Washington, and as a result are complied with slowly, if at all. Public access to Government data is consequently frustrated not due to any malice or intent to deceive, but merely to ignorance of the law.

I sincerely hope that the various agencies covered by the Freedom of Information Act will take the occasion of congressional consideration of amendments to this law to educate their employees in general offices about it. Perhaps enactment of these amendments, with its consequent demands on agencies for increased speed and scope of disclosure, will effectively require agencies to make their employees outside this city aware of the FOI law.

However greater responsiveness of Federal offices to the people they serve can be achieved, I shall be happy to see it occur. I view H.R. 12471 as a means of accomplishing that goal. For that reason, as well as those cited by previous speakers, I support the bill.

Mr. Chairman, one further matter that we may look at is that these agencies are located not just in Washington, but also around the country, and these agencies ought to be accessible to the public, as well as those agencies in Washington. I think this is an important dimension of the bill.

(Mr. Regula asked and was given permission to revise and extend his remarks.)

Mr. ERLNBORN. I thank the gentleman from Ohio.

(Mr. Wright asked and was given permission to revise and extend his remarks.)

Mr. WRIGHT. Mr. Chairman, our committee has worked long and hard to produce H.R. 12471 as a genuinely bipartisan measure to

strengthen and to improve the operation of the Freedom of Information Act. A total of 19 days of investigative and legislative hearings were held on the act in 1972 and 1973 by our Foreign Operations and Government Information Subcommittee, under the chairmanship of the gentleman from Pennsylvania (Mr. Moorhead). Another 9 days of open markup sessions were held by the subcommittee during the past months to revise, improve, and refine the language of these amendments so that we could have unanimous agreement by our subcommittee and full committee members—both Republicans and Democrats.

Mr. Chairman, the freedom of information issue—dramatized so effectively by the gentleman from California (Mr. Moss) during his 16 years as chairman of this subcommittee—has never been a partisan one. The committee has been diligent in advancing and protecting the public's "right to know" during the past four administrations—two Republican and two Democratic. We have fought the Government bureaucrat's penchant for secrecy for almost 20 years in our committee and have saved the American taxpayers untold millions of dollars in the process.

The amendments to the Freedom of Information Act of 1966 that are proposed in H.R. 12471 are the first to be considered since its enactment. This is a highly technical and complex subject, and the committee has been exceedingly careful and deliberate in the amending process. Some may feel that we have not gone far enough. For example, the language of only one of the nine exemptions contained in section 552(b) of the act is changed at all. We felt that, by and large, the Federal courts were doing a creditable job in interpreting the language of most exemptions in a way consistent with the original intent of the Congress. The clear trend in case law under the Freedom of Information Act has been tilted toward the public's "right to know" and against Government bureaucratic secrecy, and that is the way it should be.

Although most of the amendments to the law proposed by H.R. 12471 are procedural in nature, they are nonetheless of significant importance in improving the day-to-day administration of the act. As examples, I call attention to the specific time limits provided in this bill for an agency's response to a request for information from the public. Also, the requirement that indexes of certain types of information "be published and distributed by sale or otherwise" by each Federal agency and the discretionary authority given the courts to award attorney fees and costs to plaintiffs who prevail against the Government in freedom of information litigation. Amendments relating to the court review provisions of the act likewise reaffirm the original intent of Congress in the definition of the term "de novo"; they also confirm our support of discretionary use by the courts of in camera review of contested records to clearly determine if they are properly withheld under the criteria of the exemptions set forth in section 552(b) of the present law.

This is a meaningful and important bill, Mr. Chairman, and one which deserves the support of every Member of this body. By passing H.R. 12471 with an overwhelming vote we may begin to repair the grave erosion of public confidence in our governmental institutions that has resulted from recent Watergate scandals, secrecy, and coverup.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield 5 minutes to the original author of the Freedom of Information Act, the gentleman from California (Mr. Moss.)

(Mr. Moss asked and was given permission to revise and extend his remarks.)

Mr. Moss. Mr. Chairman, 8 years ago when the Congress passed the Freedom of Information Act without a single dissenting vote, I thought we had made it abundantly clear that the courts would have the power to examine classified documents in camera and determine whether they had been properly classified.

The criteria for each classification—confidential, secret, and top secret—had been set forth clearly in an Executive order by the President. Either a classified document meets the test of the criteria or it does not. It is just that simple.

It does not require an Einstein. What it does require is some intelligence, sensitivity, commonsense, and an appreciation for the right of the people to know what their Government is doing and why. I have confidence our judges have these qualities.

I do not think we have to make dummies out of them by insisting they accept without question an affidavit from some bureaucrat— anxious to protect his decisions whether they be good or bad—that a particular document was properly classified and should remain secret. No bureaucrat is going to admit he might have made a mistake.

If that sounds partisan or too severe a criticism, I would like to quote directly from a statement of the President of the United States only 2 years ago. He said:

Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations. . . .

The many abuses of the security system can no longer be tolerated. Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies . . .

Although the present Freedom of Information Act requires de novo determination of agency actions by the Federal courts, the Supreme Court has problems to the extent 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). 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.

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, the Department of State, and other agencies under Executive order authority.

Mr. Chairman, it is the intent of the committee that the Federal courts be free to employ whatever means they find necessary to discharge their responsibilities. This was also the intent in 1966 when Congress acted, but these two amendments contained in the bill before you today make it crystal clear. I ask for your unanimous support for this legislation which is intended to close such loopholes and make the right to know more meaningful to the American people.

I would like to point out, Mr. Chairman, too, I know the concern expressed by at least two Members in the questions directed to the distinguished ranking minority member of the committee, the gentleman from Illinois (Mr. Erlenborn), that the classifications of many of these documents are made at such low levels in the bureaucracy of Government that one would be almost shocked to even find out that they had the authority to impose a classification stamp.

We found at one time that classification authority was being exercised by over 2 million persons in the Federal bureaucracy. Many of those documents were classified with little understanding on the part of the classifiers and remain hidden from public view. Many of those documents could be the subject of action proposed to be taken in court under the provisions of the language now being amended to further clarify the Freedom of Information Act. I think the amendments are most worthwhile.

Mr. Chairman, before yielding the floor, I would like to address a question to the gentleman from Pennsylvania (Mr. Moorhead), regarding the report language on page 9 under the subheading, "Information to Congress."

As I understand it, I think it is of the utmost importance that in no way do we modify the rights of the Congress by any of the language contained in the amendments now pending before this committee.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, will the gentleman yield?

Mr. MOSS. Mr. Chairman, I yield to the gentleman from Pennsylvania.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, as is the usual case, the gentleman from California is 100 percent correct.

Mr. MOSS. Mr. Chairman, I thank the gentleman.

Mrs. MINK. Mr. Chairman, will the gentleman yield?

Mr. MOSS. Mr. Chairman, I yield to the gentlewoman from Hawaii.

(Mrs. Mink asked and was given permission to revise and extend her remarks.)

Mrs. MINK. Mr. Chairman, I would like to join the gentleman in the well in expressing my very genuine support for this legislation, and commend not only the gentleman in the well, but the chairman of the subcommittee and the members of this committee for bringing forth this legislation which will correct two major defects in the Court's decision as was rendered in the Mink against EPA case.

Mr. Chairman, I rise in support of H.R. 12471, legislation to amend the Freedom of Information Act.

As Congress moves to reform our election laws, it is also essential that we move forward on another front to bring Government closer to the people. This is in the area of governmental information, the free flow of which is the wellspring of our constitutional democracy.

Fortunately, we have an excellent vehicle for this. The Freedom of Information Act, first enacted in 1966, provides a tested and workable mechanism for assuring the disclosure of information to the public while at the same time protecting the confidentiality of the Government process where necessary.

Acting on the experience gained under the basic statute, we can refine and improve the act as needed. H.R. 12471 is an effort to do this. It is a carefully considered and drafted bill which was reported out unanimously by the members of the Committee on Government Operations. It makes spare and judicious changes in the act, the need for which has been fully demonstrated by events in the information area.

I would like to discuss one such change in particular, as I was a participant in the events which showed the act must be clarified. On January 22, 1973, the U.S. Supreme Court rendered its decision in the case of Environmental Protection Agency against Mink, et al. This was the first interpretation of the Freedom of Information Act by the Supreme Court. I had initiated the suit a year earlier with 32 other Members of Congress as coplaintiffs. We sought as Members of Congress and as private individuals to compel the executive branch to release papers on the nuclear test "Cannikin." At the time, Congress was making a decision on whether to authorize and appropriate funds for the test.

In our suit, we asked that the judicial branch rule on the Executive's compliance with provisions of the act. We secured an Appeals Court directive to the Federal district judge to review the documents in camera to determine which, if any, should be released. This seemed entirely proper to us as an initial step under the act, since the act does provide for court determination under section (a)(3) on a de novo basis of the validity of Executive withholdings.

Unfortunately, in the Mink case the Supreme Court reached a decision that most of us regard as somewhat tortuous in this regard. When the executive branch took the Appeals Court decision to the higher court on certiorari, the Supreme Court held that in camera reviews of material classified by the President as national defense and foreign policy matters are not authorized or permitted by the act.

The basis of this decision was the act's list of exemptions from compelled disclosure. Exemption No. 1, under section (b)(1) of the act, exempts matters authorized by specific Executive order to be kept secret in the interest of the national defense or foreign policy. Somehow, the Supreme Court decided that once the Executive had shown that documents were so classified, the judiciary could not intrude. Thus, the mere rubberstamping of a document as "Secret" or "Confidential" could forever immunize it from disclosure. All the Court could do was to determine whether it was so stamped. An affidavit was used in the Mink case to prove this. No judge ever saw the documents at all, not even their cover page.

The abuses inherent in such a system of unrestrained secrecy are obvious. As the system has operated, there is no specific Executive

order for each classified document. Instead, the President issued one single Executive order establishing the entire classification system, and all of the millions of documents stamped "Secret" under this over succeeding years are now forever immune from even the most superficial judicial scrutiny. A lower-level bureaucrat could stamp the Manhattan telephone directory "Top Secret" and no court could order this changed. Under the Supreme Court edict, the Executive need only dispatch an affidavit signed by some lowly official certifying that the directory was classified pursuant to the Executive order, and no action could be taken.

Obviously, something must be done to correct this ridiculous court interpretation. It need not be a drastic step. Actually, it was the original intention of Congress in adopting the Freedom of Information Act to increase the disclosure of information. Congress authorized de novo probes by the judiciary as a check on arbitrary withholding actions by the Executive. Typically, the de novo process involves in camera inspections. These have been done by lower courts in the case of materials withheld under other exemptions in the act. They can be barred under exemption No. 1, only through a misguided reading of the act and by ignoring the wrongful consequences.

H.R. 12471 contains two minor changes in the act to correct this aspect of the Mink decision and make crystal clear that courts have authority to make in camera inspections of original documents, no matter under what exemption they were withheld, to assure compliance with the Freedom of Information Act.

The first change inserts the words "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 the act. This change will remove all doubt that courts have discretionary authority to utilize in camera inspections when they believe it is desirable. It does not compel such actions but leaves it to the discretion of the court.

The other change brought about by the Mink decision revises the wording of exemption No. 1. Instead of referring merely to matters specifically required by Executive order to be kept secret, it will exempt matters "authorized under criteria established by an Executive order to be kept secret. This will give courts leeway to probe into the justification of the classification itself. The change will empower courts to determine whether the matters meet the criteria established by the Executive order under which they were withheld. In effect, courts will be able to rule on whether disclosure actually would bring about damage to the national security or on whatever other test is set forth in the Executive order as justification for the classification. Our intention in making this change is to place a judicial check on arbitrary actions by the Executive to withhold information that might be embarrassing, politically sensitive, or otherwise concealed for improper reasons rather than truly vital to national defense or foreign policy. We are not saying any material must be released, only that it must be submitted to an impartial judge to determine whether its withholding meets the provisions and purposes of the act.

I believe these changes are essential if we are to restore the proper functioning of our democratic process. I ask for approval of H.R. 12471.

Finally in closing, I would like to acknowledge the Members of Congress in 1971, who joined me in my suit against the Government, which led to the Mink against EPA decision. The Members of Congress who were complainants are:

LIST OF COMPLAINTIFFS

(Senator) James Abourezk, Bella S. Abzug, Herman Badillo, (the late) Nick Begich, Phillip Burton, William Clay, (former Rep.) John G. Dow, Robert F. Drinan, Bob Eckhardt, Don Edwards, William D. Ford, Donald M. Fraser, Michael Harrington, Augustus F. Hawkins, Ken Hechler, James J. Howard.

Robert W. Kastenmeier, Edward I. Koch, Robert L. Leggett, Spark M. Matsunaga, Romano L. Mazzoli, (former Rep.) Abner J. Mikva, Parren J. Mitchell, John E. Moss, Thomas M. Rees, Teno Roncalio, Benjamin S. Rosenthal, Edward R. Roybal, (the late) William F. Ryan, (former Rep.) James H. Scheuer, John F. Seiberling, Frank Thompson, Jr.

The CHAIRMAN: The time of the gentleman from California has again expired.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield 1 additional minute to the gentleman from California (Mr. Moss).

Mrs. MINK. Mr. Chairman, this has been a very long struggle for many of us, including the gentleman in the well, in the case we brought against the Government for the disclosure of information which we felt was so essential in our deliberations. The actions of this committee today in bringing this bill to the House will serve to enlarge not only our ability but the ability of the American people to acquire important information so that we can fully participate in this democracy.

Mr. Chairman, I thank the gentleman again, together with the chairman and members of the committee.

Mr. MOSS. Mr. Chairman, I thank the gentlewoman, and I would like to take this opportunity to express to the gentleman from Pennsylvania (Mr. Moorhead) and the gentleman from Illinois (Mr. Erlendborn) my unqualified admiration for the work they did in drafting these amendments.

Mr. Chairman, I am pleased to support them in offering the amendments to the House today.

Mr. ERLENDBORN. Mr. Chairman, I yield 4 minutes to the gentleman from Ohio (Mr. Brown).

(Mr. Brown of Ohio asked and was given permission to revise and extend his remarks.)

Mr. BROWN of Ohio. Mr. Chairman, I support the laudable objectives of the Freedom of Information Act, and the worthy attempt that the committee is making to strengthen the act and clarify certain ambiguities that still plague the act. But the House should make clear that the Corporation for Public Broadcasting is not intended to be covered within the expanded definition of "agency" which is part of this amendment. The corporation clearly is not a Government corporation or a Government-controlled corporation and should not become subject to the act under those terms as used within the expanded definition of "agency" in the amendment.

The Public Broadcasting Act of 1967 expressly provided that the corporation is not to be "an agency or establishment of the U.S. Government." Rather it is a private, independent corporation incorporated pursuant to the District of Columbia Nonprofit Corporation Act. Although Congress was desirous of supporting public broadcasting

with Federal funds in 1967, it was keenly aware that it would be inappropriate—constitutionally and otherwise—for the Government itself to perform the support activities that it envisioned for the corporation. Congress established a private corporation so that the Government itself would not be involved in deciding how the Federal funds appropriated for the support of public broadcasting would be used.

Of course, the corporation is not opposed to making available to the public information concerning its activities. Indeed, it is important that the public understand what the corporation does for it to succeed in its mission. But it would be a mistake to treat the corporation as a Government agency or Government-controlled corporation when its very reason for being is insulation from the Government. If the corporation is made subject to the act, the corporation will inevitably be clothed with the trappings of Government.

So, Mr. Chairman, I rise to inquire of both the chairman of the subcommittee, the gentleman from Pennsylvania (Mr. Moorhead), and the ranking member, the gentleman from Illinois (Mr. Erlenborn) if, under the language on page 8, the definition of "agency," in reference to the Corporation for Public Broadcasting, is not inconsistent with the language of the legislation and if, in fact, there is any effort to get control of the corporation or its decisionmaking function through this act. I would certainly hope not.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, will the gentleman yield?

Mr. BROWN of Ohio. I yield to the gentleman from Pennsylvania.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, as I stated earlier in the debate, the language of the statute, where it says, "Government-controlled corporation," would be controlling over the language of the report. If the Corporation for Public Broadcasting is not a Government-controlled corporation, then the provisions of the act would not reach it.

I will say to the gentleman that if the act does apply to the corporation, there is no intention to do anything but give individual members of the public the right to get information. I am sure that this corporation would give that to the individual citizens, either with the law or without the law.

There is no intent to institute Government control or congressional control over the corporation itself.

Mr. BROWN of Ohio. Mr. Chairman, I thank the gentleman for his response.

The gentleman from Illinois (Mr. Erlenborn) will concur, I trust.

Mr. ERLENBORN. Mr. Chairman, if the gentleman will yield, I will state that the gentleman is correct.

Mr. GUDE. Mr. Chairman, will the gentleman yield?

Mr. BROWN of Ohio. Mr. Chairman, I yield to the gentleman from Maryland.

(Mr. Gude asked and was given permission to revise and extend his remarks.)

Mr. GUDE. Mr. Chairman, the people's right to know is fundamental in our democracy. H. R. 12471 advances that right by making improvements in administrative procedures under the Freedom of Information Act. As a member of the subcommittee which considered this bill, I wish to add my support of it.

I would like to address myself to two provisions of H.R. 12471 in particular: Section (1)(d), which permits—but does not require—courts to examine the contents of agency records in camera to determine whether the records or any portion of them may be withheld from the public under any of the exemptions to the act, and section (2), which makes clear that only documents which may be kept secret in the interest of the national defense or foreign policy are those which have been properly classified.

Just before we began our hearings on two bills to amend the Freedom of Information Act, both of which I cosponsored, the Supreme Court ruled in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), that courts could not review the contents of classified documents. It decided that a determination of whether material was properly classified was satisfied by an affidavit from the agency controlling the information.

On the basis of personal experience, Mr. Chairman, I do not believe that this decision is reasonable. Let me cite one example. Weather modification in Vietnam during American participation in the war there is a subject in which I have had considerable interest. Both Senator Cranston and I have asked the Defense Department for information about this subject repeatedly since 1971: we have been denied it each time. Senator Pell, who is the chairman of the Senate Subcommittee on Oceans and International Environment, has also asked for this information, and he, too, has been denied it.

Weather modification is one of the most sensitive and fascinating scientific topics being discussed today. Scores of meteorologists and environmentalists are very concerned about developments in this area. Surely Congress ought to know what the Defense Department is doing with regard to it before legislating on measures in this field, such as my House Resolution 329, expressing the sense of the House that the United States should seek prohibition of weather modification as a weapon of war.

I think that the Department erred in not releasing information on weather modification, but under the present law, I could not seek court review of the Department's position.

If H.R. 12471 were to be enacted, however, I could seek that court review. I could get a hearing by an independent arbiter on whether the executive branch had acted rightly in withholding information. I am pleased to vote for a bill which makes this improvement in the administration of the Freedom of Information Act.

(Mr. Alexander, at the request of Mr. Moorhead of Pennsylvania, to revise and extend his remarks at this point in the RECORD.)

Mr. ALEXANDER. Mr. Chairman, I rise in support of H.R. 12471, which is designed to strengthen the Freedom of Information Act. This legislation is another step in making certain that government is the servant of the people and not its master.

One provision is especially important in this regard. The bill provides for the recovery of attorney fees and costs at the discretion of the courts.

Why is this so important? For one thing, there has been altogether too much unnecessary litigation forced upon our citizens by Federal agencies that feel they own or have a proprietary interest in Government information—information that belongs to all of our people.

Citizens are sometimes compelled to spend thousands of dollars—money they can ill afford—simply to assert rights which Congress is attempting to implement under both the spirit and letter of the Constitution.

The Government has lost more than half of its Freedom of Information cases. That is not much of a track record. In fact, it is lousy. And guess who is stuck with the tab? The unfortunate citizen complainant and the taxpayers.

The committee feels that once the Government has to take full responsibility for litigating indefensible cases, it will think twice before going to the mark in the first instance.

Let me emphasize that the recovery of reasonable attorney fees and other litigation costs is at the discretion of the court. It may take into consideration those factors it considers consistent with the administration of justice.

These may include when the suit advances a strong congressional policy, the ability of the plaintiff to sustain such expenses without harmful sacrifice, the obstinance of the Government in pressing a weak case, the question of possible malice and any other factors considered important to the court.

The committee feels strongly that no plaintiff should be forced to suffer any possible irreparable damage because the Government failed to live up to the letter and spirit of the Freedom of Information Act.

Only when this Nation's most threadbare citizen can stand before the full array of Government power and emerge victorious in every sense when his cause is just will the full promise of our system of government be realized. That promise must be guarded and brought to reality and that is our intention.

I ask this House to strike another blow for liberty and approve this legislation with resounding affirmation for its constitutional goals.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I yield such time as he may consume to the gentleman from Florida (Mr. Fascell), a member of the committee.

Mr. FASCELL. Mr. Chairman, I thank the gentleman for yielding time to me.

Mr. Chairman, as one of the original charter members of the Moss subcommittee, appointed by the late Chairman Dawson in 1955 to investigate Government secrecy and withholding practices, I am particularly pleased to support the pending bill, H.R. 12471.

This measure would measurably improve and strengthen the original Freedom of Information Act, now in operation for almost 7 years. Our committee has spent many weeks of concentrated effort in investigative and legislative hearings and in public markup sessions to draft and perfect the legislation before us today. The need for these amendments has been fully documented in our 1972 investigative report—House Report 92-1418—and in our legislative report on this measure—House Report 93-876. I commend these two documents to all Members. They make a clear-cut case for these important amendments to curb Federal agency delays and other abuses in the administration of the act, to clarify and reaffirm original congressional intent, and to make the Freedom of Information Act a much more usable tool for the working press.

Mr. Chairman, the advantages of open public access to the workings of government have been clearly demonstrated in both the Federal

Freedom of Information Act and in my own State of Florida through the "sunshine law." One of the ways in which we can help reestablish public confidence in our governmental operations is by the quick enactment of these amendments to the Freedom of Information Act.

For the most part, the Federal courts have taken adequate notice of the importance of the act as a milestone enactment by Congress in preserving the fundamental right of all Americans to be informed about the business of their Government. The pending legislation, therefore, does not change the language of eight of the nine exemptions contained in section 552(b) of the act. One of the most eloquent statements by a Federal court in support of the principles of the act was made in the 1971 freedom of information case of Soucie against David:

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate Federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all government records whose disclosure would not significantly harm specific governmental interests. The policy of the act requires that the disclosure requirements be construed broadly, the exemptions narrowly.

Mr. Chairman, one historical reference is particularly important in understanding the need for these amendments. When hearings were held 9 years ago by the Moss subcommittee on legislation that finally was enacted as the Freedom of Information Act of 1966, every single witness from the Federal bureaucracy—then under a Democratic President—opposed the bill. They claimed that it would seriously hamper the functioning of Federal agencies and be ruinous to the decisionmaking process. Despite their opposition, the bill was unanimously passed by the Congress and President Johnson wisely signed it into law. Of course, no such calamitous result was forthcoming. The spectres never appeared. During the hearings on this current legislation to strengthen the freedom of information law, every single witness from the Federal bureaucracy—this time under a Republican President—has again opposed the bill, using the same types of discredited arguments heard 9 years ago. I trust that history will repeat itself and that Congress will again give its overwhelming approval to freedom of information legislation and that the present White House incumbent will likewise sign the bill into law.

Mr. Chairman, I urge our House colleagues to support the important bipartisan amendments to the Freedom of Information Act as contained in H. R. 12471.

Mr. Chairman, I would just simply like to add two points: One is that the original act, after long years of study and thousands of pages of testimony, has been in operation now for 7 years, and all of the cries that were raised at the time the original act was passed can be summed up probably in this fashion: That it was said that if we passed the Freedom of Information Act, it would bring the executive branch of Government to a grinding halt.

None of that, of course, has happened. The Freedom of Information Act has found its place in the legislative history and in the administration of our Government. It has been an extremely useful tool for our citizens, and it has helped build confidence in Government. Goodness knows, we need more of that.

So these amendments now are another long step toward clarifying the right of public access to Government information.

Mr. Chairman, I would just want to add this one thought: That none of the fears that have been expressed really materialized. I do not believe that any would materialize in the future as a result of these amendments or any other act that deals with this subject. I think it is too well ingrained now in our legislative history and in the operational history of this Government.

One point we should keep in mind is that members of the public and the rights of individual Congressmen are also covered under this act as members of the public, and I would like to ask the chairman of the committee, once again, in view of the long history on this point, that whatever rights accrue to Members of Congress under this act as Members of the body politic, this in no way is in derogation of other rights which may exist by reason of our responsibilities as Members of Congress and in no way diminishes or modifies those rights.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, the gentleman is entirely correct.

(Mr. Fascell asked and was given permission to revise and extend his remarks.)

Mr. LEHMAN. Mr. Chairman, I rise in support of the Freedom of Information Act amendments, and urge the defeat of any weakening amendments.

Mr. Chairman, the people in the 13th District in Florida wonder why it takes over a month to receive even an interim reply from a Federal agency on a request for information. As a matter of fact, my staff often has the same problem.

The information stored in Government files is valuable stuff. And the people whose taxes paid for it should in most circumstances be able to get hold of information quickly. I am pleased to see that the committee has set time limits of ten working days for agency action on original requests.

The Freedom of Information Act amendments before us today are more of what we in Florida call "government in the sunshine." Government in the sunshine is letting the people see what it is that the Government is doing, and gives the people better access to the Government. Conversely, it also makes the Government more responsive to the people.

Mr. Chairman, I urge the support of my colleagues for this bill.

Mr. HANRAHAN. Mr. Chairman, I was particularly proud of the recent action of the House of Representatives in passing H.R. 12471. This bill represents the first comprehensive attempt to expand and improve upon the Freedom of Information Act which became public law in 1966.

Never before in the history of America has the need for better access to governmental information by the people been so great. One of the major reasons so many Americans have lost faith in our form of government has been the persistent belief that ours is a government of the few which makes its decisions in secret. The whole purpose of the Freedom of Information Act was to open up governmental information to the scrutiny of the American people. By passing H.R. 12471, the House has acted decisively to make this important public law more effective and available for use by all Americans.

The following major improvements to the Freedom of Information Act are included in H.R. 12471:

First. A current index of agency policies and documents shall be promptly published and distributed to interested individuals by sale or otherwise;

Second. Requests for information must merely "reasonably describe" as opposed to "specifically identify" records in question;

Third. Nothing in this bill shall be construed to limit in any way congressional access to information;

Fourth. Time limits for each phase of agency response to informational requests are set up. Original requests must be acted upon within 10 days. Administrative appeals must be decided within 20 working days. Court proceedings may be initiated if these deadlines are not met;

Fifth. The court may reimburse an informational requester in cases where the agency denial is not upheld;

Sixth. The court may examine in secret any information denied to see if it falls into any category of excluded information;

Seventh. Information denied for security reasons must be specifically identified as such by the executive branch;

Eighth. Each agency must submit an annual report of its efforts to meet the requirements of this act including the number of denials, reasons for each and the amount and rate of fees; and

Ninth. All executive agencies and Government corporations, including the Executive Office of the President, are required to abide by this act.

As a Member of Congress who has taken a deep and abiding interest in the free flow of Government information, I feel the House has acted in the public interest by passing H.R. 12471. I sincerely hope this wise and farsighted measure will be speedily enacted into law.

Mr. PATTEN. Mr. Chairman, many years ago, Lord Acton wrote that—

Everything secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity.

I have always believed that, for I am convinced that the public has the right to know what the Government is doing right—or wrong. That is why I was a cosponsor of the Freedom of Information Act of 1966. It always disturbed me to read or hear that some Federal departments or agencies conceal public information, instead of revealing it.

Although the 1966 act has made more information available to the public, many improvements have to be made before Congress can really say it is furnishing the people with the information they deserve. Therefore, once again, I have become a cosponsor of freedom of information legislation, because it contains provisions that help strengthen the present law. The new legislation not only strengthens procedural aspects, but also improves its administration, and expedites the handling of requests for information from Federal agencies, including reports to Congress that will show applications for information denied.

Mr. Chairman, I have, like Jefferson, "confidence in the people, cherish and consider them as the most honest and safe." After years in public life, my confidence in the people has grown, while my faith in some who govern has declined. Yet, I have hope and believe that one of the best ways of improving the low esteem in which Congress

is held by the public—only about 21 percent think we are doing a good job—is to pass a Freedom of Information Act that will provide people with the information they need about government. If government is right, it should be praised, and if it is wrong, it should be criticized.

I urge my colleagues to vote for this bill, for it will not only strengthen the public's right-to-know, but also help restore some of the public confidence that Federal agencies and Congress have lost.

Mr. THOMPSON of New Jersey. Mr. Chairman, I rise in support of H.R. 12471 in order that the Freedom of Information Act might be strengthened and made a more workable tool by the news media and other Americans.

As a cosponsor of the original 1973 bill on which the Foreign Operations and Government Information Subcommittee held hearings, I have closely followed the markup sessions that produced this bipartisan measure before us today. I think it significant, Mr. Chairman, that there is a broad representation of the political spectrum of both sides of the aisle in support of this bill.

History has repeatedly shown that an obsession for secrecy in governmental institutions has been the handmaiden of repression, corruption, and dictatorial rule. Government secrecy for the purpose of hiding wrongdoing, inept leadership, or bureaucratic errors undermines and can eventually destroy our system of representative government. The confidence of the American public in governmental institutions must be restored if we, as a nation, are to emerge from the Watergate doldrums. This bill to make the Freedom of Information Act a more viable weapon in the fight against secrecy excesses of the entrenched Government bureaucracy is an important start in that direction.

Mr. Chairman, in that connection we should all heed the recent observations of former Chief Justice Earl Warren when he said:

It would be difficult to name a more efficient ally of corruption than secrecy. Corruption is never flouted to the world. In Government, it is invariably practiced through secrecy. . . . If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of Government. . . .

I urge that we begin today by an overwhelming vote in support of H.R. 12471, to let the American public know that we in Congress believe that freedom of information is the best antidote for the Watergate secrecy and coverup poison.

Mr. OBEY. Mr. Chairman, I should like to commend the gentleman from Pennsylvania (Mr. Moorhead) and the Foreign Operations and Government Information Subcommittee which he chairs for doing a superb job of legislative oversight on the Freedom of Information Act. That painstaking and hard-hitting job of oversight in the 92d Congress led to the introduction last year of amendments to clarify and strengthen the act, which I was pleased to cosponsor. Subsequent legislative hearings helped shape the amendments that are before us now.

I think a strong case for these amendments has already been made. All I hope to do now is contribute one example of why congressional vigilance is necessary to assure that the Freedom of Information Act functions in the way Congress intended.

Last December 27 the Soil Conservation Service of the Department of Agriculture published regulations prescribing the policies, proce-

dures and authorizations governing the public availability of its materials and records under what it erroneously referred to as the "Public Information Act."

The SCS said it would make its records available with "reasonable promptness" for inspection or copying, except for certain kinds of records which it then listed. The SCS may have intended that its list reflect the act's list of certain categories of information that are exempt from mandatory disclosure, but the agency stumbled before it even got started.

Its very first category was:

Materials specifically required by Executive orders to be kept secret.

A much, much broader category than that specified by the act itself, which now reads:

To compound its error, the SCS did not invite public comment on its regulations, declaring blandly that—

Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.

No substantive basic policy or procedural changes have been made.

Of course, that allegation was nonsense.

I cite this example to show that Federal agencies still cannot yet be trusted to live up to the Freedom of Information Act on their own. We must monitor them constantly and continue to demand that they strive to comply with the law to the fullest. If we do not, the public will not have the access to government information that it is entitled to have under the law.

Mr. Chairman, I urge that these amendments to the Freedom of Information Act be passed as reported out by the Government Operations Committee.

Mr. BROOMFIELD. Mr. Chairman, I rise today in support of H.R. 12471, to amend the Freedom of Information Act. When this historic act was passed in 1966, the intent was to guarantee the right of the American people to know what their Government was doing by enabling them to obtain information and records from Federal agencies.

It has been increasingly evident since then that the 1966 act lacks the strength necessary to make it effective in this area. Certain ambiguities and weaknesses have prevented it from achieving the results intended by its passage. We have the opportunity today to correct this situation and inject new life into the original act by passing H.R. 12471.

The basis of a sound democracy is an informed public. We pride ourselves on being a government that depends on the voices of all the people, not just a few. But for these voices to play an active part they must have access to knowledge. Otherwise, they are merely the voices of ignorance.

The access to Government information is a basic right of all the American people. As one of our greatest Presidents said, this is a government "of the people, by the people, and for the people." I urge all my colleagues to echo Abraham Lincoln's words today by voting favorably on H.R. 12471.

Mr. DRINAN. Mr. Chairman, the people's right to know how the Government is discharging its duties is essential to a democratic society. This is the basis of the Freedom of Information Act, and for the amendments to that act before us today.

One of the most important features of the legislation before us today is that it would create the machinery for continuous congressional oversight of the information practices of the Federal Government.

The underlying principle of the Freedom of Information Act is that of Congress performing its most essential role, acting as a check in balance on the growth of executive power. Indeed, Senator Stuart Symington, quoted in "The Pentagon Papers and the Public," Freedom of Information Center Report No. 0013—U. Mo. July 1971—gave an excellent example of the dangers of secrecy in Government when he stated that he "slowly, reluctantly, and from the unique vantage point of having been a Pentagon official and the only Member of Congress to sit on both the Foreign Relations and Armed Services Committees concluded that executive branch secrecy has now developed to a point where secret military actions often first create and then dominate foreign policy responses."

The bill before us today strengthens the Freedom of Information Act of 1966. It provides for a wider availability of agency indexes listing informational items. It permits access to records on the basis of a reasonable description of a particular document rather than requiring specific titles or file numbers as is presently the case in many agencies. The bill sets short time limits for agency responses to inquiries. It provides for recovery of attorneys' fees and court costs by plaintiffs.

The bill also permits in camera court review of classified documents for purposes of determining whether the documents were properly classified under executive authority. This key provision in effect reverses *Environmental Protection Agency et al. v. Patsy T. Mink et al.*, 410 U.S. 73 (1973), a suit in which I was one of 33 congressional party plaintiffs, by specifically allowing in camera inspection by the courts of all documents in dispute, including those which may relate to national defense and those which may fall into the category of inter- and intra-office memoranda. This provision reestablishes the original intent of this bill.

The purpose of this legislation is to facilitate access to information by the public. At a time when the deleterious effects of Government secrecy have never been in greater evidence, this legislation is most welcome.

Mr. REUSS. Mr. Chairman, I strongly support H.R. 12471. The Freedom of Information Act would be strengthened and improved after 7 years of operation.

The Government Operations Committee adopted a comprehensive report on the administration of the Freedom of Information Act in September 1972. It was the unanimous view of the membership of our committee, based on many weeks of hearings and investigations by the Foreign Operations and Government Information Subcommittee, that certain amendments were required to make the law truly effective.

Hearings held on legislation to implement this committee recommendation were held last year and produced supporting testimony and statements from a number of widely diverse organizations, including:

From the news media:

Creed Black, editor of the Philadelphia Inquirer;

Herbert Brucker, former editor of the Hartford Courant and former president of the American Society of Newspaper Editors;

J. R. Wiggins, former editor of the Washington Post, past president of the ASNE, now publisher of the Ellsworth, Maine, American;

Richard Smyser, editor of the Oak Ridger, Oak Ridge, Tenn., and vice president of the Associated Press Managing Editors;

Clark Mollenhoff, former Nixon White House counsel and now bureau chief of the Des Moines Register-Tribune;

Tep Koop, Washington office director of the Radio-Television News Directors Association;

E. W. Lampson, president of the Ohio Newspaper Association;

Ted Serrill, executive vice president, National Newspaper Association;

Courtney R. Sheldon, chairman, Freedom of Information Committee, Sigma Delta Chi;

Stanford Smith, president, American Newspaper Publishers Association;

William H. Hornby, executive editor, the Denver Post and chairman, FOI Committee, American Society of Newspaper Editors; and The Association of American Publishers, Inc.

From the legal profession:

John T. Miller, chairman, section of administrative law, American Bar Association;

Richard Noland, vice chairman, Committee on Access to Government Information, American Bar Association;

Stuart H. Johnson, Jr., chairman for Freedom of Information, Federal Bar Association;

John Shattuck, staff counsel, American Civil Liberties Union;

Ronald Plesser, attorney, Center for the Study of Responsive Law; and

Thomas M. Franck, law professor and director, Center for International Studies, New York University.

The measure is also supported by the American Library Association, Common Cause, and has been cosponsored in its various forms by more than 75 Members of the House and Senate.

H. R. 12471 contains needed and well-conceived amendments to the original 1966 Freedom of Information Act. While they may not solve all of the problems in its day-to-day administration resulting from foot-dragging tactics of the Federal bureaucracy, it will serve notice that Congress and the public strongly reaffirms its supports for the principles of the people's "right to know." As the late President Lyndon Johnson said when he signed the original measure into law:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. * * * I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

Mr. HARRINGTON. Mr. Chairman, in 1966 the Congress saw fit to enact Public Law 89-487—popularly recognized as the "Freedom of Information Act." This landmark legislation was structured to guarantee the rights of citizens to know the business of their Govern-

ment. But for all of its desirable ambitions, the Freedom of Information Act has, at times, proved incapable of assuring public access to the records of Federal agencies and departments.

Accordingly, the Committee on Government Operations of the House of Representatives has reported out legislation (H.R. 12471) to further protect the right of the public to check on the activities of the Federal Government, by improving the Freedom of Information Act.

During the summer of 1971, the Government Operations Subcommittee on Foreign Operations and Government Information undertook a comprehensive study of administration of the Freedom of Information Act by the Federal agencies. This investigation revealed widespread abuses of the act by the Federal agencies involved. By resorting to delaying tactics, various classification ploys and requiring of requestors a specificity of identification of desired information, Federal agencies were able, all too often, to successfully circumvent a multitude of the public's requests. The subcommittee, in its subsequent report, suggested a series of administrative changes to correct existing deficiencies in making information available by the Federal Government. Also set forth were a list of specific legislative objectives designed to improve the administration of the Freedom of Information Act. H.R. 12471, now before this House, is legislation that should correct those deficiencies noted by the subcommittee.

This measure, similar to H.R. 5425 which I sponsored in the previous session of the 93d Congress, seeks to accomplish more efficient, prompt, and full disclosure of information. H.R. 12471 would affect the following areas of the Freedom of Information Act:

H.R. 12471 would improve the availability of Federal agency indexes, which list the specific information available from individual agencies. The bill would require that indexes be readily available, in usable and concise form, upon request, even though agencies would not, by reasons of practicality, be required to print indexes in bound form.

Many agencies at present require an individual to designate a specific title or file number to identify desired documents. H.R. 12471 would allow for the retrieval of information with only a reasonable "description" of the requested information, thus restricting one manner in which citizens' access to information has been limited in the past.

Frequently, information from the Federal Government can be used only if it is timely. Too often, however, the intent of the Freedom of Information Act has been circumvented by dilatory tactics on the part of agencies. To deal with this problem, H.R. 12471 would set a 10-day time limit on agency responses to original requests for information, and 20 days for administrative appeals of denials. In unusual cases, good faith assurances of the agency will allow for an extension of the time period allowed. So as to expedite litigation carried out under the Freedom of Information Act, the bill would also cut to 20 days the present 60-day requirement for agency responses to complaints. The bill would also allow defendants to recover attorney's fees from the Government, as well as court costs, if the case goes against the Government.

An important expansion of the coverage of the act is also included in H.R. 12471, as the definition of what constitutes an "agency" is expanded. Government corporations, such as the Tennessee Valley Authority, and Government-controlled corporations, such as the Corporation for Public Broadcasting or Amtrak, would come under the authority of the Freedom of Information Act for the first time. Also, agencies within the executive branch, such as the Office of Management and Budget or the National Security Council, would be covered.

H.R. 12471 also contains a provision extremely significant in the light of recent controversies over the classification of Government documents. The bill would permit, at the option of the court, in camera court review of document classification. Courts would be enabled to review the actual classified documents, rather than the classification notices, as is often the case under existing law. Courts would be empowered to determine whether the classifications imposed upon documents by agencies were properly constituted. These new procedures, I hope, will reduce the appalling incidence of smokescreen "national security" defenses raised by the Government in Freedom of Information Act cases.

Mr. Chairman, this important legislation enhances and improves the original Freedom of Information Act. In a nation which claims with just pride that it is ruled "by the people," the accessibility of Government records to the populace is of great importance. The amendments proposed to the original act by H.R. 12471 would limit the abuses of the act by Federal agencies that have had a chilling effect on the ability of citizens to fulfill their right to know. Today the House has the opportunity to pass historic legislation building upon the foundation of the original 1966 Freedom of Information Act. We should not shirk from the task before us today; we should pass this bill.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I have no further requests for time.

The CHAIRMAN. All time having expired, the Clerk will read.

The Clerk read as follows:

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 552(a) (2) of title 5, United States Code, is amended by striking out "and made available for public inspection by 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 indentifiable 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 553(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, 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.

Mr. MOORHEAD of Pennsylvania [during the reading]. Mr. Chairman, I ask unanimous consent that the bill be considered as read, printed in the RECORD, and open to amendment at any point.

The CHAIRMAN. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The CHAIRMAN. Are there any amendments?

AMENDMENT OFFERED BY MR. WHITE

Mr. WHITE. Mr. Chairman, I offer an amendment.
The Clerk read as follows:

Amendment offered by Mr. White: On page 4, lines 9 through 14, strike all of subsection (d) and insert the following in lieu thereof:

"(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 and the President of the Senate for referral to the appropriate committees of the Congress. The report shall include—"

(Mr. White asked and was given permission to revise and extend his remarks.)

Mr. WHITE. Mr. Chairman, my amendment to the Freedom of Information Act bill is designed to bring the bill in conformity with the rules of the House. I cite you on page 542, rule 40, entitled "Executive Communications":

Estimates of appropriations and all other communications from the executive departments, intended for the consideration of any committees of the House, shall be addressed to the Speaker, and be referred as provided by clause 2 of rule 24.

Clause 2 of rule 24 states:

Business of the Speaker's table shall be disposed of as follows:

Messages from the President shall be referred to the appropriate committees without debate. Reports and communications from the heads of departments, and other communications addressed to the House . . . may be referred to the appropriate committees in the same manner. . . .

Section 3 of the bill calls for submission of a report by each agency to the Government Operations Committees of the House and Senate and to the Senate Judiciary Committee. But, according to the House rules all such agency reports must first be directed to the Speaker of the House. Then the Speaker may refer them in accordance with rule 24, clause 2, to the appropriate committee. I understand the Senate has the same procedure.

If you desire to maintain order in the application of our rules to our bills, then my amendment should be adopted. Although my amendment may be a technical one, it is offered with the purpose of keeping the laws we make on submission of agency reports consistent with the rules we have made for ourselves.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, will the gentleman yield?

Mr. WHITE. I am glad to yield to the chairman of the subcommittee.

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, the gentleman from Texas (Mr. White), has been kind enough to provide us with a copy of his amendment. Insofar as the members of the committee on this side are concerned, we would accept this amendment.

Mr. WHITE. I thank the gentleman.

Mr. ERLNBORN. Mr. Chairman, will the gentleman yield?

Mr. WHITE. I am glad to yield to the gentleman from Illinois.

Mr. ERLNBORN. Might I call to the gentleman's attention what I consider to be a statement which perhaps is confusing in his amendment. It says "strike all of subsection (d) and insert the following in lieu thereof:" and then the material referred to is inserted. That might be construed as striking out all of subsection 1 through 5 in that subsection. I know that is not the gentleman's intention.

Mr. WHITE. No. It is lines 9 through 14 that would be stricken by the wording of the amendment. That covers the areas that I am interested in.

Mr. ERLNBORN. Then it is clear that the gentleman only intends to strike the material in lines 9 through 14?

Mr. WHITE. Yes; according to the language of the amendment.

Mr. ERLÉNORN. I thank the gentleman.

Mr. CHAIRMAN, I see no objection to the language.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Texas (Mr. White).

The amendment was agreed to.

The CHAIRMAN. Are there any further amendments? If not, under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker having resumed the chair, Mr. Eckhardt, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee having had under consideration the bill (H. R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, pursuant to House Resolution 977, he reported the bill back to the House with an amendment adopted in the Committee of the Whole.

The SPEAKER. Under the rule, the previous question is ordered.

The question is on the amendment.

The amendment was agreed to.

The SPEAKER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER. The question is on the passage of the bill.

The question was taken, and the Speaker announced that the ayes appeared to have it.

Mr. BUCHANAN. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 383, nays 8, not voting 41, as follows:

[ROLL No. 89]

Yeas—383

Abdnor	Bevill	Broyhill, N.C.
Abzug	Biaggi	Broyhill, Va.
Adams	Biester	Buchanan
Addabbo	Bingham	Burgener
Alexander	Blackburn	Burke, Calif.
Anderson, Calif.	Blatnik	Burke, Fla.
Andrews, N.C.	Boggs	Burke, Mass.
Andrews, N. Dak.	Boland	Burlison, Mo.
Archer	Bolling	Burton
Ashbrook	Bowen	Butler
Ashley	Brademas	Byron
Aspin	Bray	Camp
Badillo	Breaux	Carney, Ohio
Bafalis	Breckinridge	Carter
Baker	Brinkley	Casey, Tex.
Barrett	Brooks	Cederberg
Bauman	Broomfield	Chamberlain
Bell	Brown, Calif.	Chappell
Beunnett	Brown, Mich.	Chisholm
Bergland	Brown, Ohio	Clancy

Clark	Frey	Kazen
Clausen, Don H.	Froehlich	Kemp
Clawson, Del	Fulton	Ketchum
Cleveland	Fuqua	King
Cochran	Gaydos	Koch
Cohen	Gettys	Kuykendall
Collins, Tex.	Giamo	Kyros
Conable	Gibbons	Lagomarsino
Conlan	Gilman	Landrum
Conte	Ginn	Latta
Conyers	Goldwater	Leggett
Corman	Gonzalez	Lehman
Coughlin	Goodling	Lent
Crane	Grasso	Litton
Cronin	Green, Oreg.	Long, La.
Culver	Green, Pa.	Long, Md.
Daniel, Dan	Griffiths	Lott
Daniel, Robert	Gross	Lujan
W., Jr.	Grover	Luken
Daniels,	Gubser	McClory
Dominick V.	Gunter	McCloskey
Danielson	Guyer	McCollister
Davis, Ga.	Haley	McCormack
Davis, S.C.	Hamilton	McDade
Davis, Wis.	Hammerschmidt	McFall
de la Garza	Hanley	McKinney
Defaney	Hanna	McSpadden
Dellenback	Hanrahan	Macdonald
Dellums	Hansen, Idaho	Madden
Denholm	Hansen, Wash.	Madigan
Dennis	Harrington	Mahon
Dent	Harsha	Mallary
Derwinski	Hastings	Mann
Devine	Hawkins	Maraziti
Diggs	Hays	Martin, Nebr.
Dingell	Hébert	Martin, N.C.
Donohue	Hechler, W. Va.	Mathias, Calif.
Downing	Heckler, Mass.	Mathis, Ga.
Drinan	Heinz	Matsunaga
Dulski	Helstoski	Mayne
Duncan	Henderson	Mazzoli
du Pont	Hicks	Meeds
Eckhardt	Hillis	Melcher
Edwards, Al.	Hinshaw	Mezvinsky
Edwards, Calif.	Hogan	Michel
Eilberg	Holifield	Milford
Erlenborn.	Holt	Miller
Esch	Holtzman	Mills
Eshleman	Horton	Minish
Evans, Colo.	Howard	Mink
Evins, Tenn.	Huber	Minshall, Ohio
Fascell	Hudnut	Mitchell, Md.
Findley	Hungate	Mitchell, N. Y.
Fish	Hunt	Moakley
Fisher	Hutchinson	Mollohan
Flood	Ichord	Moorhead, Calif.
Flowers	Jarman	Moorhead, Pa.
Flynt	Johnson, Calif.	Morgan
Foley	Johnson, Pa.	Mosher
Ford	Jones, N.C.	Moss
Forsythe	Jones, Okla.	Murphy, N. Y.
Fountain	Jones, Tenn.	Murtha
Fraser	Jordan	Myers
Frelinghuysen	Karth	Natcher
Frenzel	Kastenmeier	Nedzi

Nelsen
Nichols
Nix
Obey
O'Brien
O'Hara
O'Neill
Parris
Passman
Patten
Perkins
Pettis
Peysner
Pike
Poage
Powell, Ohio
Preyer
Price, Ill.
Pritchard
Quie
Quillen
Railsback
Randall
Rarick
Regula
Reuss
Reigle
Rinaldo
Roberts
Robinson, Va.
Rodino
Roe
Rogers
Roncalio, Wyo.
Roncallo, N. Y.
Rooney, Pa.
Rose
Rosenthal
Rostenkowski
Roush
Rousselot
Roy
Roybal
Ruppe

Ruth
Ryan
St Germain
Sandman
Sarasin
Sarbanes
Scherle
Schneebeli
Schroeder
Sebelius
Seiberling
Shipley
Shoup
Shriver
Shuster
Sikes
Sisk
Skubitz
Slack
Smith, Iowa
Smith, N. Y.
Snyder
Spence
Staggers
Stanton, J. William
Stanton, James V.
Stark
Steed
Steele
Steelman
Steiger, Ariz.
Steiger, Wis.
Stephens
Stokes
Stratton
Stubblefield
Studds
Sullivan
Symington
Symms
Talcott
Taylor, Mo.
Taylor, N. C.
Thompson, N. J.

Thomson, Wis.
Thone
Thornton
Tiernan
Towell, Nev.
Treen
Udall
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Veysey
Vigorito
Walde
Walsh
Wampler
Ware
Whalen
White
Whitehurst
Whitten
Widnall
Wiggins
Williams
Wilson, Bob
Wilson, Charles H.,
Calif.
Winn
Wright
Wyatt
Wydler
Wylie
Wyman
Yates
Yatron
Young, Alaska
Young, Ga.
Young, S. C.
Young, Tex.
Zablocki
Zion
Zwach

Nays—8

Beard
Burleson, Tex.
Dickinson

Hosmer
Landgrebe
Satterfield

Waggonner
Young, Fla.

Not voting—41

Anderson, Ill.
Annunzio
Arends
Armstrong
Brasco
Brotzman
Carey, N. Y.
Clay
Collier
Collins, Ill.
Cotter
Dorn
Gray
Gude

Johnson, Colo.
Jones, Ala.
Kluczynski
McEwen
McKay
Metcalf
Mizell
Montgomery
Murphy, Ill.
Owens
Patman
Pepper
Pickle
Podell

Price, Tex.
Rangel
Rees
Reid
Rhodes
Robison, N. Y.
Rooney, N. Y.
Runnels
Stuckey
Teague
Wilson, Charles, Tex.
Wolf
Young, Ill.

So the bill was passed.

The Clerk announced the following pairs:

Mr. Annunzio with Mr. Owens.
 Mr. Rooney of New York with Mr. Pickle.
 Mr. Cotter with Mr. Anderson of Illinois.
 Mr. Rangel with Mr. Gude.
 Mr. Brasco with Mr. Arends.
 Mr. Gray with Mr. Mizell.
 Mr. McKay with Mr. Brotzman.
 Mr. Podell with Mr. Price of Texas.
 Mr. Metcalfe with Mr. Reid.
 Mr. Teague with Mr. Montgomery.
 Mr. Wolff with Mr. Armstrong.
 Mr. Pepper with Mr. Rhodes.
 Mr. Kluczynski with Mr. Johnson of Colorado.
 Mr. Jones of Alabama with Mr. Collier.
 Mr. Carey of New York with Mr. McEwen.
 Mr. Clay with Mr. Rees.
 Mrs. Collins of Illinois with Mr. Runnels.
 Mr. Stuckey with Mr. Robison of New York.
 Mr. Dorn with Mr. Young of Illinois.
 Mr. Murphy of Illinois with Mr. Charles Wilson of Texas.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

**B. SENATE DEBATE AND VOTES, MAY 30, 1974;
PAGES S9310-S9343**

AMENDMENT OF FREEDOM OF INFORMATION ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of S. 2543, which the clerk will state by title.

The assistant legislative clerk read the bill by title, as follows:

A bill (S. 2543) to amend section 552 of title V, United States Code, commonly known as the Freedom of Information Act.

The Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary with an amendment to strike out all after the enacting clause and insert:

That (a) the (fourth sentence of section 552(a)(2) of title 5, United States Code, is deleted and the following substituted in lieu thereof: "Each agency shall 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 publish, quarterly or more frequently, each index 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 comparable to that charged had the index been published."

(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 reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of such title 5 is amended by redesignating paragraph (4) 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, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of such search and duplication. Documents may 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. But such fees shall ordinarily not be charged whenever—

"(i) the person requesting the records is an indigent individual;

"(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than \$3;

"(iii) the records requested are not found; or

"(iv) the records located are determined by the agency to be exempt from disclosure under subsection (b).

"(B)(i) 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 consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may 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.

“(j) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

“(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within forty 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.

“(D) Except as to causes 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 causes 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. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the Government's withholding of the records sought had a reasonable basis in law.

“(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

“(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 such 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 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) Upon the written certification by the head of an agency setting forth in detail his personal findings that a regulation of the kind specified in this paragraph

is necessitated by such factors as the volume of requests, the volume of records involved, and the dispersion and transfer of such records, and with the approval in writing of the Attorney General, the time limit prescribed in clause (i) for initial determinations may by regulation be extended with respect to specified types of records of specified components of such agency so as not to exceed thirty working days. Any such certification shall be effective only for periods of fifteen months following publication thereof in the Federal Register.

“(C) In unusual circumstances as specified in this subparagraph, the time limits prescribed pursuant to subparagraph (A), but not those prescribed pursuant to subparagraph (B), may be extended by written notice to the requester setting forth the reasons for such extension and the data 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 10 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 assign professional or managerial personnel with sufficient experience to assist in efforts to locate records that have been requested in categorical terms, or with sufficient competence and discretion to aid in determining by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions;

“(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, in order to resolve novel and difficult questions of law or policy; and

“(iv) the death, resignation, illness, or unavailability due to exceptional circumstances that the agency could not reasonably foresee and control, of key personnel whose assistance is required in processing the request and who would ordinarily be readily available for such duties.

“(D) Whenever practicable, requests and appeals shall be processed more rapidly than required by the time periods specified under (i) and (ii) of subparagraph (A) and paragraphs (B) and (C). Upon receipt of a request for specially expedited processing accompanied by a substantial showing of a public interest in a priority determination of the request, including but not limited, to requests made for use of any person engaged in the collection and dissemination of news, an agency may by regulation or otherwise provide for special procedures or the waiver of regular procedures.

“(E) An agency may by regulation transfer part of the number of days of the time limit prescribed in (A)(ii) to the time limit prescribed in (A)(i). In the event of such a transfer, the provisions of paragraph (C) shall apply to the time limits prescribed under such clauses as modified by such transfer. 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 provision 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) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute;”

(b) 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 Committee on the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which 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) a copy of every rule made by such agency regarding this section;

"(5) the total amount of fees collected by the agency for making records available under this section;

"(6) a copy of every certification promulgated by such agency under subsection (a) (6) (B) of 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) (3) (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' means any agency defined in section 551(1) of this title, and in addition includes 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."

SEC. 4. There is hereby authorized to be appropriated such sums as may be necessary to assist in carrying out the purposes of this Act and of section 552 of title 5, United States Code.

SEC. 5. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

MR. KENNEDY. Mr. President, I ask unanimous consent that Mr. Thomas Susman and Mrs. Hank Phillippi, of the staff of the Subcommittee on Administrative Practice and Procedure, Mr. Al Friendly and Mr. Al From, of the staff of the Committee on Government Operations, and Mr. Paul Summit and Mr. Dennis Thelen, of the staff of the Committee on the Judiciary, be accorded the privilege of the floor during the consideration of this measure.

The PRESIDING OFFICER. Without objection, it is so ordered.

MR. KENNEDY. Mr. President, I yield myself such time as I may use.

The Supreme Court of the United States observed a few years ago that:

It is now well established that the Constitution protects the right to receive information and ideas.

Continued the Court,

This right to receive information and ideas is fundamental for our free society:

An important objective behind the Freedom of Information Act, passed by Congress in 1966, is to give concrete meaning to one aspect of this right to receive information—the right to receive information from the Federal Government. This is no meager right. The processes of Government touch almost every aspect of our lives, every day. From the food we eat to the cars we drive to the air we breathe; Federal

agencies constantly monitor and regulate and control. Our Government is the biggest buyer and the biggest spender in the world. It taxes and subsidizes and enforces. And it generates tons of paperwork as it goes about its business.

The Freedom of Information Act guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information. The protections of the act thus become protections for the public's right to receive information and ideas. And the accomplishments of the act become fuller implementation of the first amendment of the Constitution.

There is another significant purpose behind the Freedom of Information Act, perhaps best stated by Justice Brandeis when he wrote:

Publicity is justly commendable as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant, and electric light the most effective policeman.

Chief Justice Warren echoed this recently when he said that secrecy "is the incubator for corruption." We have seen too much secrecy in the past few years, and the American people are tired of it. Secret bombing of Cambodia, secret wheat deals, secret campaign contributions, secret domestic intelligence operations, secret cost overruns, secret antitrust settlement negotiations, secret White House spying operations—clearly an open Government is more likely to be a responsive and responsible Government. And the Freedom of Information Act is designed to open our Government.

Finally, the Freedom of Information Act is basic to the maintenance of our democratic form of government. President Johnson said on signing the FOIA that—

A Democracy works best when the people have all the information that the security of the nation permits.

The people can judge public officials better by knowing what they are doing, rather than only by listening to what they say. But to know what Government officials are doing, the people must have access to their decisions, their orders, their instructions, their deliberations, their meetings. The Freedom of Information Act provides an avenue to public access to the records of Government. Through these records the public can better judge, weigh, analyze, and scrutinize the activities of public officials, making sure at every turn that Government is being operated by, of, and for the people. And that Government is fully accountable to the people.

The Freedom of Information Act contains three basic subsections. The first sets out the affirmative obligation of each Government agency to make information available to the public, with certain information to be published and other information to be made available for public inspection or copying. Remedies are provided for noncompliance: No regulation, policy, or decision can affect any person adversely if it is not published as required, and any person improperly denied information can go to court to require disclosure. The second subsection contains exceptions to the general mandatory rule of disclosure, for matters such as properly classified information, trade secrets, internal advice memoranda, personnel and investigatory files. The third subsection makes clear that the Freedom of Information Act authorizes only withholding "as specifically stated" in the exemptions and that the act "is not authority to withhold information from Congress."

I think that it is important to point out that the act attempts to strike a proper balance between disclosure and nondisclosure, providing protection for information where legitimate justification is present. Congress has circumscribed narrowly the boundaries of justifiable withholding in the act's exemptions. Agencies have no discretion to withhold information that does not fall within one of those exemptions. It is equally clear, however, that agencies have a definite obligation to release information—even where withholding may be authorized by the language of the statute—where the public interest lies in disclosure. Congress certainly did not intend the exemptions of the Freedom of Information Act to be used to prohibit disclosure of information or to justify automatic withholding. This is a frequent misunderstanding, shared by many Government officials who insist on citing the act as forbidding release of requested information in specific cases. In fact, the exceptions to required disclosure are only permissive and mark the outer limits of information that may be withheld.

The Freedom of Information Act grew out of the efforts of a special House subcommittee and the Senate Subcommittee on Administrative Practice and Procedure in the mid-1960's. The Administrative Procedure Act had attempted to open up Government records in 1946, but it failed to provide any remedy for wrongful withholding of information. It required persons seeking information to be "properly and directly concerned," and it allowed administrators to withhold information where secrecy was required "in the public interest" or where it was considered "confidential for good cause found." With support and encouragement by the press, Congress, in 1966, enacted the Freedom of Information Act guaranteeing the public an enforceable right to Government records in the broadest sense.

Shortly after I took over as chairman of the Administrative Practice Subcommittee, we undertook a review of agency practices and court decisions under the Freedom of Information Act. We found that many agencies had not yet brought their regulations and procedures into line with the requirements of the act, but we concluded that additional time would be useful to allow them to come into compliance before looking to legislative proposals to change the still-new law. Many of the areas of the act where language was considered unclear or ambiguous were being interpreted by the courts, and we believed that the development of a body of case law on the act would be a useful predicate to any legislative attempt at clarification.

In 1972 a House subcommittee conducted extensive hearings on the operation of the Freedom of Information Act and concluded that there were major gaps in the law through which agencies were able to justify unnecessary delays, to place unreasonable obstacles in the way of public access, and to obtain undue withholding of information. The final report of the House Government Operations Committee described the failure of the act to realize fully its lofty goals because of agency antagonism to its objectives.

When Congress passed the Freedom of Information Act, it issued a rule of Government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital Defense and State secrets, personal privacy, tradé secrets, and the like—were only permis-

sive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people—the people are not their servants.

Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from we, the people.

Last year, my Subcommittee on Administrative Practice and Procedure began its efforts to define the loopholes in the Freedom of Information Act and to design legislation to close them. After extensive hearings, I introduced S. 2543, which focused on the procedural obstacles to timely access to Government information. Through subcommittee and full committee consideration, we amended and improved some of the sections of the bill. And on May 8 the Judiciary Committee unanimously ordered the bill reported, as amended.

S. 2543 makes a number of changes in the present Freedom of Information Act. Let me briefly outline all of the changes made by the bill, and then discuss in greater detail what I consider to be some of its most significant provisions.

First. Indexes. Under present law, indexes of agency opinions, policy statements, and staff manuals must be made available to the public. To increase the availability of these indexes, S. 2543 requires their publication unless it would be "unnecessary and impractical." This should especially increase their availability to libraries, which play a vital role in making information widely available to the people.

Second. Identifiable records. Under present law a request must be made for "identifiable records." Since some agencies have used this requirement to evade disclosure of public information, S. 2543 requires only that the request "reasonably describes" the records sought.

Third. Search and copy fees. Each agency presently sets its own schedule of fees without review or supervision. Exaggerated search charges and extravagant charges for legal review time can provide effective obstacles to public access to Government information. S. 2543 requires the Office of Management and Budget to set uniform fees, which will only cover direct costs of search and duplication, eliminating any possibility of padded fees or charges for peripheral services. These fees may be waived or reduced under specific circumstances set out in the bill.

Fourth. Venue. The bill establishes alternate concurrent venue for Freedom of Information cases in the District of Columbia, which has built up a special expertise in such cases.

Fifth. Expedition and appeal. Freedom of Information cases are under present law to be expedited in the trial court. The bill adds a congressional intent that expedition of Freedom of Information cases extends to the appellate level also.

Sixth. In camera and de novo review. Presently de novo review with in camera inspection of documents is allowed in all cases except where withholding is justified as being in the interest of national defense or foreign policy. This exception is dictated by the Supreme Court's interpretation of the Freedom of Information Act in the case of Environmental Protection Agency against Mink. S. 2543 would

reverse Mink and extend full in camera judicial review to all areas, including those involving classified documents. Specific procedures are set out in the bill for courts to follow where classification decisions are reviewed.

Seventh. Attorneys' fees. S. 2543 would allow recovery from the Government of attorneys' fees where the plaintiff in a Freedom of Information action substantially prevails and where recovery would be in the public interest. The bill contains criteria to govern the court's award of these fees.

Eighth. Answer time in court. The Government presently has 60 days to respond to a complaint in the Federal District Court. Private parties have 20 days. The bill would expedite the Government's response time, allowing 40 days for its answer. The court may grant an extension of time, or may shorten the response time, for good cause shown.

Ninth. Sanction for withholding. S. 2543 adds a new government accountability provision whereby if the court in a freedom of information case, after a hearing, finds the withholding to have been without a "reasonable basis in law," the official responsible can be disciplined or suspended by direction of the courts for up to 60 days. This should eliminate many of the cases where obstinate officials disregard the law in order to minimize embarrassment to the agency.

Tenth. Administrative deadlines. S. 2543 sets deadlines for agency handling of freedom of information requests: 10 days for the initial reply and 20 days on appeal. It sets up a certification procedure for extraordinary cases—where a large magnitude of documents subject to numerous requests are widely disbursed geographically—allowing 30 days for the initial answer time. And it provides that 10 days may be added to either the reply or appeal time if "unusual circumstances," as narrowly defined by the bill, are presented.

Eleventh. Exemption (b)(1). In its only amendment of a substantive exemption in the FOIA, S. 2543 makes clear the duty of a court reviewing withholding of classified material to determine whether a claim based on national defense or foreign policy is in fact justified under statute or executive order. Thus the court will not take an official's word for the propriety of the classification, but will look to the substance of the information to see if it had been properly classified.

Twelfth. Responsible officials. The names and positions of all government officials responsible for denying freedom of information requests are required by S. 2543 to be noted in denials and reported annually to the Congress. This supplements the sanctions section in encouraging personal accountability on the part of government officials who would withhold information.

Thirteenth. Segregable records. S. 2543 adds a new provision to the act stating that if exempt portions of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of "portions" of files or records as well as entire files or records.

Fourteenth. Reporting. S. 2543 requires annual reporting of agency handling of freedom of information requests to Congress. Specific information useful to the oversight functions of Congress in assessing implementation of the bill and the act is required in the report.

Fifteenth. Agency definition. The bill expands the definition of agency under the Freedom of Information Act to include the Postal Service, and Government corporations, such as the National Railroad Passenger Corporation.

Sixteenth. Authorization. S. 2543 contains language authorizing appropriations for such sums as may be necessary to assist in carrying out agency freedom of information activities, although it is expected that funds will be appropriated only for special or supplemental agency activities and not for the routine processing of requests.

Seventeenth. Effective date. S. 2543 will become effective 90 days after enactment, to give the agencies time to adapt their internal procedures to the requirements of the new law.

Mr. President, I would now like to focus on some of the most significant portions of the bill we are considering today and elaborate on the purposes and objectives of the legislation in those areas.

One of the key provisions is the new subsection 552(a)(4)(F) proposed by the bill. Under this subsection if the court determines that the Federal employee or official responsible for wrongfully withholding information from the public has acted without a reasonable basis in law, it may order the employee or official be disciplined or suspended from employment up to 60 days. Specifically, the subsection reads as follows:

Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

The Freedom of Information Act has been in operation for almost 7 years, but one of its great failures is that it does not hold Federal officials accountable for withholding information required by the act to be made public. The only mechanism for enforcing the mandates of the Freedom of Information Act has been for individuals to go to court for an injunction, on a case-by-case basis, with great cost and delay. This is an expensive and not always an effective approach. The sanction is intended to encourage administrators responsible for carrying out the Freedom of Information Act to make sure that their actions faithfully carry out the terms of that law.

Former Attorney General Richardson observed in our hearings that—

The problem in affording the public more access to official information is not statutory but administrative.

He indicated that—

The real need is not to revise the act extensively but to improve compliance.

That is precisely why we included this sanction in S. 2543.

There are three problems to which this new accountability provision addresses itself: where officials refuse to follow clear precedent, forcing a requester to go to court despite the clarity of the disclosure require-

ment in the specific case; where officials deny requests without bothering to inform themselves of the mandates of the law; and where obstinacy provides the obvious basis for the official's refusal to disclose information. Let me provide some examples, both from our hearing record and from the subcommittee's day-to-day involvement with agencies on FOI problems.

Mr. Mal Schechter, a senior editor of Hospital Practice magazine, provided the subcommittee with an egregious example of agency handling of his freedom of information requests. He had for several years been attempting to obtain from the Social Security Administration access to medical survey reports done on nursing homes and other medical facilities receiving Federal payments under medicare. Mr. Schechter finally brought legal action under the Freedom of Information Act, and the district court here in the District of Columbia granted him access to 15 reports on nursing homes in the Washington metropolitan area. The Government did not appeal.

The safe assumption would have been that the next time Mr. Schechter asked for access to a medical survey report, it would be made promptly available to him; this was not the case. For in response to his next request for similar documents, the Social Security Administration refused access and stated that they did not acquiesce in the opinion of the court. Mr. Schechter had to go to court again.

The situation is epidemic in the area of requests for information which the Government considers "confidential" but which is neither commercial nor financial. While the language of the fourth exemption of the Freedom of Information Act may on its face have been slightly ambiguous on this point, numerous courts have unanimously held that for information which does not constitute trade secrets to be withheld under this exemption, the information must be both confidential and commercial, or both confidential and financial. Agency refusals to acquiesce in this clearly correct judicial interpretation have been frequent, but in light of the clarity of the case law on the subject the earlier position on this issue could no longer be considered as having a reasonable basis in law.

One of our witnesses, Mr. Peter Shuck, told of a lawsuit brought to obtain access to Agriculture Department inspection reports on meat processing plants. His suit was successful and the Government did not appeal. About a year later, however, USDA refused to turn over similar reports to another requester, alleging that they were exempt from disclosure under the FOIA. Only after Mr. Shuck's attorney intervened on behalf of this second requester did the USDA release reports.

If the persons responsible for the decisions in the nursing home and meat inspection cases knew that their actions the second time around might have resulted in the imposition of administrative sanctions by a Federal judge, their responses would likely have been different. Access would have been expedited, and resort to the courts unnecessary.

In some circumstances agency officials refuse access to information merely because they do not want it released, and they practically dare the requester to bring them to court. One example from our hearing will suffice to illustrate this problem.

Pursuant to statute the Office of Economic Opportunity must

prepare an annual report. A report for fiscal 1972 was prepared prior to the decision by the administration to dismantle OEO, but the report was not submitted to Congress and was not released. Two individuals requested and were denied access to the report. They filed suit under the Freedom of Information Act.

The required disclosure of this document was so clear that the Justice Department took the position it would not defend OEO in court on the question of access to that report. Where the law was clear, and their lawyers wouldn't even defend them, OEO officials nevertheless persisted withholding the report until the last moment in court. If the responsible officials at OEO knew that their actions could result in the imposition of administrative sanctions, perhaps the citizens requesting the information would not have had to wait so long for a final adjudication of their rights.

In one instance, an agency official refused access to documents because he did not think they ought to be made available to the requester, although during a subsequent review it became clear that this official had not even considered application of the Freedom of Information request. In another, an agency lawyer articulated the basis for refusing access to records thusly: the material requested was written before 1967—so the act would not apply, he surmised—and the requester had not given any reason why he needed the information. These are cases that would likely not have arisen if the sanctions provision had been a part of the law at that time.

The concept of administrative sanctions for the nonperformance of a Federal official's duties is not a new one, nor is the concept of sanctioning a Government official for noncompliance with disclosure laws.

Under title 5 of the Code of Federal Regulations, a Federal employee can be reprimanded or suspended without the benefit of a hearing. That sanction applies to a wide range of derelictions ranging from insubordination to tardiness to failure to follow work regulations. Under the adverse action procedures an employee may be suspended for more than 30 days or removed from his job. Although a hearing is required, it is not held until after an employee is removed. An adverse action is used where it is determined that the employee should be disciplined or removed for the efficiency of the service. And under the conflict of interest regulations an employee who is involved in an activity that may give the appearance of conflict and that may affect public confidence in the Government may be administratively re-assigned without a hearing or right of review.

The administrative sanctions section of S. 2543 provides only that if a Federal judge has found the withholding of a document was without reasonable basis in law, the responsible employee—after being given notice and a hearing to present his own defense—may be subject to certain sanctions in the discretion of the judge. The recommendation of the agency involved, as to the appropriate sanction, is to be taken into account. This is certainly more protective of a Government employee's rights than those in existing Civil Service regulations. Here, only officials or employees who have clearly violated the law are subject to sanctions—not too great a penalty for guaranteeing the public's right to an open Government.

Fifteen States have penalties for violation of their freedom of information of public records statutes. Most of these penalties are criminal in nature and charge the violating official with a misdemeanor. A list of the State laws with a brief description of the penalties they provide appears in the committee report on S. 2543 at page 63.

In a recent case in the New York Federal district court, a court ordered imposition of a \$5,000 sanction against a party to private litigation who obstructed the discovery of information by the adverse party under the Federal Rules of Civil Procedure. The concept of imposing sanctions to guarantee a right of access to information is thus not a novel one in the law.

The administrative sanctions contained in S. 2543 will create an incentive to Government administrators to withhold information from the public only when the Freedom of Information Act specifically exempts disclosure. Without such a sanction the act will remain a right without an effective remedy.

Now I would like to turn to another important feature of S. 2543, which is reflected in two provisions of the bill. That is the strong statement against commingling of exempt with nonexempt materials in order to prevent disclosure of the latter, and against withholding records where deletions would as well serve the purposes of the exemption under which they are withheld. Section 552(a)(4)(B)(i) provides that the court shall in Freedom of Information Act actions "consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may 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."

Furthermore, a new sentence is added to section 552(b) stating:

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 section.

Taken together these provisions are intended to require agencies, and courts, to look at the information requested—not the title of the document or a restricted-access stamp or the fact that the record is in a file marked "Confidential" or "Investigation"—to determine whether the information should be released under the Freedom of Information Act.

When I originally introduced S. 2543 in October 1973, the new sentence added to section 552(b) would have read as follows:

If the deletions of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions.

During subcommittee consideration of the legislation it became clear that it would be desirable to apply this deletion principle to other exemptions. For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Deletion of formulas or statistics or figures may also in many cases entirely fulfill the purpose of the

fourth exemption, designed to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus the objectives and purposes of these exemptions, as well as of exemptions (1) and (7), could equally be served by selective deletions while the basic document or record or file could otherwise be made available to the public.

It is upon this background that the new language in the Freedom of Information Act must be read. The Association of the Bar of the City of New York, in its recent report on freedom of information legislation, indicated its conclusion that the deletion or "savings clause" is "in its original form one of the most significant proposed amendments of the FOIA. It seems very important," stated the association, "that this deletion concept be included in any final amendment, and be expanded to cover other reasons for nondisclosure and all exemptions." This is precisely what we had in mind, Mr. President, in amending the original language. As stated in the committee report, page 32:

The amended language is intended to encompass the scope of this original proposal but to apply the deletion principle to all exemptions.

With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn against Rosen, requiring the Government to sustain its burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to all cases, involving all exemptions. As one court observed, "it is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt." "Suitable deletion may be made," said the court. In another case the court found that the legislative history of the Freedom of Information Act "does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information." And another court said that "identifying details or secret matters can be deleted from a document to render it subject to disclosure."

When the Freedom of Information Act, as amended, refers to disclosure of "any part" of a record or to "any reasonably segregable portion of a record" this is intended to provide for release of the record after deletion of the names of informers or sources of information formulas or financial information, confidential investigatory tech-

niques, and the like, depending on the exemption involved. The legislative history of the act and the case law construing it is adequate to provide the basis for those exemptions, against which this deletion principle can be applied and measured.

I would like to take a few minutes to mention some other areas where S. 2543 would strengthen the public's right to Government information. These involve providing meaningful judicial review of classification decisions, setting firm time deadlines for agency responses to information requests, and eliminating abuses in the charging of fees for handling Freedom of Information Act requests, and allowing recovery of attorneys' fees in successful court actions.

Before January 23, 1973, it was generally thought that the de novo review required in Freedom of Information Act cases by section 552(a) (3) of the act applied to documents withheld under all nine exemptions, and that contested documents under all exemptions could be examined in camera by a court deciding whether withholding was justified. On that day, however, the Supreme Court handed down its decision in Environmental Protection Agency against Mink, in which Congresswoman Patsy Mink was attempting to obtain documents relating to the effect of the proposed Amchitka atomic test. The Supreme Court, upholding nondisclosure, held that where information is claimed to be required by Executive order to be kept secret in the interest of National Defense and Foreign Policy, the Freedom of Information Act does not permit an attack on the merits of the classification decision. Thus where the document requested on its face bears a classification marking, in camera review serves no useful purpose.

S. 2543 addresses both aspects of the *Mink* decision—the reviewability of classification decisions in freedom of information cases and the related matter of in camera inspection of records in the course of such review. Under the amended exemption (b)(1), courts must determine whether documents in issue are “in fact covered” by an Executive order or statute in the interest of national defense or foreign policy. In order to make this factual determination, the courts will have discretion to examine the contested documents in camera.

The bill sets out some procedures to guide judicial review of the propriety of withholding classified documents. In making its factual determination, the court must first attempt to resolve the matter on the basis of affidavits and other information submitted by the parties. If it does decide to consider the documents in camera, the court may consider further argument by both parties, may take further expert testimony, and may in some cases of a particularly sensitive nature entertain an ex parte showing by the Government. This ex parte showing would represent an exception to the normal judicial procedures. Although it may be requested frequently by the Government in order to gain some advantage over its opponent in court, I do not believe that courts should initiate such a procedure lightly. It should be used only in the most exceptional cases, perhaps where the court determines that involvement of plaintiff's counsel in that aspect of the case would itself pose a threat to national security. If the head of the agency involved, and this means a commission chairman, cabinet official or independent agency administrator, files an affidavit with the court certifying that he has personally reviewed the contested documents and finds them properly

withheld under the standards of the applicable Executive order, then the court must resolve whether, in its view, the determination by the agency head is in fact reasonable or unreasonable.

That affidavit should specify which information be required to be kept secret and the reasons for this conclusion. The Court can then order disclosure of the material if it finds the withholding to be without a reasonable basis under the order of statute.

Clearly, Mr. President, the classification system is noted more for its abuses than for its protection of legitimate Government secrets. In May 1973 the House Government Operations Committee issued a report on Executive classification of information that concluded that there has been "widespread overclassification, abuses in the use of classification stamps, and other serious defects in the operation of the security classification system." The committee found the existing classification order inadequate in many respects and thus projected continuing problems in this area.

When he issued a new Executive order on classification in March 1972, President Nixon acknowledged the widespread abuses raging under the existing classification process. Let me quote from President Nixon's statement on the issue:

Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

In our subcommittee hearings last spring retired Air Force security analyst William Florence observed that—

There is abundant proof that the false philosophy of classifying information in the name of national security is the source of most of the secrecy evils in the executive branch.

Mr. Florence then listed what he considered the reasons most commonly used for classifying information, and I would like to read this list for my colleagues:

- First, newness of the information;
- Second, keep it out of the newspapers;
- Third, foreigners might be interested;
- Fourth, do not give it away—and you hear the old cliché, do not give it to them on a silver platter;
- Fifth, association of separate nonclassified items;
- Sixth, reuse of old information without declassification;
- Seventh, personal prestige; and
- Eighth, habitual practice, including clerical routine.

This sentiment was echoed and the list expanded somewhat by retired Rear Adm. Gene LaRocque, who observed in testimony on the House side that for the vast majority of classified information, the reasons for classification are:

To keep it from other military services, from civilians in their own service, from civilians in the Defense Department, from the State Department, and of course, from Congress.

It is therefore crucial that there be effective judicial review of executive branch classification decisions if the most far reaching barricade of unjustified secrecy in Government is to be penetrated. S. 2543 is designed to provide just such effective judicial review.

Another problem which this bill addresses itself to, Mr. President, is that of undue delays in agency handling of Freedom of Information requests. Time and again our witnesses from the private sector decried the unreasonable and unnecessary delays that are involved in agency responses to requests for information under the act. Our record abounds with example upon example where a request was followed by periods of long silence, with the first word back from the agency often unresponsive. Earlier this spring my Subcommittee on Administrative Practice and Procedure opened oversight hearings on administration of the Freedom of Information Act at the Internal Revenue Service, and we continued to find delays endemic in that agency's process. Clearly legislative restrictions and guidance are necessary to meet this kind of problem.

S. 2543 establishes time deadlines for the administrative handling of Freedom of Information requests. It requires agencies to determine within 10 working days whether to comply with a request, and gives them an additional 20 days to respond to an appeal or any denial of access at the initial stage. Agencies can by regulation shift time from the appeal to the initial reply period, but would have to do this across the board, not selectively as to types of documents.

Where there are specific types of documents in large quantities, subject to numerous requests, spread geographically, then the bill provides for a certification procedure allowing the agency 30 days for the initial response time. This is to be considered an exceptional procedure, and I believe that our use in the Senate report of the Immigration and Naturalization Service example best illustrates the committee's intention with regard to this section. INS processes an average of 90,000 formal requests for records each year, seeking access to 1 or more of the 12 million individual files dispersed and frequently transferred between 57 widely scattered service offices and 10 Federal records centers. Few other agencies will be able to rival this example; but then few other agencies should be allowed to take advantage of this special certification process.

Under S. 2543 an agency may, by notifying the requester, obtain a limited extension for a period not to exceed 10 days of either the initial or appellate time limits—but not both. If the agency has certified a longer period of time for its initial response as to records sought, then no additional time extension may be obtained for this period.

Mr. President, I recognize that the sections of the bill imposing deadlines might be subject to abuse by the agencies because they are not airtight. And history has convinced us that whenever there are loopholes in procedural legislation, there is a tendency for administrators to navigate their agencies through them at each opportunity. Nonetheless, we have tried to tighten substantially the exceptions to our basic time limits. We have tried to define their perimeters in the legislation and in a rather extensive report on this point. And we will be requiring agencies to report their practices to the Congress each year, so that both the House and Senate subcommittees with oversight responsibilities can exercise those responsibilities effectively. Certainly language of these escape clauses was not lightly arrived at. We do not expect them to be lightly invoked.

The press often has special problems with its need to obtain information in a timely manner, and testimony at our hearings reflected

how delays in agency responses to press requests can particularly frustrate the operation of the Freedom of Information Act from its perspective. A new provision is included in the law to promote expedited handling of any requests which is "accompanied by a substantial showing of a public interest in a priority determination of the request." I believe that this will assist the press in its efforts to obtain Government information. It should also assist others who have a special need for expedited handling of their request, such as workers or public interest groups requesting information relating to health and safety. The Federal Energy Office set a good example by providing for the answering of press requests within 24 hours whenever possible.

There are two final matters I would briefly mention before concluding my remarks. First is the provision in the bill relating to user charges that may be imposed by agencies under the Freedom of Information Act. Under it the Office of Management and Budget is to promulgate regulations, subject to notice and comment, specifying a uniform schedule of fees applicable to Freedom of Information Act requests. These are to be limited to "reasonable standard charges for document search and duplication," thereby establishing a ceiling and preventing agencies from imposing burdensome and unreasonable fees as barriers to the disclosure of information which should otherwise be forthcoming.

Agencies could not under the bill charge for professional time used to review requested records or to sanitize documents before release. S. 2543 also allows documents to be furnished without charge or at a reduced rate where the public interest is best served thereby. And this public interest standard, spelled out generally in the legislation, is to be liberally construed.

Second, the bill authorizes discretionary assessment of attorneys' fees and costs against the Government where the complainant substantially prevails. This would eliminate another major obstacle to public access to information, assisting the public in their efforts to obtain judicial enforcement of the mandates of the Freedom of Information Act. S. 2543 sets out four criteria for courts to use in determining whether to award fees in a given case. The amount of fees awarded will, of course, also be influenced by application of these criteria. The bill does not state precisely how costs or fees are to be measured, but courts should look to the prevailing rate on attorneys' fees, for example, rather than solely to whether the specific attorney involved is from Wall Street or a public interest law firm.

The effective date of this legislation will be 90 days, from the date of enactment. I hope that agencies will not plan to wait until the last possible moment before implementing this new legislation, since its basic principles have been proposed and debated for over a year, and a similar measure passed the House over 2 months ago. Provisions such as those relating to in camera inspection and attorneys' fees should be applied to cases already filed before the effective date, since these are not dependent on any prior agency preparation or public notice for implementation.

Mr. President, the Freedom of Information Act has already opened substantial access for the public to Government files and records. Under the act citizens have been able to obtain nursing home reports, meat inspection reports, statements of Justice Department intent on

proposed mergers, AEC reports on nuclear generator safety, civil rights compliance documents, IRS agents' manuals, FBI counter-intelligence program guidelines, FHA appraisal reports, and a large number and variety of other documents reflecting what the Government is doing and how it is doing it.

Even now, however, with the law on the side of the American public, it is still an uphill battle with the Government agencies and their deeply inured penchant for secrecy. There are blatantly unnecessary delays and purposeful frustrations.

There are outrageous fees. There is nitpicking over identification and there is bargaining over exemptions. There are lengthy and costly court fights. And with each new request the entire process often has to be repeated.

This is not the intent of the Freedom of Information Act. This is not what is meant by citizens' access in an open government.

The amendments presented in my bill today will give the people of this country more than just a foot in the agencies' doors—it will provide them with the necessary tools to break down the traditional bureaucratic barriers of secrecy, and to gain access to what is granted them by the Freedom of Information Act.

I urge the Senate's adoption of this important legislation.

Mr. HRUSKA. I yield myself 5 minutes on the bill.

Mr. President, I ask unanimous consent that David Clanton, a member of Senator Griffin's staff, be allowed the privilege of the floor during the debate and vote on the pending measure.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. Mr. President, freedom of information is basic to the democratic process. The right of the citizen to be informed about the actions of his government must remain viable if a government of the people is to exist in practice as well as theory. It is elementary that the people cannot govern themselves if they cannot know the actions of those in whom they trust to carry out the functions of Government.

Yet, it is also elementary that the welfare of our Nation and that of its citizens may require that some information in the possession of the Government be held in the strictest of confidence. For example, the individual's right of privacy requires that personal information collected and held in the files of Government agencies under census reporting laws, income tax reporting laws, criminal investigations, and other activities, be protected from disclosure. Indeed, Senator Ervin and I have introduced bills dealing with criminal justice information systems, the primary purpose of which is to insure that this type of information is not disclosed to the public or to any persons not directly engaged in apprehending and prosecuting an offender. Likewise, information which directly bears on delicate negotiations with foreign nations or on the maintenance of our national defense must not be exposed for all the world to see, to the prejudice of our national position or our national integrity.

The Freedom of Information Act, enacted in 1966, recognized the competing interests in disclosure and confidentiality. It attempted to balance and protect all the interests, yet place emphasis on the fullest responsible disclosure. That act imposed on the executive branch an affirmative obligation to provide access to official information that previously had been long shielded from public view. Under that act,

an agency must comply with a citizen's request for information unless it can show that competing interests, such as the right of privacy or the national defense, require the information to remain confidential.

It is my understanding that, by and large, the balancing of competing interests codified in the Freedom of Information Act has proven successful. However, experience with the administration of the act indicates that some changes are necessary. As the Committee on the Judiciary found in reporting on this bill:

The primary obstacles to the act's faithful implementation by the executive branch have been procedural rather than substantive.

In short, the problem lies not with the substantive provisions of the act but with its administration. The real need is to improve compliance with the disclosure provisions we already have on the books.

To this end, S. 2543, as amended, has been reported favorably by the Committee on the Judiciary. It is designed to remove the obstacles to full and faithful compliance with the act. Its basic purpose is to facilitate more free and expeditious public access to the information the act obligates the Government agencies to disclose.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. HRUSKA. I yield myself an additional 5 minutes.

The provisions of the bill have already been discussed. The basic features of the bill that I believe deserve elaboration are the following:

First. The bill expedites public access to Government information by requiring Government agencies to respond to requests for information within specified time periods. It is a difficult task to draw the deadline at the most appropriate point. If too much time is granted, there is the possibility that the requester's access to government records may be delayed. On the other hand, if the time limits are too rigid, Government agencies, in a spirit of caution to insure that personal rights and other interests are served, will be forced to deny requests for information that might with more study be granted. In short, time limits that are too rigid, too inflexible will be counterproductive to the interests in affording citizens the greatest amount of access to information that individual rights and good Government will permit.

I believe that the time limit provision of this bill walks the fine line. It imposes reasonable time limits under which an agency must respond to a request but permits the agency to extend the time for certain compelling reasons. For example, an agency could get an extension of time if the records requested are dispersed and cannot be located within the time limits imposed or if the request is for a voluminous amount of records which must be located and reviewed. In my view, this provision is responsive to the needs of both the Government agencies and the public.

Second. S. 2543 insures the integrity of the classification of a classified document by allowing the courts to review the document in camera, if that procedure becomes necessary. However, the bill does not permit a judge to substitute his view of the sensitivity of the document for that of the agency. A judge can overrule the agency's decision to withhold the document only if he is convinced that there is not any reasonable basis for the classification.

Mr. President, I think that this standard is sensible. Under this bill, the court can review the document to determine whether the

classification is reasonably based on an Executive order or statute. But the Court cannot, and should not, be able to second-guess foreign policy and national defense experts.

Third. The bill insures responsible responses to requests by holding accountable those officials who, without a reasonable basis, deny requests for information. If a court determines that the withholding by the decisionmaker was without a reasonable basis, it may order that corrective or disciplinary action be taken. Before making such a decision, however, the agency involved shall recommend what corrective or disciplinary action it deems appropriate and the court shall accord this recommendation considerable weight in making its ultimate decision.

Finally, I want to refer to a provision that is not in the bill. The basic premise under which S. 2543 was drafted is that the problems arising under the Freedom of Information Act are procedural, not substantive. True to this premise, the committee decided not to amend the substantive provisions of the act. One of the substantive provisions considered but deleted by the committee from the bill as originally introduced was a provision changing the word "files" in exemptions 6 and 7 to the word "records." By and large, the reason for this deletion was that there was no evidence that such a change was necessary.

The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. This provision reflects existing law, but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7.

Mr. President, I am pleased to have worked with the Senator from Massachusetts (Mr. Kennedy) to develop this bill which was supported by every member of the Committee on the Judiciary when it was reported. I believe that this bill will insure that the Freedom of Information Act lives up to its title. While stressing the fullest responsible disclosure, it produces a workable formula that, in my view, balances and protects all interests.

Mr. President, I reserve the remainder of my time.

Mr. KENNEDY. Mr. President, I yield 30 seconds to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. HART. Mr. President, during the consideration of this bill I ask unanimous consent that two members of my staff, Burton Wides and Harrison Wellford be granted access to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CRANSTON. Mr. President, the Freedom of Information Act has become one of the basic charters of the public's right to know what goes on inside their Government's executive departments and agencies.

As a result of the act, more information has been made available to

the public. Entire battalions of rubberstamp wielding bureaucrats have been stripped of their arbitrary, unreviewable, power to keep documents secret from the public.

Before the act, there were an estimated 53,000 officials authorized to classify documents—23,000 at the Department of Defense, over 5,000 at State and hundreds of others scattered through agencies such as General Services Administration and HEW.

Reductions of classifiers at some agencies have been dramatic, for example, before the act there were 7,745 classifiers at the Department of Commerce, today there are 81. At GSA there were 866, today there are 31. But there is still a small army of classifiers at work—17,364 in 25 agencies and 11 White House offices, according to the staff of the Government Operations Committee.

Arrayed against this phalanx is the Interagency Classification Committee, which has no chairman, one full-time employee, and a secretary.

Fortunately, the Freedom of Information Act contemplated more than a toothless guardian of the public's right to know. The act gave to citizens the right to go into court to compel agency heads to comply with the requirements of the act.

But the courts have applied rules of administrative law which have made bureaucrats the final judge of the public's right to know. The seal of approval to this interpretation of the Freedom of Information Act was given by the Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 732 (1973). In that case the Court ruled that the Executive's determination as to what shall be kept secret "must be honored."

Justice Stewart in a separate opinion wrote:

[Congress] has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret", however, cynical, myopic, or even corrupt that decision might have been. . . .

In my judgment, we must not let 17,364 bureaucrats be the final judges of what we are to know from our Government. The courts have been the traditional defenders of the right to know and association first amendment rights. The courts must not be pushed out of the picture.

S. 2543, amending the Freedom of Information Act, brings the courts back into the process of deciding what information shall be withheld from the public and what information shall be disclosed.

It provides that challenges to Government claims of exemption from disclosure under the act shall be reviewed de novo in court and the burden of sustaining the claim of exemption is on the Government.

It eliminates opportunities for arbitrary delay and obstructionism by agencies attempting to deny information to citizens. Among the abuses the bill corrects are denials of records based on the agency's assertion that the citizen has not specified an "identifiable record" when the agency knows full well exactly which documents the citizen is requesting. Arbitrary and unreasonable fees for copying and searching for documents will become uniform under schedules to be set by the Office of Management and Budget. At present agency copying fees range from 5 cents per page to \$1 per page and search fees range from \$3 to \$7 per hour.

The bill further provides for the award of attorneys fees and costs, if the Government loses in court. This provision will discourage unreasonable litigation by the Government undertaken for no good reason except to make as burdensome as possible the effort of a citizen to acquire information from his Government.

These modifications and improvements of the Freedom of Information Act are vitally necessary. But S. 2543 falls short in at least two respects of what can be done to strengthen the public right to know under the Freedom of Information Act.

First, the provisions of section (b)(4)(B)(ii) should be eliminated from the bill.

The provisions in effect require the court to accept without question the Government's word when it decides to keep information secret from the public. The practical result of this direction to the courts is to make hollow the major achievement of S. 2543 in spelling out the right of a plaintiff to a de novo review in court of the agency's determination not to disclose confidential information.

The second change is to spell out the precise grounds on which the Government can withhold information contained in investigatory files. This change has been recommended by the administrative law section of the American Bar Association.

Our Government and way of life thrive on free and open debate. The free flow of information is vital to sustenance of our freedoms. The control of access to information should not be left solely in the hands of bureaucrats whose function it is to deny information. Citizens must have an opportunity to appeal bureaucratic determination in court. The amendments to the Freedom of Information Act proposed by S. 2543 will guarantee full review of refusals by Government agencies to make public information withheld unreasonably.

Mr. MUSKIE. Mr. President, I call up my amendment No. 1356.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk proceeded to read the amendment.

Mr. MUSKIE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered, and, without objection, the amendment will be printed in the Record.

The amendment, ordered to be printed in the Record, is as follows:

On page 10, line 11, strike out "(i)", and on page 10, beginning with line 24, strike out all through page 11, line 15.

Mr. MUSKIE. Mr. President, I call up this amendment in behalf of 27 of my colleagues. I ask unanimous consent that their names be included as cosponsors. I will not undertake to read them all.

The PRESIDING OFFICER. Without objection, it is so ordered.

The names of the cosponsors, ordered to be printed in the Record, are as follows:

Mr. Ervin, Mr. Javits, Mr. Symington, Mr. Hart, Mr. Chiles, Mr. Humphrey, Mr. McGovern, Mr. Gravel, Mr. Clark, Mr. Tunney, Mr. Metcalf, Mr. Mondale, Mr. Mathias, Mr. Hathaway, Mr. Burdick, Mr. Percy, Mr. Ribicoff, Mr. Montoya, Mr. Weicker, Mr. Cranston, Mr. Nelson, Mr. Baker, Mr. Stevenson, Mr. Hatfield, Mr. Abourezk, Mr. Inouye, and Mr. Biden.

Mr. MUSKIE. Mr. President, I rise with some reluctance today to offer an amendment to the generally excellent Freedom of Information Act amendments offered by my friend and able colleague, the

Senator from Massachusetts. No one should underestimate the diligence and concern with which he and other members of the Committee on the Judiciary have worked to insure that the changes made in the 1967 act will, in fact, further the vital work of making Government records readily available for public scrutiny and making the conduct of the public business a subject for informed public comment.

It is because the bill before us is so very rare and important an opportunity to correct the defects we discovered in the administration of the act during joint hearings I conducted with Senator Kennedy and Senator Ervin last year that I wish to insure that we fully meet our responsibility to make the law a clear expression of congressional intent. In many important procedural areas, S. 2543, as the Judiciary Committee has reported it, will close loopholes through which agencies were evading their duties to the public right to know.

For example, this legislation will enable courts to award costs and attorneys' fees to plaintiffs who successfully contest agency withholding of information. The price of a court suit has too long been a deterrent to legitimate citizen contests of Government secrecy claims. Additionally, the bill will require agencies to be prompt in responding to requests for access to information. It will bar the stalling tactics which too many agencies have used to frustrate requests for material until the material loses its timeliness to an issue under public debate. And the bill provides long-overdue assurance that agencies will give full report to the Congress of their policies and actions in handling Freedom of Information Act cases.

With all these significant advances in its favor, there should be little reason to argue with the wisdom of the bill's authors. But in one vital respect, S. 2543 runs counter to the purpose I and 21 cosponsors had in introducing its predecessor, S. 1142, and endangers the momentum this Congress is developing toward bringing the problem of Government secrecy under review and control.

Responding to the Supreme Court ruling of January 22, 1973, in the case of *Environmental Protection Agency et al. v. Patsy T. Mink et al.*, I had proposed in S. 1142 that we require Federal judges to review in camera the contents of records the Government wished to withhold on grounds of security classification. I agree that such a requirement would have been an excessive response to the Court's holding that the original act prohibited in camera inspection of classified records, and I am completely at ease with the language in S. 2543 that makes in camera inspection possible at the discretion of the judges whenever any of the nine permissive exemptions are asserted. What I cannot accept and what I move today to strike in the subsequent language which would force judges to conduct the proceedings of in their chambers in such a way that the presumption of validity for a classification marking would be overwhelming.

Under the present terms of S. 2543, the Court is permitted to make a determination in camera to resolve the question of whether or not the information was properly classified under the criteria established by the appropriate Executive order or statute. However, if an affidavit is on record filed by the head of the agency controlling the information certifying that the head of the agency in fact examined the information and determined that it was properly classified, the judge must sustain the withholding unless he "finds the withholding is without a reasonable basis under such criteria."

If this provision is allowed to stand, it will make the independent judicial evaluation meaningless. This provision would, in fact, shift the burden of proof away from the Government and go against the express language in section (a) of the Freedom of Information Act, which states that in court review "the burden of proof shall be on the Government to sustain its action." Under the amendment I propose, the court could still, if it wishes, make note of an affidavit submitted by the head of an agency, just as the court could request or accept any data, explanatory information or assistance it deems relevant when making its determination. However, to give express statutory authority to such an affidavit goes far to reduce the judicial role to that of a mere concurrence in Executive decisionmaking.

The express reason for amending the section of the act dealing with review of classified information grows, as I indicated, from concern with the Supreme Court ruling in the Mink case last year. In that case 32 Members of Congress, bringing suit as private citizens, sought access to information dealing with the atomic test on Amchitka Island in Alaska. The U.S. Court of Appeals directed the Federal district judge to review the documents in camera to determine which, if any, should be released. This seemed an appropriate step since the act does provide for court determination on a de novo basis of the validity of any executive branch withholdings.

Unfortunately, the Supreme Court reached a decision in that case which I regard as somewhat tortuous. The Court held that in camera review of material classified for national defense or foreign policy reasons not permitted by the act. The basis of this decision was exception No. 1, which permits withholding of matters authorized by Executive order to be kept secret in the interests of national defense or foreign policy.

The Supreme Court decided that once the Executive had shown that documents were so classified, the judiciary could not intrude. Thus, the mere rubberstamping of a document as "secret" could forever immunize it from disclosure. All the Court could determine was whether it was so stamped.

The abuses inherent in such a system of unrestrained secrecy are obvious. As the system has operated, there is no specific Executive order for each classified document. Instead, the President issued one single Executive order establishing the entire classification system, and all of the millions of documents stamped "secret" under this authorization over succeeding years are now forbidden to even the most superficial judicial scrutiny. One of the 17,364 authorized classifiers in the Government could stamp the Manhattan telephone directory "top secret" and no court could order the marking changed. Under the Supreme Court edict, the Executive need only dispatch an affidavit certifying that the directory was classified pursuant to the Executive order, and no action could be taken.

Obviously, something must be done to correct this strained court interpretation. It need not be a drastic step. Actually, it was the original intention of Congress in adopting the Freedom of Information Act to increase the disclosure of information. Congress authorized de novo probes by the judiciary as a check on arbitrary withholding actions by the Executive. Typically, the de novo process involves in camera inspections. These have regularly been carried out by lower

courts in the case of materials withheld under other exemptions in the act. They can be barred under exemption No. 1, only through a misguided reading of the act and by ignoring the wrongful consequences.

But in correcting this fault, to permit in camera review of documents withheld under any of the exemptions, S. 2543 would simultaneously erect such restrictions around the conduct of the review when classified material was at issue that the permission could probably never be fully utilized.

By telling judges so specifically how to manage their inquiry into the propriety of a classification marking, we show a strange contempt for their ability to devise procedures on their own to help them reach a just decision. Moreover, by giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge.

It should not have required the deceptions practiced on the American public under the banner of national secrecy in the course of the Vietnam war or since to prove to us that Government classifiers must be subject to some impartial review. If courts cannot have full latitude to conduct that review, no one can. And if we constrict the manner in which courts may perform this vital review function, we make the classifiers privileged officials, almost immune from the accountability we insist on from their colleagues.

I object to the idea that anything but full de novo review will give us the assurance that classification—like other aspects of claimed secrecy—has been brought under check. I cannot accept an undefined reasonableness standard as the only basis on which courts may overrule an agency head's certification of the propriety of classification. And I cannot understand why we should trust a Federal judge to be able to sort out valid from invalid claims of Executive privilege in the Watergate affair but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of defense or foreign policy.

Therefore, while I am anxious to compliment the chief sponsor of S. 2543 on the fine work that has been done and to praise the Judiciary Committee for its sincere commitment in improving the working of the Freedom of Information Act, I must respectfully move to strike these 17 offensive and unnecessary lines and to make the bill what we all want it to be—a restatement of congressional commitment to an open, democratic society.

I withhold the remainder of my time.

Mr. KENNEDY. Mr. President, at the outset I want to say how much I have enjoyed joining with the distinguished Senator from Maine, as well as the distinguished Senator from North Carolina, during the course of our joint hearings on the Freedom of Information Act and Government secrecy last year. The kind of joint hearings we had provided an additional dimension and insight into our better understanding the opportunities as well as the problems of the Freedom of Information Act.

Many of the amendments that are included in the legislation today were developed out of and during the course of those hearings, and I want to commend the distinguished Senator from Maine for focusing

attention on the particular provision of the legislation that we are considering here this afternoon. I know of his special interest and expertise in this area.

This area was a matter of considerable interest to the members of the committee. As a matter of fact, when I initially introduced the bill last year, it did not include the language which the distinguished Senator from Maine desires to strike. But during the course of the subcommittee and full committee process of markup, this language in issue was added.

I want to state at the outset that I think the amendment of the Senator from Maine is responsible and reasonable and I intend to support it.

I would like to ask the Senator from Maine just a few questions. The clause which will be excluded by the Senator from Maine's amendment deals with the procedures of how classified documents will be considered in camera.

I ask unanimous consent that the whole section to be struck be included at this point in the Record.

There being no objection, the extract was ordered to be printed in the Record, as follows:

(ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

Mr. KENNEDY. I will highlight these particular lines: "a court may review a contested document in camera if it is unable to resolve the matter on the basis of affidavits." It continues as follows: "In conjunction with its in camera examination, the court may consider further argument."

There was some suggestion that we require courts to entertain ex parte argument from the Government in every case, but we did succeed in making it permissive.

Our language would add a presumption to the agency head's declaration that if such a matter falls within the statute or an Executive order referred to in subsection (b)(1) of this section, the court shall sustain that provision unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

I want to indicate to the Senator from Maine that although others may read it differently, I do not interpret that language as indicating a very strong presumption. I cannot understand why it concerns the Senator from Maine, although, as I said before, I intend to support the amendment. I do want the legislative history to be clear that I, at least, do not think it presents a very strong presumption in favor of an administrative agency.

But I understand what the Senator is attempting to do. I think it would strengthen the legislation.

I should like to ask the Senator from Maine some specific questions.

His amendment in no way attempts to require an in camera inspection, but I understand it still leaves that as discretionary in each of these cases. Is this right?

Mr. MUSKIE. The Senator is correct.

Mr. KENNEDY. Furthermore, the Senator's amendment allows the court to question the propriety of classification only under the standards set up in a statute or by Executive order. Is that correct?

Mr. MUSKIE. The Senator is correct.

Mr. KENNEDY. I think that is important.

This is an important, useful amendment, but it does not seek to alter the classification standards or procedures presently applicable.

We do add a slight presumption, which the Senator recognizes from reading the language. It concerns him because it is a presumption. As the author of the bill, I do not want to acknowledge a very strong presumption. At least, that is my interpretation.

Does the Senator believe there ought to be any special exemption for the National Security Administration, NSA, or the Department of Defense in this part of the bill itself?

Mr. MUSKIE. As the Senator probably knows, we are holding hearings on proposals to establish classification control systems and new criteria for classifications. Out of those hearings may come something; but the amendment I have offered does not touch that.

Mr. President, will the Senator from Massachusetts yield further to me?

Mr. KENNEDY. I yield.

Mr. MUSKIE. The Senator, I think, has described the sense of my amendment very accurately and precisely. I have no real quarrel with the procedures which my amendment would remove from the statute. The principal quarrel is with the last 3 lines, as the Senator from Massachusetts has correctly pointed out.

The weight of that presumption has to be analyzed in the light of the classification system. As the Senator knows, fully as well as I do, my amendment relates to the reluctance to declassify. All the momentum in the existing classification system is on the side of secrecy and all the incentives are in favor of classification.

All of that experience with the classification system goes back a quarter of a century or more. It seems to me the language in the bill, read in that context, would reinforce the same presumptive effect. The effect would be different with different judges.

I must say that different members of the committee and of the Senate, I think, would give it a different effect if we started from scratch, with a new law that would define the presumptions dealing with classification.

If we were to start from scratch and have a new law with the presumption of law in that way, I think the presumption would be different from that operating with the existing classification system.

So the inevitable momentum that the bill's language gives supports the classifier and the classification in these words:

The court shall sustain such withholding unless it finds such withholding is without a reasonable basis.

I should think that a judge might feel that anyone who has the responsibility at high levels to classify would not classify without a basis that was reasonable to him.

If he is a responsible man, we have to accept his basis, whether or not someone else would agree. He would make an independent judgment. That basis is reasonable.

That does not say that his basis is the same basis as my reason or the basis of someone else's, presumably that of the classifier.

That language must have a purpose, and putting that language into the bill has a purpose. The purpose clearly is to give greater weight to the testimony which the judge receives from the head of the agency than the evidence received from any other source and greater than the weight of his own judgment.

That is how I read that language. I think that in the context of the momentum of the experience which has been generated under the classification system, we ought to be very reluctant and careful in adopting this kind of language.

Mr. BAYH. Mr. President, I ask unanimous consent that Howard Paster of my staff be granted the privilege of the floor during the debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. Will the Senator permit me 1 minute under the bill?

Mr. KENNEDY. Mr. President, I yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I will yield to the Senator from Mississippi shortly. I simply want to say that I find great comfort in the position of the Senator from Maine.

It seems to me that in a free society, certainly in the light of everything that we have seen occur over the past few months and years, we ought to revise the present position which seems to be that there is a right to mark something classified until it is proved not to be in the public interest. In a free society information ought to be regarded as a matter of public interest and public knowledge unless it can be proven that it should be secret.

Mr. MUSKIE. Mr. President, I thank the Senator from Indiana. In proposing this amendment, I am not asking the courts to disregard the expertise of the Pentagon, the CIA, or the State Department.

Rather, I am saying that I would assume and wish that the judges give such expert testimony considerable weight. However, in addition, I would also want the judges to be free to consult such experts in military affairs as the Senator from Mississippi (Mr. Stennis), or experts on international relations, such as the Senator from Arkansas (Mr. Fulbright), or other experts, and give their testimony equal weight. Their expertise should also be given considerable weight.

I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. He has the additional weight that the exclusive judgment is given to him. He has all of that behind him.

Why should he be given a statutory presumption in addition if he cannot make his case on its merits. He is in a better position to do that than anyone else.

Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.

We ought not to classify information by presumptions, but only on the basis of merit. And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it

and not find it possible to get sustained only through the support of a statutory presumption.

Mr. HRUSKA. Mr. President, I yield 5 minutes in opposition to the amendment to the Senator from Mississippi.

Mr. STENNIS. Mr. President, I certainly thank the Senator from Nebraska.

I have just gone into this matter within the last hour, Mr. President, but I am greatly concerned with the Senator's amendment, the amendment of the Senator from Maine, and that is not discounting his very fine work on the subject.

I think the bill itself, as worked out by the committee, has struck a fair balance that meets the requirements of law and, at the same time, gives a reasonable amount of protection.

The Senator from Maine raised a point of why give a little more weight here to the head of an agency with reference to these matters. It is for the very reason that we have placed that person in charge of that agency and given him all responsibility and power that goes with that entire office. He is the only one who is permitted to file such an affidavit here, as I understand.

I want to focus now primarily on the CIA. I start with the proposition that we have to have a CIA in world affairs; we just must have one, and time has proven its value.

So in the matter of certain information being classified, the average judge—and with all due deference to them personally—and I had the honor at one time of being a judge of a trial court myself—is just short of knowledge and information on a lot of different subject matters, just as a Senator is on a great deal of subject matters that come before him.

So I imagine that the average judge would want to hear and would want to give consideration to the head of this agency and, in matters of great concern, would really have no objection to this amendment. It is a kind of warning to the judge. The head of the agency is the only person who can file an affidavit with a court within a vast worldwide operation such as the CIA. It has to be the head of the agency. If he files an affidavit, if he takes a position on the classification of a document, that is certainly not just another piece of paper.

That is something with the man's honor and official responsibility tied with it. This provision here is one where the judge is still the master of the situation; he is still running his own court, as we use that term. He is still free to reach a conclusion of his own. But this is a mild guideline as the Senator from Massachusetts suggests. It is not a violent presumption. It is not a wall built around this head of agency and his testimony. It is a mild presumption in favor of his testimony. The judge can still weigh it all, and unless there is found a reason that satisfies the judge—and you have got to satisfy this judge—he is not going to stop and back off because it might have satisfied the head of the agency. The judge has all of this other testimony before him, and he is going to have to be convinced himself in view of all other testimony or he is going to rule in favor of reviewing the classified documents now.

I tell you this is a serious matter, Members of the Senate. I do not lean toward trying to protect everything. I want matters to be classified the same as the rest of you do. But I have been at this thing long.

enough and on enough subject matters to know that we are flirting here with things that can be deadly and dangerous to our welfare, our national welfare, and we ought not to just throw the gates wide open and say, "All this is to be testimony along with all the other testimony," some of which is usually from biased sources, sources of interest, and not give any consideration here any more than just ordinary consideration to the official certification under oath of the head of the agency.

So I have to rest this thing with the Senate. The committee has worked on it and has come up with something that, I take it, is practical to live with and, at the same time largely gives to the complainants what they might wish in this case.

So until we just strike down this matter that the committee has worked so hard on and has balanced off, let us take a second thought, and I believe we will—

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. STENNIS. I thought he had yielded to me and I will then finish. I thank the Senator. I have not made any remarks here yet about the Department of Defense.

There are matters, and there are many of them, that are of equal importance as those of the CIA. When I leave this floor I am going down here now for a hearing with respect to a gentleman who is nominated to be the Chief of Naval Operations, the highest ranking officer in the Navy. Next week we are going to have a hearing for the Chairman of the Joint Chiefs, the highest ranking officer, military officer, in the whole Government. In addition to that we have the civilian officers over there, men of great esteem, of great competence.

These caliber men do not carelessly file affidavits, that is my point, and committee proposal would put their honor and their official conduct at stake and at issue. Those things are not carelessly done.

So instead of just brushing them aside here in a moment, let us stay or remain with the law of reason as this committee has worked it out.

I thank the Senator again for yielding to me.

Mr. MUSKIE. Mr. President, just a minute or two of response.

May I say to the distinguished Senator from Mississippi that I hardly regard my amendment as throwing the doors wide open to irresponsible disclosure of Government secrets. But on the question as to whether or not the weight of the bureaucracy of Government is on the side of secrecy or openness, let me give you a few statistics. At the CIA there are only five full-time secrecy reviewers for 1,878 authorized classifiers.

In the third quarter of 1973 in the CIA, 1,350 documents were classified top secret, and that has climbed until, during the first quarter of this year, the number has risen to 3,115. So the enormous weight of the bureaucracy is on the side of secrecy. We have all that here, and now we want to add to that weight, a presumption. Arrayed on the other side is a district court judge who treats this issue as a part-time responsibility, who does not have this background, and he is asked to give that weight, that bureaucratic weight, a presumption over anything else he hears, over any other testimony he hears. That is what we are trying to overcome. I do not regard that as throwing the door wide open.

I am happy to yield to the Senator from New York.

Mr. JAVITS. Mr. President, I have joined Senator Muskie and his other colleagues in his amendment for the following basic reasons:

I believe that, one, there is no question about the fact that the whole movement of Government, especially in view of Government's experience in Vietnam, Watergate, and many other directions, is toward more openness, so that the bias, in my judgment, in the Senate, should be toward more openness rather than being toward more closed.

Second, we have finally come abreast of the fact of life that it is not providence on Mount Sinai that stamps a document secret or top secret, but a lot of boys and girls just like us who have all their own hangups and who decide in individual cases what the document should be classified as, and very serious consequences flow to individuals as a result of that classification, very serious consequences in the denial of the basic information upon which the judge releases it to the public. So the bias ought to be for openness not for closeness.

Now, one would say this is a close question normally because of this tension as between the right of the public to know and the necessity of Government in given cases to have secrecy. But the basic question has been decided by the committee, as by us, who are the movers of the amendment, that is, that a judge in camera should have the right to inspect this material. Having done that, and that is the basic question, why put a ball and chain on the ankle of the deciding authority? I cannot see that the balance of wisdom in government should move in that direction, having decided that the judge may see it. We should give him the freedom to determine whether, under all the circumstances, as the umpire between the right of the public to know and the necessity for secrecy—claimed necessity for secrecy—the umpire should not be restricted by ground rules, except ground rules dealing with basic justice and the balance of responsibility and the balance of the national interest as it relates to a given item of information.

It is for those reasons, Mr. President, because I think, having made that basic decision which now has been made by the sponsors of the bill, by the sponsors of the amendment, and by the sponsors of the House bill, I see no case for further restricting that authority and hamstringing it, once it has been given.

I find special support for that proposition in the fact that the committee itself—incidentally, I personally think they are promising a lot more than they can deliver in terms of decisions of the courts, but the committee itself says that this standard of review does not allow the court to substitute its judgment for that of the agency as under a de novo review, and neither to require the court to refer discretion of the agency even if it finds the determination thereof arbitrary or capricious. I respectfully submit it is promising a lot more than it will deliver, because I doubt that judges will do any differently—except judges who want to do differently—they are human like the classifiers in reading the information in camera—than they would without the provision.

In those circumstances, why put it in? Why not put responsibility on the shoulders of the judges, whom we trust enough to allow to see the material anyhow?

For all these reasons, Mr. President, the motion to strike is eminently warranted, and I hope that the Senate will support it.

Mr. HRUSKA. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER (Mr. Helms). The Senator from Nebraska is recognized for 5 minutes.

Mr. HRUSKA. I rise in opposition to the amendment proposed by the senior Senator from Maine (Mr. Muskie). The Freedom of Information Act was enacted at the expense of a lot of time and effort. It took several years to process to the point of balancing the several interests contained in it and a sincere balanced result has been attained.

There is the right to know on the part of the public, but there is also the right and duty on the part of the Government to survive and to take such steps as may be necessary to preserve the national integrity and security.

This amendment would substantially alter that balance which is presently contained in the Freedom of Information Act. It would endanger the passage and approval of the instant bill into law, in my considered judgment. It should be acted on, if we act on it at all, not in connection with a bill where virtual unanimity was reached in the Judiciary Committee and reported unanimously without any objection to the Senate.

Mr. President, I oppose the amendment offered by the Senator from Maine. I believe that the amendment is unworkable and certainly is unwise.

At the outset, it is imperative to realize what is and what is not at issue here. Is the crux of the issue whether the courts should be able to review classified documents in camera? No. Under both the bill and the amendment, the judge can review the documents in camera. Thus, S. 2543, as unanimously recommended by the Judiciary Committee, establishes a means to question an executive decision to stamp a classification on the document.

What is at stake, Mr. President, is the sole question of whether there should be a special standard to guide the judge's decision in this matter pertaining to the first exemption. S. 2543 provides such a standard.

Under the bill, a judge shall sustain the agency's decision to keep the document in confidence unless he finds the withholding is "without a reasonable basis." We could turn that around, Mr. President, and we could ask whether it would be proper for a judge to go ahead and disclose a document even if he finds that a reasonable basis for declassification exists. That is the other end of the dilemma.

In other words, if the court finds a reasonable basis for the classification, it shall not disclose the document.

The amendment of the senior Senator from Maine would eliminate this "reasonable basis" standard and put nothing in its place. It does not substitute any standard in its place. How is the judge to be guided in his decision whether a document is properly classified? In the absence of a specified standard, I must assume that the standard that obtains is the one that applies to all the other exemptions.

Let me take the sixth exemption as an example. That exemption allows an agency to withhold records if it determines that disclosure would constitute an unwarranted invasion of privacy. In determining

whether the invasion is unwarranted, the court attempts to ascertain the extent of the invasion and then balances that against the requester's and the public's need for that information. The burden of proving that the extent of the invasion outweighs the countervailing interests is on the Government.

How would this standard then apply with respect to exemption 1—the exemption that allows the Government to maintain classified documents in confidence. It would allow the judge to balance what he perceives to be the public interest in disclosing the information against Government's, which is to say the people's, judgment that disclosure will jeopardize our foreign relations and national defense. Stated quite simply, the amendment before us purports to allow a judge to release a classified document if he believes that the document should be in the public domain even if there exists a reasonable basis for the classification.

I realize that standards of proof are difficult concepts to understand and apply even for the lawyer. So, let me pose an example. Suppose that the Freedom of Information Act, together with this amendment, was on the books in the 1940's. And further suppose that someone wrote the Government requesting information about the Manhattan project. Now, under this amendment, a judge would be able to examine the project's documents in camera and decide for himself whether the classification was proper. He would realize that the disclosure of documents could jeopardize national defense but, on the other hand, he could also reason that the public should have some information so that it would know how much all this research was costing and what its objectives were. The judge could go on to reason that the public should be informed of the cataclysmic damage that could be done by an atomic weapon upon delivery so that the public could make a moral judgment as to whether such a weapon should ever be used. Balancing these concerns, as the Muskie amendment would call for, the judge could find the public interest in disclosure to outweigh the national defense implications.

Mr. President, such a standard of proof is workable for the other exemptions. If a judge is wrong in a case involving exemption 6—the privacy exemption—the harm is confined. Only one person is injured. But if a judge is wrong in a case involving the first exemption, the damage is not confined. Aspects of our national defense or foreign relations could be compromised. Put in jeopardy is not just one person but a nation and perhaps its allies.

Mr. President, what then is the crux of the issue? Is it a question whether the judge can review the classified documents in camera? No. Under both the bill and the amendment the judge can review the document in camera. Instead, the sole question is whether there should be a standard to guide the judge's decision in this matter.

By eliminating any standard to guide the judge's decision in this area, the proposed amendment would put the courts in the position of making political judgments in the fields of foreign affairs and national defense. Yet the courts have little, if any, experience in these fields. Indeed the courts themselves have declared that they do not have the capacity or expertise to make these kinds of judgments.

In *Epstein v. Resor*, 421 F. 2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), the Court of Appeals, for the Ninth Circuit

stated that the judiciary has neither the—and I quote—“aptitude, facilities, nor responsibility” to make political judgments as to what is desirable in the interest of national defense and foreign policy. The Supreme Court took the same view in *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948).

A “Developments in the Law Note on National Security” by the Harvard Law Review reaches the same conclusion. In discussing the role of the courts in reviewing classification decisions, it states that—

There are limits to the scope of review that the courts are competent to exercise.

And concludes that—

A court would have difficulty determining when the public interest in disclosure was sufficient to require the Government to divulge information notwithstanding a substantial national security interest in secrecy. 85 Harvard Law Review 1130, 1225-26 (1972).

There is also another reason why the judges should not be making political judgments on foreign policy and national defense. In order to convince a court that national defense interests outweigh any interests in public disclosure, the Government agencies may have to disclose more sensitive information to show how sensitive the documents requested really are. For example, the fact that information is sensitive may not appear from the face of the document. The agency may then be required to divulge more information to show that the document is relevant to secret ongoing negotiations with a foreign nation. Thus the agency may be put in the curious dilemma that it must divulge more sensitive information to protect the information requested.

Mr. President, I believe we all recognize that there have been some abuses in the classification system. But we should also recognize that new classification procedures have recently been promulgated in Executive Order 11652 to correct these abuses. In a progress report just issued by the Interagency Classification Review Committee, the body created to monitor the classification system, the following progress was documented:

First. The total number of authorized classifiers within all departments has been reduced by 73 percent since the order took effect;

Second. The National Archives and Records Service has declassified over 50 million pages of records since 1972;

Third. The Department of Defense alone achieved a 25-percent reduction in its “Top Secret” inventory during 1973;

Fourth. The majority of requests, 63 percent, for the declassification of documents has been granted either in full or in part.

This last point deserves some elaboration. Under the Executive order, a person may request review of classified documents in order to obtain access to the records. If the documents are over a certain age, the agency must review the documents. This is usually a two-step process: the operating division first reviews the document to see if it is properly classified. If it determines the classification is appropriate, the requester may then appeal to the review board in the agency. If he is not successful there, he may appeal outside the agency, to the Interagency Classification Review Committee. He thus has three opportunities to obtain the documents declassified before he files suit under the Freedom of Information Act.

Mr. President, in my own view, a decision by all three of these bodies that the classification is proper should put the matter to rest. Nevertheless, under S. 2543, we will also permit the courts to review the documents in camera to judge whether the classification is proper. Is it too much to ask that a standard be imposed to guide the court's decision so that a document will not be divulged to all the world if there is a reasonable basis for the classification? I think not.

Mr. President, the question whether a document is properly classified is a political judgment. This judgment must take cognizance of a number of factors, such as negotiations with other countries, the timeliness of the moment, the disclosure of other information. Who is in a better position to make this judgment—the Secretary of State or a district judge? Should we permit a judge to balance what he perceives to be the interests of the public in disclosure against the interests of the public in maintaining the document in confidence? I say, most emphatically, no.

I believe the point must be stressed that this standard does not equip the courts with a mere rubber stamp. The courts are granted the authority to review the documents in camera. And the courts can overturn a classification decision in a case involving a request for the classified documents upon finding that there is no reasonable basis upon which the classification decision can be predicated.

But if there is a reasonable basis for the classification, a judge would not and should not be able to divulge the document. It is as simple as that.

Mr. President, Senator Kennedy, the author of this bill, has worked with me and other members of the Senate Judiciary Committee in developing a bill that recognizes and balances all of the interests. The bill was reported by the committee without a dissent. I fear that this amendment will thwart the bipartisan and cooperative efforts of the committee. But more than that, it is unworkable and extremely unwise.

If my colleagues believe that a judge should not be granted the power to disclose a classified document upon finding a reasonable basis for the classification, they should vote against the proposed amendment. I intend to.

Under the amendment offered by the Senator from Maine and under the way the bill as now drafted the judge can review documents in camera. The sole question is whether there should be a standard to guide the judge's decision on this matter.

It is not a ball and chain, Mr. President, because he can decide for himself whether there is a reasonable basis for the classification. Under the bill as presently drafted the judge is governed by the existence of a reasonable basis for the classification and on appeal it would be for the circuit court to decide whether there is a reasonable basis for that classification. I do not know—perhaps I can pose that question to the distinguished Senator from Maine, whether there is an intent to foreclose an appeal under his amendment.

Mr. MUSKIE. There is not, of course, any intention to foreclose. In addition, there is no presumption on the part of the Senator from Maine that, absent the language my amendment would strike—judges would always be unreasonable. What the Senator seeks to tell us is that his language, the language I have described, was inserted

in the bill because otherwise judges would be unreasonable in evaluating the basis for the classification of documents; and that the only way to avoid that unreasonable tendency on the part of district court judges is to create a presumption on the part of the classifier. I listened to the Senator's argument closely, and that seems to be the thrust of the argument.

Mr. HRUSKA. Mr. President, the Attorney General has written a letter, the text of which is on the desk of each Senator, and I ask unanimous consent that it be printed in the Record.

There being no objection, the letter was ordered to be printed in the Record, as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 29, 1974.

Hon. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: The Department of Justice appreciates your interest in S. 2543, a bill to amend the Freedom of Information Act.

You have inquired about a proposed amendment to the bill's provision on judicial review of documents withheld in the interest of national defense or foreign policy. This suggested amendment would alter the provisions on page 10, line 24 through page 11, line 15 of S. 2543. It would subject these documents to standards of judicial review that are the same or similar to standards applicable to ordinary government records.

As the courts themselves have recognized, the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason the constitutionality of the proposed amendment is in serious question.

In addition, the suggested change would call for a de novo review by the court, and shift the burden of proof to the government. Such a change would place a heavy burden on the executive branch to reveal classified material which the judicial branch is unprepared to properly evaluate.

For these reasons the Department of Justice is opposed to an amendment of this nature.

Sincerely,

WILLIAM B. SAXBE,
Attorney General.

Mr. HRUSKA. The letter says, among other things the following:

As the courts themselves have recognized, the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason the constitutionality of the proposed amendment is in serious question.

In addition, the suggested change would call for a de novo review by the court, and shift the burden of proof to the government. Such a change would place a heavy burden on the executive branch to reveal classified material which the judicial branch is unprepared to properly evaluate.

Mr. MUSKIE. I gather that in offering that letter from Mr. Saxbe, the Senator is suggesting another point: If, for example, the bill is amended by my amendment and is passed and enacted into law and its constitutionality is challenged, would it be the Senator's view that Mr. Saxbe's view on the subject of constitutionality ought to be given a presumption over that of any other opinion that the court would consider?

Mr. HRUSKA. The language in the bill is not intended to serve as the basis for the creation of a presumption. That is not its intent at all, and I do not think that is its meaning.

Mr. MUSKIE. What is its intent, if it is not a presumption? If it is not intended to give the classifier's judgment a weight exceeding that of any other witness, what is it intended to do?

Mr. HRUSKA. Let me suggest this. The question of whether a document is properly classified is a political judgment. There is no question about it. It has to be that, when it comes to national security and foreign policy.

This judgment must take cognizance of a number of factors, such as negotiations with other countries, the timeliness of the moment, the disclosure of other information, and so forth. Who is in a better position to make this judgment—the Secretary of State or a district judge? That is what it comes down to.

Should we permit a judge to balance what he perceives, with his relatively parochial interests, to be the interests of the public, in disclosure against the interests of the public, in maintaining the document in confidence? I say, most emphatically, no.

It is a problem of such scope and with so many ramifications that it belongs, as the Senator from Mississippi has said, in the hands and in the minds and in the decisions of those who are versed in that field and who have the expertise for it.

That is the reason for the language in the bill as it exists—to furnish the judge, when he is called upon to pronounce judgment, with the standard and the requirement that if he finds there is a reasonable basis for the classification, he must sustain that classification.

The point should be stressed that this standard does not equip the courts with a mere rubberstamp. They are granted the right and the authority to review the documents in camera. They can overturn a classification decision in a case involving a request for the classified documents upon finding that there is no reasonable basis upon which the classification be predicated.

It seems to me that we are tampering here with a highly important subject. The decision was deliberately made some years ago, when the parent act was passed, and we will be interfering with that political balance and a matter of vital importance if this amendment is adopted.

I hope the Senate will reject the amendment.

Mr. HART. Mr. President, will the Senator yield me a couple of minutes?

Mr. MUSKIE. I yield.

Mr. HART. I should like to ask a question of the Senator from Maine. I have listened to the exchange he has had with the Senator from Nebraska; and, as I understand, the bill, as reported by the committee, says that in the matter of a security document or file, if the head of the agency—let us say the Secretary of Defense—certifies to the court that he has examined the document and has determined that it should be withheld, the court must sustain that finding and certification, unless the court finds the withholding is without a reasonable basis.

Mr. MUSKIE. In other words, he has to find that the Secretary of Defense was unreasonable.

Mr. HART. I have never been confronted with the problem of resolving a national security file, but some of us, at least years ago, were confronted with the homely experience of trying an accident case. Is there not a parallel here?

A plaintiff puts on one eminent physician who describes why the blinking eye is the result of the accident, and the defendant puts on 10 very eminent physicians who say that is nonsense, that the blinking eye is congenital. That court can make a decision, choosing which among the 11 opinions seems most persuasive. But if accident cases were tried under a statute such as this committee bill provides, would not the court be compelled to agree with the plaintiff because there is a reasonable presumption supporting the blinking eye?

If the Secretary of Defense files a certificate, that certificate is a reasonable basis; but five prior Secretaries of Defense and the CIA Director—and name your favorite expert—all say that is nonsense. The court may agree with them; but under this language, unless it is stricken, he is handcuffed, is he not?

Mr. MUSKIE. I think the Senator has described the effect of the amendment as I understand it.

Mr. HART. I would not be comfortable with that kind of restriction.

Mr. HRUSKA. Certainly, the judge has the right to say that the blinking of an eye is, as a defense, unreasonable. Then that case will go to the circuit court of appeals, and I see no harm in that. I trust that the Senator from Michigan does not, either. But it seems to me that the door is open by this amendment and the language in plain and simple: If the basis is considered unreasonable and the judge so finds, then the information must be disclosed.

Mr. MUSKIE. I yield myself 1 minute, and then I will yield to the distinguished Senator from Florida.

The difficulty with the Senator's response is simply this. The Senator minimizes the implication that the Senator from Michigan and the Senator from Maine draw from his language, but then, in the Senator's prepared remarks, in which he justifies his language, he justifies it on the ground that the Director of the CIA is the only man who knows. The Senator clearly wants to give his knowledge, his position, and his judgment a weight far out of proportion to the Senator's response to the question raised by the distinguished Senator from Michigan.

I say to the Senator that he cannot have it both ways. Either this amendment has the effect of giving a weight to the classifier's judgment and certificate that inhibits the disclosure of information that ought to be disclosed or it does not. It cannot do both. I think I read it correctly when I read it as the Senator from Michigan has read it.

How much time would the distinguished Senator from Florida like?

Mr. CHILES. Four minutes.

Mr. MUSKIE. I yield 4 minutes to the distinguished Senator from Florida.

The PRESIDING OFFICER. The Senator from Florida is recognized.

Mr. CHILES. Mr. President, I support the amendment offered by the Senator from Maine (Mr. Muskie), when the Freedom of Information Act was enacted over 7 years ago, it was the congressional intent that from that time forward the general rule to be observed by all bureaucrats was that disclosure of information was the norm and withholding the exception. Recognizing that the ideal is not often observed, the Federal district court was given jurisdiction to litigate differences originating from requests.

The past years' experience with the act has indicated that the fears of bureaucratic obstruction were in large part well founded and that

but for firm guidance by the courts in the more than 200 cases litigated under the act, the public's right to know would still be little more than a wish.

The bill before us today is the result of extensive hearings which pointed out a number of procedural shortcomings in administration of the Freedom of Information Act. I am satisfied that many of the problems will be resolved by this bill. However, I am concerned by the language presently found in a section of the bill which, in my estimation, would reverse the central thrust of the Freedom of Information Act.

As the result of a Supreme Court decision which adopted an interpretation of the language in section (b)(1) of the original act, information claimed to be classified for security purposes could not be examined by the Federal courts to determine if in fact the classification was proper and valid. Rather, the Supreme Court held that the trial judge must be satisfied with an affidavit from the head of the department originally classifying the information which affidavit would attest to the propriety of the classification. Thus, the classifier would, in fact, be the judge of the classification. This result was patently absurd. Yet, the corrective language in the bill before us does little to remedy the situation. Rather than allow true judicial review of this material, the present language once again attempts to hold the view of the department head by stating that the court must accept his affidavit unless it is found to be unreasonable. While seemingly, a step forward, this language actually reverses the general rule of the Freedom of Information Act which puts the burden of proof upon the Government to establish the basis for withholding.

If the present language in (b)(4)(B)(ii) is allowed to stand, the burden of proof will in effect be shifted away from the Government and placed with the courts.

This is a situation which must not be allowed to stand. I do not argue that an affidavit or other submission from the head of an agency should be disregarded. On the contrary, I would hope that the Court, in its in camera examination of contested documents, would call upon whatever expertise it found necessary.

However, to raise the opinion of one person, especially an interested party, to that of a rebuttable presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

I think it really goes against the thrust of what we are trying to do in amending the bill, to again say that the norm is to be to open things up unless a reason can be shown to have them closed.

If, as the Senator from Mississippi said, there is a reason, why are judges going to be so unreasonable? We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.

I think we would be much better off with this amendment. I urge the adoption of the amendment.

Mr. KENNEDY. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, in my opening remarks I mentioned some words of the President of the United States when he issued his new Executive order on classification. This concern which has been expressed by the Senator from Florida, the Senator from Maine, and the Senator from Michigan is very real. This is what the President of the United States said in talking about classification, and it supports the basis for the amendment of the Senator from Maine:

Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

I think precisely this kind of sentiment has triggered the amendment of the Senator from Maine. In reviewing hearings before the Committee on Armed Services, dealing with the transmittal of documents from the National Security Council to the Chairman of the Joint Chiefs of Staff, I find the following on page 4 of those hearings, part 2:

The CHAIRMAN. I do not know of anything now that really is national security. We have not been able to find out anything. But when we get into it it will be a matter of judgment and so forth.

Senator HUGHES. Who is to make that judgment?

The CHAIRMAN. The committee. I am not trying to overrule anyone as a member of this committee, you know that, but it is all right for you to raise the point.

Gentlemen, anyone else want to say anything?

Senator SYMINGTON. Last summer when the special prosecutor sent us some papers taken out of the Dean file, in Alexandria, and which had a lot to do with CIA and military matters, they were sent here and also sent to the Ervin committee. Hastily everyone wanted to see us at once, the State Department, the CIA, FBI, DIA. Anybody I left out, Mr. Braswell?

Mr. BRASWELL. NSA, I think.

Senator SYMINGTON. Yes, and they all said these papers from the standpoint of national security must not be utilized by the Watergate Committee. We sat around this table. I said, the best thing to do would be to first read the papers Mr. Dean put in his safe before we consider making a decision to request Senator Ervin not to use them. So we read the papers. They literally had nothing to do, that we could see, with the national security. One of the staff members said, after we had read for 10 or 15 minutes, it looks to me as if this is more a case of national embarrassment than national security. In my opinion, he could not have been more right. So having been through that syndrome last summer, that particular aspect, and because of all of the various stories that have been getting out, I would join the Senator from Iowa and hope we make a full report on this situation, one way or the other because I do not see any national security involved. Admiral Moorer said he knew everything being done. So I do not see the national security angle.

The CHAIRMAN. I have already told you twice that I have not run across anything yet that is national security.

Here, supposedly the most sensitive materials are considered classified by the heads of these respective agencies mentioned, yet the language which would be included in the committee amendment to the Freedom of Information Act would add some presumption to their conclusion. That presumption is what the Senator from Maine is attempting to erase. And these excerpts illustrate his point.

I think the amendment makes sense, and I am extremely hopeful that this body will support the Senator from Maine. I think it is a

responsible approach. It is sensitive, as we reviewed earlier, in terms of protecting the kinds of classified material, where that protection is legitimately essential to our security and the national defense. The amendment would reach the kinds of abuses we have seen far too often in recent times.

I hope the amendment is agreed to.

Mr. MUSKIE. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The Senator from Maine is recognized.

Mr. MUSKIE. Mr. President, first may I say that if the committee bill prevails, I would like to see something that minimizes the question of presumption, but I am afraid to raise the issue because, in the proper perspective, we have to describe the situation as it is.

Then, Mr. President, I would like to make one technical point with respect to the letter to Senator Hruska by the Attorney General, William Saxbe, which was put in the Record earlier. The Attorney General's letter reads:

In addition, the suggested change would call for de novo review by a court and shift the burden to the government.

I wish to correct that. Section (a) of the Freedom of Information Act provides that in court cases "the burden is on the agency to sustain its action." That is no shifting of the burden. The Freedom of Information Act imposes this burden for a very real reason. That reason is the weight of the Federal bureaucracy, which has made it almost impossible for us to come to grips with secrecy control and limit the classification process.

I withhold the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. MUSKIE. Mr. President, I am happy to yield 4 minutes to the distinguished Senator from North Carolina (Mr. Ervin).

Mr. ERVIN. Mr. President, I rise in support of this amendment. It seems to me that we ought not to have artificial weight given to agency action, which the bill in its present form certainly would do.

It has always seemed to me that all judicial questions should be determined de novo by a court when the court is reviewing agency action. One of the things which has been most astounding to me during the time I have served in the Senate is the reluctance of the executive departments and agencies to let the American people know how their Government is operating. I think the American people are entitled to know how those who are entrusted with great governmental power conduct themselves.

Several years ago the Subcommittee on Constitutional Rights, of which I have the privilege of being chairman, conducted quite an extensive investigation of the use of military intelligence to spy on civilians who, in most instances, were merely exercising their rights under the first amendment peaceably to assemble and to petition the Government for redress of grievances. At that time, as chairman of that subcommittee, I was informed by the Secretary of Defense, when the committee asked that one of the commanders of military intelligence appear before the committee to testify that the Department of Defense had the prerogative of selecting the witnesses who were to testify before the subcommittee with respect of the activities of the Department of Defense and the Department of the Army.

On another occasion I was informed by the chief counsel of the Department of Defense that evidence which was quite relevant to the committee's inquiry, and which had been sought by the committee, was evidence which, in his judgment, neither the committee nor the American people were entitled to have or to know anything about.

And so the Freedom of Information Act, the pending bill, is designed to make more secure the right of the American people to know what their Government is doing and to preclude those who seek to keep the American people in ignorance from being able to attain their heart's desire.

I strongly support the amendment offered by the distinguished Senator from Maine, of which I have the privilege of being a co-sponsor, because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

I thank the Senator for yielding.

Mr. MUSKIE. I thank the distinguished Senator from North Carolina.

Mr. President, at this time I withhold the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

A little while ago the question was asked whether the Director of the CIA or the Secretary of State is the only man who knows whether information should be classified or whether a district judge equally situated with regard to matters relating to national security or foreign policy as any other officer of the Government.

Mr. President, it is not a question whether or not he is the only man. The courts themselves have said, as has already been cited in *Epstein versus Resor* in 1970, wherein certiorari was denied by the Supreme Court, that the judiciary has neither the "aptitude, facilities, nor responsibility" to make political judgments as to what is desirable in the interest of national defense and foreign policy. That is their decision, Mr. President—it is not the court's business to attempt to weigh public interests in the disclosure of this information. These are political judgments outside the province of the courts.

The Supreme Court, in the case of *C. & S. Air Lines against Waterman Corp.*, in 1948, held to the same effect.

The Harvard Law Review note reached that same conclusion.

It is not a matter of any one person's knowing who is the one who would best know. There is the review, the trial *de novo*, to be sure. The bill is written so as to place upon the district judge the responsibility of determining whether or not there is a reasonable basis. If there is no reasonable basis, then he orders the information disclosed. If there is a reasonable basis, he is charged with the responsibility of maintaining the confidentiality of the information. Under that system, it would be an appealable order. It would be something that could be reviewed.

The further suggestion is made that there is no indication that a district judge will be unreasonable in acting under the amendment of the Senator from Maine. I would not think that any judge would

be unreasonable. But that is not the point. If the district judge finds that there is no reasonable basis for it, should he still have the power to say, "Release the information, anyway"? That is the position for which the Senator from Maine is arguing. That is exactly the position for which he is arguing.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. I yield myself 3 minutes more.

In all applications for the disclosure of public documents, the procedures, under the amendment of the Senator from Maine as well as under the bill, are the same. The documents would be available if the matter cannot be resolved on the basis of affidavits. The documents are available for examination in camera, and it will be for the judge to examine them and determine whether there is a reasonable basis.

Under the amendment proposed there is no standard to guide the courts in this difficult area. The purpose of the language in the bill is to require the judge to determine whether or not there is a reasonable basis. If there is, he holds the document; if there is no reasonable basis, he may order it disclosed.

Mr. President, there are difficulties in getting papers from the Government and its agencies. There is no question that there are abuses. But, as I indicated in my earlier remarks, many steps have been taken pursuant to the Executive Order 11652 to correct those abuses. However, again, I say that the issue of abuses is not relevant to a consideration of the amendment proposed by the Senator from Maine.

Finally, I must say, Mr. President, that the adoption of this amendment could endanger the passage and approval of the bill into law. It will substantially alter that finely tuned balance. We have competing interests that are highly controversial in this field that must be encompassed and balanced.

Mr. President, it is my hope that the amendment will be defeated.

Mr. MUSKIE. Mr. President, I yield to the Senator from North Carolina.

The PRESIDING OFFICER. The Senator from North Carolina is recognized.

Mr. ERVIN. Mr. President, the question involved here would be whether a court could determine this is a matter which does affect national security. The question is whether the agency is wrong in claiming that it does.

The court ought not to be required to find anything except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge. We ought not to leave that decision to be made by the CIA or any other branch of the Government.

The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong.

With all due respect to my friend, the Senator from Nebraska, is it not ridiculous to say that to find out what the truth is, one has to show whether the agency reached the truth in a reasonable manner?

Why not let the judge determine that question, because national security is information that affects national defense and our dealings with foreign countries? That is all it amounts to.

If a judge does not have enough sense to make that kind of judgment and determine the matter, he ought not to be a judge, and he ought not to inquire whether or not the man reached the wrong decision in an unreasonable or reasonable manner.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

Mr. President, will the Senator respond to a question on that subject? He and I have discussed this matter preliminarily to coming on the floor.

If a decision is made by a court, either ordering a document disclosed or ordering it withheld, is that judgment or order on the part of the district court judge appealable to the circuit court?

Mr. ERVIN. I should think so.

Mr. HRUSKA. What would be the ground of appeal?

Mr. ERVIN. The ground ought to be not whether a man has reached a wrong decision reasonably or unreasonably. It ought to be whether he had reached a wrong decision.

Mr. HRUSKA. I did not hear the Senator.

Mr. ERVIN. The question involved ought to be whether an agency reached a correct or incorrect decision when it classified a matter as affecting national security. It ought not to be based on the question whether the agency acted reasonably or unreasonably in reaching the wrong decision. That is the point that the bill provides, in effect. In other words, a court ought to be searching for the truth, not searching for the reason for the question as to whether someone reasonably did not adhere to the truth in classifying the document as affecting national security.

Mr. HRUSKA. The bill presently provides that a judge should not disclose a classified document if he finds a reasonable basis for the classification. What would the Senator from North Carolina say in response to the following question: Should a judge be able to go ahead and order the disclosure of a document even if he finds a reasonable basis for the classification?

Mr. ERVIN. I think he ought to require the document to be disclosed. I do not think that a judge should have to inquire as to whether a man acted reasonably or unreasonably, or whether an agency or department did the wrong thing and acted reasonably or unreasonably.

The question ought to be whether classifying the document as affecting national security was a correct or an incorrect decision. Just because a person acted in a reasonable manner in coming to a wrong conclusion ought not to require that the wrongful conclusion be sustained.

Mr. HRUSKA. Mr. President, I am grateful to the Senator for his confirmation that such a decision would be appealable.

However, on the second part of his answer, I cannot get out of my mind the language of the Supreme Court. This is the particular language that the Court has used: Decisions about foreign policy are decisions "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." *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948).

That is not their field; that is not their policy.

Mr. ERVIN. Pardon me. A court is composed of human beings.

Sometimes they reach an unreasonable conclusion, and the question would be on a determination as to whether the conclusion of the agency was reasonable or unreasonable.

Mr. HRUSKA. Mr. President, I yield myself 2 minutes to read from the Supreme Court case of C. & S. Airlines versus Waterman Corp., 333 U.S. 103 (1948):

[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.

Mr. President, I think that is pretty plain language. I stand by it.

In this connection, as I understand Senator Muskie's amendment, the burden of proof is upon the Government to demonstrate what harm would befall the United States if such information would be made public and the court is to weigh such factors against the benefit accruing to the public if such information were released. However, no standards for guiding the court's judgment are included.

It seems obvious to me that in an area where the courts have themselves admitted their inadequacies in dealing with these issues, Congress should endeavor to provide the proper guidance. The reported version of this bill does so. It provides that only in the event a court determines the classification of a document to be without a reasonable basis according to criteria established by an Executive order or statute may it order the document's release.

Therefore, I respectfully submit that Senator Muskie's proposed amendment does not adequately come to grips with the various competing concerns involved in this issue.

Mr. MUSKIE. Mr. President, how much time have I remaining?

The PRESIDING OFFICER. The Senator from Maine has 21 minutes remaining.

Mr. MUSKIE. Mr. President, I yield myself 3 minutes.

Mr. President, I have listened to the distinguished Senator from Nebraska expound at length on what he believes to be the facts and say that the judges are not qualified to make evaluations of classification decisions.

If he believes what he says he believes, he has got to be opposed to the committee bill because the committee bill establishes a procedure for judicial review. If he believes judges to be as unqualified as he describes them, eloquently and vigorously, on the floor of the Senate, he has to be against the bill to which he has given his name and support, because that bill rests on the process of judicial review.

The second point that I wish to make is, of course, that judges can be unreasonable, as my good friend the Senator from North Carolina has pointed out. But what about the executives? Let me read, from the committee report, the language of Justice Potter Stewart in concurring with the majority opinion of the Supreme Court in the *Mink* case that we seek in this bill to alter.

Justice Stewart stated:

Congress has built into the Freedom of Information Act an exemption that provides no means of questioning an executive decision that determine a document is secret, however, cynical, myopic, or even corrupt that decision might have been.

Now that is the opinion of a justice who concurred in the decision in the *Mink* case which denied judges in camera review of executive decisions to classify in the national security field, clearly urging the Congress, in my judgment, to do something about it, and that is what we seek to do.

I simply cannot understand the position of the Senator from Nebraska (Mr. Hruska) in supporting, on the one hand, a judicial review process designed to open the door to examination of executive decision, and then on the other hand closing that door part way back again, because that is the clear purpose of the presumption written into the act.

So I hope, Mr. President, that, having taken this step, that we will not take part of it back, and I urge the support of my amendment for the reasons that I have amply discussed this afternoon.

I am ready for a vote at any time, but I will withhold the remainder of my time until it is clear that the Senate is ready for the vote.

Mr. TAFT. Mr. President, the Judiciary Committee deserve our appreciation for the significant work that is embodied in the bill before us today.

These amendments to the Freedom of Information Act will accomplish the committee objective of providing more open access to Government activities. The fresh air that open access will bring can only strengthen our form of Government. Informed citizens and responsive Government agencies will go a long way toward restoring the faith and confidence that the American people must have in our institutions.

The amendment offered to S. 2543 by the Senator from Maine which deals with classified information relating to national defense or foreign policy will not serve the interests of clear legislation or assist in the delicate process of making available such sensitive classified material.

It seems to me that the committee version of S. 2543 offers a definite procedure and a definite standard by which national defense or foreign policy classified information may be examined in a court proceeding. The court is not required to conduct a de novo review, most courts are not knowledgeable in the sensitive foreign policy factors that must be weighed in determining whether material deserves or in fact demands classification. Under the committee version a court needs to determine if there is a reasonable basis for the agency classification. The standard "reasonable basis" is not vague. The standard of reasonableness has been applied in our judicial system for centuries.

The proposed amendment would call for a de novo weighing of all of the factors and leave the determination to the court according to a weighing of all the information which is much more vague than that standard promulgated by the committee.

The executive branch has especially significant responsibilities in foreign policy and national defense. The recently conducted Middle

East negotiations by our Secretary of State had to be conducted in secret and we are now enjoying fruit of the successful culmination of these negotiations.

I believe foreign policy considerations and national defense considerations deserve special attention and the committee version of S. 2543 accords them such special attention.

It does not seem worthwhile to confuse the standard that the committee has set nor does it seem useful to diminish the executive branch's flexibility in dealing with sensitive foreign policy matters.

I intend to support S. 2543 and urge my colleagues to approve it without amendment.

Mr. KENNEDY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KENNEDY. Are there a sufficient number of Senators present to order the yeas and the nays?

The PRESIDING OFFICER. There is not a sufficient second.

Mr. HRUSKA. Mr. President, I have no further requests for time on this side or in opposition to the amendment.

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum, with the time to be charged to my time.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on the Muskie amendment.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Maine (Mr. Muskie).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollings), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett), the Senator from New York (Mr. Buckley), and the Senator from Illinois (Mr. Percy) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

On this vote, the Senator from Illinois (Mr. Percy) is paired with the Senator from South Carolina (Mr. Thurmond).

If present and voting, the Senator from Illinois would vote "yea" and the Senator from South Carolina would vote "nay."

The result was announced—yeas 56, nays 29, as follows:

[No. 219 LEG.]

Yeas—56

Abourezk	Eagleton	Moss
Aiken	Ervin	Muskie
Baker	Hart	Nelson
Bayh	Haskell	Packwood
Beall	Hatfield	Pastore
Bentsen	Hathaway	Pearson
Biden	Huddleston	Proxmire
Brock	Humphrey	Randolph
Brooke	Javits	Ribicoff
Burdick	Johnston	Roth
Byrd, Robert C.	Kennedy	Schweiker
Case	Magnuson	Stafford
Chiles	Mansfield	Stevens
Church	Mathias	Stevenson
Clark	McIntyre	Symington
Cook	Metcalf	Tunney
Cranston	Metzenbaum	Weicker
Dole	Mondale	Williams
Domenici	Montoya	

Nays—29

Allen	Goldwater	McGee
Bartlett	Griffin	Nunn
Bellmon	Gurney	Scott, Hugh
Bible	Hansen	Scott, William L.
Byrd, Harry F., Jr.	Helms	Stennis
Cannon	Hruska	Taft
Cotton	Jackson	Talmadge
Curtis	Long	Tower
Eastland	McClellan	Young
Fong	McClure	

Not voting—15

Bennett	Gravel	McGovern
Buckley	Hartke	Pell
Dominick	Hollings	Percy
Fannin	Hughes	Sparkman
Fulbright	Inouye	Thurmond

So Mr. Muskie's amendment (No. 1356) was agreed to.

Mr. MUSKIE. Mr. President, I move that the vote by which the amendment was agreed to be reconsidered.

Mr. KENNEDY. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BAYH. Mr. President, I send my amendment to the desk and ask that it be stated.

The PRESIDING OFFICER (Mr. Helms). The amendment will be stated.

The legislative clerk read as follows:

On page 9, line 9, following the word "person" insert the following:

"When such records are made available under this section in matters which the person seeking those records can demonstrate to be of general public concern, the agency complying with the request for the records shall make them available for public inspection and purchase in accordance with the provisions of this act, unless the agency can demonstrate that such records could subsequently be denied to another individual under the exceptions provided for in subsection (b) of this act."

Mr. BAYH. Mr. President, this amendment is designed to make certain Federal departments and agencies comply with both the letter and the spirit of the Freedom of Information Act in making public requested documents in matters of general public concern.

It is not consistent with the intent of Congress for an agency to comply with a request for a certain document under the Freedom of Information Act, but, at the same time, to refuse to make that document available to the public despite the legitimate and broad public nature of the document in question.

Yet, this is precisely what happened in a Freedom of Information Act request which I made earlier this year to the Federal Trade Commission. Probably the best way to demonstrate the real need for adoption of the amendment I have offered would be for me to recount my experience in seeking information from the FTC.

On March 20 a public interest law firm—the Institute for Public Interest Representation at the Georgetown University Law Center—wrote to the Federal Trade Commission on my behalf requesting a copy of a transcript of prehearing conference the Commission had conducted on December 18, 1973 with eight major oil companies which the FTC has charged with engaging in anticompetitive practices.

That request was based on the Freedom of Information Act. Subsequently, on April 3, having received no substantive reply to the letter my attorney had sent 2 weeks earlier, I filed suit in U.S. District Court here in Washington against the FTC to secure a copy of the requested transcript.

While I did not take lightly the significance of a U.S. Senator suing an agency of the Federal Government, I felt the issue was of such importance that this strong action was required. In seeking access to the transcript, I must emphasize, I did not merely want to secure this material for myself.

Certainly the Senator from Indiana did feel it would be helpful to him in weighing current energy-related legislation to have the information being generated in this very important proceeding before the Federal Trade Commission. But beyond the need which I felt I had for the document, I also felt that it was important that the transcript of a proceeding against the eight largest oil companies be available to the public.

Few issues have generated as much concern among the American people in recent months than the energy crisis. Much has been charged about the role of the oil companies in contributing to and exploiting the energy crisis, and the FTC allegations of major anticompetitive practices against the oil companies go directly to the heart of the public concern regarding the role of the oil companies.

It, therefore, seemed to me important that not only should the transcript in question be available to the Senator from Indiana, but that transcript should be part of the public record of the FTC, available for examination and purchase by the media and individual citizens.

However, when, on April 30, the FTC agreed to my request for the December 18, 1973 transcript, it did so on a very limited basis. Specifically, the Commission provided copies of the transcript to me and to three State attorneys general who had requested it. The Commission did not add the transcript to the public docket in its case against the oil companies, and when newsmen requested a copy of the transcript

they were told they would have to make individual requests for copies under the Freedom of Information Act.

This limited release of the transcript was especially incongruous since I was not under any constraint in what I could do with the copy delivered to me. Accordingly, to save those newsmen the time and trouble of bringing individual Freedom of Information Act cases against the FTC, I provided access to the transcript to anyone who wanted to come to my office and examine it.

It is evident, Mr. President, that in its limited response to my request the FTC had complied with the letter of the Freedom of Information Act. But it is equally evident that in refusing to add the requested transcript to the public docket in its case against the oil companies that the FTC had not complied with the spirit of the act.

This amendment is designed to avoid such evasion of the true purpose of the act.

I must note, Mr. President, that the amendment is written in such a way so as to place the responsibility for demonstrating that the requested material is of general public concern on the individual requesting the material. The purpose of this part of the amendment is to guarantee that the various agencies do not have to make general release of all information provided for under the Freedom of Information Act. It would be an unfair and burdensome requirement on the agencies to insist that documents of limited interest—for example, something required for academic research—be made public.

Also, the amendment does permit the agency faced with a request that information be made public to object to that request if the agency can argue successfully that subsequent requests for the documents might be denied under the exemptions provided for in subsection (b) of the act.

If I may take my experience with the FTC as an example, Mr. President, it is obvious that the case against the major oil companies is of general public concern and it is not unreasonable to place the responsibility for demonstrating this fact on the Senator from Indiana or any other individual requesting material in this category.

As for the right of the agency to object, I see no problem in giving the agency the responsibility—if it does not want to make something public—to prove that the material in question might under different circumstances qualify for a subsection (b) exception. I am satisfied once again using my experience as an example, that the FTC could not make a successful argument of this nature in the oil company case.

I do want to emphasize, Mr. President, that in citing my experience as an example I am not trying to pass an amendment of relevance to a single issue in which I was involved. Rather, I cite this experience as an example, with the conviction that if the amendment I propose addresses itself properly to my experience, it would work in the future on matters of similar public concern. In this way, when Freedom of Information Act requests are made in areas of general importance, we can be satisfied that Federal agencies will have to meet both the letter and the spirit of the law.

Mr. President, finally, what this amendment is designed to do is to satisfy what I think the intent was of the original act, and the bill brought to us today by the distinguished Senator from Massachusetts

and others who are joining him, as I am, in proposing the new amendments to the Freedom of Information Act.

My amendment specifies that if an individual, under this act, is entitled to information that is a matter of some public concern, a copy of the information that is given to the individual should also be spread on the agency's public record, so that members of the news media and individual citizens may have access to it.

As I said, I have been involved in this matter with the FTC relative to some of the prehearing conferences they have been holding with the major oil companies. At long last, after having to take them to court or threatening to take them to court, the agency did, in fact, give me a copy of the first conference transcript; and I hope that before we are through, they will promise to give me other transcripts as these hearings are held. Yet while Birch Bayh happens to be a Senator from Indiana who wants this material to make proper decisions on energy issues; but I think the public has a right to know what is going on before the FTC as well. This amendment would make that possible, by requiring that a copy of these documents be put in the public records, pursuant to the provisions of this act.

Mr. KENNEDY. I yield myself such time as I may require.

Mr. President, I urge the acceptance of this amendment, I believe that the Senator from Nebraska has been informed of it as well.

It seems to me to make eminently good sense that if information is going to be made available to a particular individual, and if it meets the other requirements of the Freedom of Information Act relating to disclosure, that information should be available to other citizens as well.

The amendment does have certain protections. When an agency attempts to respond positively and constructively to a request of an individual, even though the act would allow withholding, the amendment has certain protections for the agency so it does not have to release this generally automatically, I think makes a good deal of sense. I believe it carries forward the spirit and the purpose of the legislation in encouraging release of information, and I hope that the amendment will be accepted by the Senate.

Mr. HRUSKA. Mr. President, will the Senator yield me 2 minutes?

Mr. KENNEDY. I yield.

Mr. HRUSKA. Mr. President, upon analysis, it is found that this amendment does clarify the law. The amendment contains a safeguard, by reference to section 4(b) of Public Law 90-23, commonly known as the Freedom of Information Act, which amply takes care of those items which are excluded from its purview.

I have no objection to the amendment. In fact, I favor it.

Mr. KENNEDY. Mr. President, I yield back the remainder of my time.

Mr. BAYH. I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Indiana.

The amendment was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. HRUSKA. Mr. President, I have a brief amendment, which I send to the desk.

The PRESIDING OFFICER. The amendment will be stated.
The legislative clerk read as follows:

On page 14, line 22, insert the word "working" between "10" and "days."

Mr. HRUSKA. Mr. President, this amendment has to do with the time limitation for the purpose of filing an answer or extending the time within which an answer should be given to certain applications for disclosure. The general reference to time limitations is in terms of "working days." By inadvertence, I take it, line 22, page 14, simply says "for more than 10 days." The amendment, technical in nature, would insert the word "working," so that it would be for not more than 10 working days. That is the purpose of the amendment, and I urge its adoption.

Mr. KENNEDY. Mr. President, this is a technical, clarifying amendment. It is useful and consistent with the other provisions of the bill, and I urge its adoption.

I yield back the remainder of my time.

Mr. HRUSKA. I yield back the remainder of my time.

The PRESIDING OFFICER (Mr. Domenici). The question is on agreeing to the amendment.

The amendment was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

AMENDMENT NO. 1361

Mr. HART. Mr. President, I call up Amendment No. 1361.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk proceeded to read the amendment.

Mr. HART. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the Record.

The amendment is as follows:

On page 11, line 15, after the period, insert the following new subsection:

(3) Section 552(b)(7) is amended to read as follows: "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 or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigatory techniques and procedures."

Mr. HART. I yield myself such time as I may require.

Mr. President, this act exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have.

—Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.

That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.

I am offering this amendment on behalf of myself and the following Senators: Mr. Mathias, Mr. Cranston, Mr. Muskie, Mr. Clark, Mr. Ribicoff, Mr. Moss, Mr. Javits, Mr. McGovern, Mr. Proxmire, Mr. Humphrey, Mr. Hatfield, Mr. Biden, Mr. Nelson, and Mr. Abourezk.

This amendment was proposed by the Administrative Law Section of the American Bar Association. It explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques or procedures.

Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.

Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

Second, the protection for personal privacy included in clause (B) of our amendment was not explicitly included in the ABA Administrative Law Section's amendment but is a part of the sixth exemption in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish also to make clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files, and not only the person who is the object of the investigation.

Third, investigatory files compiled for law enforcement purposes would not be made available where production would deprive a person of a right to a fair trial or an impartial adjudication.

Fourth, the amendment protects without exception and without limitation the identity of informers. It protects both the identity of

informers and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential.

Finally, the amendment would protect against the release of investigative techniques and procedures where such techniques and procedures are not generally known outside the Government. It would not generally apply to techniques of questioning witnesses.

The purpose of the Freedom of Information Act is to provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality. This amendment balances those two interests and is critical to a free and open society. This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

Mr. President, I think that it would be useful if a brief excerpt from the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York were printed in the Record. The full document is captioned "Amendments to the Freedom of Information Act." I ask unanimous consent that that material may be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

S. 2543 and H.R. 12471 do not propose any amendment to Exemption 7, but would add to subsection (b) the "Savings Clause" discussed above.

The courts have agreed that Exemption 7 applies to investigations by regulatory agencies as well as criminal investigations. But there is dramatic disagreement over the question of continued non-disclosure after the specific investigation is completed. The Second Circuit, in *Frankel v. SEC*, 460 F. 2d 813 (1972), held that investigatory files are exempt from disclosure forever, on the theory that disclosure of investigatory techniques would undermine the agency's effectiveness and would choke off the supply of information received from persons who abhor, for whatever reason, public knowledge of their participation in the investigation. The court found:

"These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement." *Id.* at 817.

Other jurists, however, have reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed. We agree with this view.

The fear that disclosure of investigative techniques *in general* will hinder an agency's operations appears to be illusory. The methods used for such investigations are widely known and relatively limited in type and scope. The realistic problems are those we have already met—the need to preserve the identity of sources of information *in particular cases*, the need to assure an impartial trial and to protect reasonable personal privacy. In the context of Exemption 7, there is the additional consideration that premature disclosure of the Government's case will allow the civil or criminal defendant to "construct" his defense.

Against these real problems must be weighed important policy considerations which are by now also familiar—that our political system is premised upon public and congressional knowledge of the Executive Branch's activities; that the policy of agency actions is ultimately established by Congress and the public; that

importunate decisions or those based on party politics, campaign contributions and the like are less likely if the public has access to the record of such decisions.

Mr. HART. Mr. President, I reserve the remainder of my time, but I hope very much that the committee and our colleagues are persuaded as to the wisdom of the amendment.

Mr. KENNEDY. Mr. President, I yield myself such time as I may use.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I believe that it would be useful for me to outline for my colleagues briefly why S. 2543 did not initially attempt to amend the seventh exemption of the Freedom of Information Act, and why I presently believe that the amendment proposed by the Senator from Michigan is a constructive and desirable one.

Last October, when I introduced S. 2543, the case law on the subject of investigatory files was substantially different that it is today. During our hearings in the spring of 1973, the subcommittee had before it legislation that would have amended in various ways a number of the exemptions of the FOIA. These proposals were fully discussed and debated. Nonetheless, when I introduced the legislation I believe that the public was secure in its right to obtain information falling within the "investigatory file" exception to disclosure mandated by the act. As Attorney General Elliot Richardson had told our subcommittee:

The courts have resolved almost all legal doubts in favor of disclosure.

Thus, I did not propose a change in the language of that exemption.

In the report on S. 2543, as amended, the Judiciary Committee expressed its position generally:

The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the FOIA, and the increasing acceptance by courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendments to the language of the exemptions.

But we warned that by leaving the substance of the exemptions unchanged—

The committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which duly constrict the application of the act.

Unfortunately, Mr. President, I must agree with the Senator from Michigan that our initial appraisal of the development of the law in the area affected by his amendment has turned out to be short lived. A series of recent cases in the District of Columbia has applied the seventh exemption of the act woodenly and mechanically and, I believe, in direct contravention of congressional intent when we passed that law in 1966. One court a few years back correctly read this intent when it observed:

The touchstone of any proceedings under the act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.

Yet in the most recent decision interpreting the seventh exemption of the Freedom of Information Act, the District of Columbia Court of Appeals observed that—

Recent decisions of this court construing exemption seven have considerably narrowed the scope of our inquiry.

This, Mr. President, was a foreboding that the court was going astray, since the court was limiting its inquiry to avoid discussion of the intent behind the exemption and whether Congress intended documents of the kind sought, under the circumstances, to be kept secret pursuant to that exemption. The court continued:

The sole question before us is whether the materials in question are "investigatory files compiled for law enforcement purposes." Should we answer that question in the affirmative, our role is "at an end."

This is the same kind of determination made by the Supreme Court in the Mink case, when it observed that once a judge determined records to be in fact, on their face, classified, then he could not look beneath that marking to determine whether they were properly classified. We are today reversing that holding of the court by the legislation before us, spelling out that it is Congress intention for courts to look behind classification markings. I think it appropriate and useful that we also spell out our disapproval of the line of cases I referred to earlier, and that we make clear our intention for courts to look behind the investigation mark stamped on a file folder.

The Senator from Michigan has made a persuasive case for the amendment he is proposing, and I will not go over the same ground he has covered. I do want to make two points that bear directly on this issue.

First, whether or not this amendment is adopted, I would like to make it clear that I believe the courts have, in narrowly and mechanically interpreting the seventh exemption, strayed from the requirements and the spirit of the Freedom of Information Act. The Supreme Court has not ruled on the subject yet, and there is a division among various circuits on a number of issues arising from application of that exemption. I thus want the record to show that by accepting the Senator's amendment we will be reemphasizing and clarifying what the law presently requires. If it is not accepted, the Supreme Court will still have the opportunity to set things straight.

Second, I would point out that we do address ourselves in S. 2543 to this issue in a less direct manner. Our report and my opening statement contain extensive discussion of new provisions in this legislation relating to release of records "or portions of records" and to deleting or segregating exempt portions of files or records so that nonexempt portions may be released. Judicial and agency adherence to the requirements of these amendments would go a long way to removing strict and indiscriminating adherence to narrow interpretations of the Freedom of Information Act. This would apply to the area of investigatory files as well as to the other exemptions of the act. So I think that courts would have to reconsider their reliance on any restrictive cases after passage of these new provisions anyway.

The approach suggested by the Senator from Michigan in his amendment, which states the policy considerations to be utilized by agencies and courts in determining whether to disclose investigatory information, is a salutary one. It is the same approach—with the same language—proposed by the American Bar Association representative at our hearings last year. Then, Attorney General Elliot Richardson, testifying at our hearings, told the subcommittee that—

If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered.

These comments were addressed to a rather different proposal to amend the seventh exemption contained in S. 1142, being considered by the subcommittee at the time. And just last week the prestigious Association of the Bar of the City of New York issued its report on amendments to the Freedom of Information Act, in which it too recommended adoption of the language proposed by the ABA, with slight modifications. Since the discussions by the ABA, the Attorney General, and the City of New York Bar Association on this issue are relevant to our consideration of the proposed amendment, I ask unanimous consent that excerpts therefrom be included in the Record at this point.

There being no objection, the material was ordered to be printed in the Record, as follows:

FROM THE STATEMENT OF JOHN MILLER, CHAIRMAN, ADMINISTRATIVE LAW SECTION, AMERICAN BAR ASSOCIATION, JUNE 11, 1973

THE SEVENTH EXEMPTION

S. 1142 also proposes changes in the seventh exemption to the Freedom of Information Act, which relates to investigatory files compiled for law enforcement purposes, by expressly excluding certain specific types of records from the investigatory files exemption (Section 2(d)). However, the Administrative Law Section believes that a better approach is to set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objectives would be frustrated were the information disclosed. Because many different types of information may be contained in an investigatory file for which there are legitimate reasons for non-disclosure, the Section believes that it is unwise to attempt to exclude certain types of records from the exemption under all circumstances. For example, even "scientific tests, reports, or data" (Section 2(d)) contained in an investigatory file, if released prematurely, could interfere with the prosecution of an offense or result in prejudicial publicity so as to deprive an accused of his right to a fair trial. In addition, the proposal set forth in S. 1142 would not resolve the issue as to when the investigatory files exemption terminates, an issue that has arisen in several recent court decisions.

Accordingly, the Administrative Law Section recommends that, if the seventh exemption is to be amended, it be revised to read as follows:

"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) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

FROM THE REPORT OF THE COMMITTEE ON FEDERAL LEGISLATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APRIL 22, 1974

EXEMPTION 7

Exemption 7 now exempts:

"Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

H.R. 5425 and S. 1142 would have amended Exemption 7 to read as follows:

"(7) investigatory records compiled for any specified law enforcement purpose the disclosure of which is not in the public interest, except to the extent that—

"(A) any such investigatory records are available by law to a party other than an agency, or

"(B) any such investigatory records are—

"(i) scientific tests, reports, or data,

"(ii) inspection reports of any agency which relate to health, safety, environmental protection, or

"(iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency."

S. 2543 and H.R. 12471 do not propose any amendment to Exemption 7, but would add to subsection (b) the "Savings Clause" discussed above.

The courts have agreed that Exemption 7 applies to investigations by regulatory agencies as well as criminal investigations. But there is dramatic disagreement over the question of continued non-disclosure after the specific investigation is completed. The Second Circuit, in *Frankel v. SEC*, 460 F.2d 813 (1972), held that investigatory files are exempt from disclosure forever, on the theory that disclosure of investigatory techniques would undermine the agency's effectiveness and would choke off the supply of information received from persons who abhor, for whatever reason, public knowledge of their participation in the investigation. The court found:

"There Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its stronger case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement." *Id.* at 817.

Other jurists, however, have reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed. We agree with this view.

The fear that disclosure of investigative techniques *in general* will hinder an agency's operations appears to be illusory. The methods used for such investigations are widely known and relatively limited in type and scope. The realistic problems are those we have already met—the need to preserve the identity of sources of information *in particular cases*, the need to assure an impartial trial and to protect reasonable personal privacy. In the context of Exemption 7, there is the additional consideration that premature disclosure of the Government's case will allow the civil or criminal defendant to "construct" his defense.

Against these real problems must be weighed important policy considerations which are by now also familiar—that our political system is premised upon public and congressional knowledge of the Executive Branch's activities; that the policy of agency actions is ultimately established by Congress and the public; that importunate decisions contributions and the like are less likely if the public has access to the record of such decisions.

For these reasons, we conclude that the strict definitions in the earlier proposed amendment to Exemption 7 could not be relied upon to produce the intended result in all cases. For example, the non-exemption of "scientific tests, reports or data" could easily cause disclosure of special techniques or the extent of the Government's knowledge with respect to a particular investigation. Therefore, we recommended amendment of Exemption 7 instead to state the policy considerations which are to be utilized by the agencies and courts with respect to disclosure. The Department of Justice and the ABA Administrative Law Section reached the same conclusion and recommended similar amendments.

For the reasons discussed above, we recommend adoption of the language proposed by the ABA, modified slightly to make it clear that (a) *completed* investigations must be disclosed except where confidential sources of information will be *unavoidably* revealed, (b) only specialized techniques, not generally used in investigations, are protected from disclosure; and (c) the exemption applies to "records" not "files," so that disclosable material is not exempted merely by being placed in an investigatory file. Thus, Exemption 7 would read:

"Investigatory records compiled for law enforcement purposes, but only to the extent that disclosure of such records would (A) interfere with pending or actually and reasonably contemplated enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) unavoidably disclose the identity of an informer, or (D) disclose unique or specialized investigative techniques other than those generally used and known."

FROM THE STATEMENT OF ELLIOT L. RICHARDSON, ATTORNEY GENERAL OF THE UNITED STATES, JUNE 26, 1973

Section 2(d) of the bill would also limit the coverage of the exemption by excluding: (1) scientific tests, (2) inspection reports relating to health, safety or environmental protection, and (3) any investigatory records which are also used as a basis for public policy statements or rulemaking.

These changes would seriously impair the law enforcement capability of many agencies.

The provision excluding scientific tests, reports or data from the protection of the exemption presents several problems.

First, it could jeopardize the right to an impartial trial by permitting any requestor to obtain and publish any incriminating scientific tests, such as ballistic reports, before the defendant is brought to trial.

Second, because the act does not permit an agency to determine whether a requestor has a rational basis for seeking information, anyone could insist on obtaining autopsy reports or other medical reports on victims of crime, which reports may not be exempt under exemption six if the victim is dead.

Because this same information can be obtained in discovery proceedings, in which the need of the individual for the reports is a proper consideration, we do not believe an amendment is necessary.

The provision denying the protection of exemption seven to inspection records relating to health, safety or environmental protection would impede the efforts of agencies to take law enforcement action against offenders.

It would permit offenders to obtain these records and thereby discover all of the details that an agency intends to use against them in any law enforcement action, whether civil or criminal.

Finally, the provision excluding from the coverage of exemption seven records which serve as a basis for public statements or regulations not only would inhibit rulemaking in important regulatory areas but also would restrict the flow of information to the public by discouraging official discussion of public business.

For example, if a Justice Department spokesman announced that on the basis of an investigation by the FBI and the Criminal Division a grand jury would be convened to consider indictments, all of the investigatory reports apparently would no longer be protected by exemption seven.

The protection of this information cannot depend on the continued silence of officials in making public statements or issuing regulations.

If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered along the following lines:

The provisions of this section shall not be applicable to matters that are . . . (7), investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided*, that This exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments.

Mr. KENNEDY. Mr. President, I recommend the adoption of the amendment of the Senator from Michigan.

Mr. HRUSKA. Mr. President, I yield myself 10 minutes to speak in opposition to the amendment.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HRUSKA. Mr. President, again we have a situation here where an amendment is proposed that goes to the substance of a bill which was enacted after years of processing. In 1966, agreement was finally reached among several competing interests in this field for the disclosure of public documents. Those issues were resolved and we have a very well balanced act, the deficiencies of which are such that they called for amendment but amendments which have procedural features rather than substantive features. I do believe that while the public has a right to know, there is also the duty of a government to survive. There must be sufficient safeguards under which officials of our Government can preserve national integrity, security, and public interest, and in the case of the instant amendment, law enforcement.

In my judgment, the approval of this amendment would endanger the passage and approval of this bill into law, and I would urge the

Members of the Senate to reject the amendment for that reason and for additional reasons which I shall now recite.

Mr. President, in considering this bill, the Judiciary Committee reviewed an amendment that did not go as far as this one. The Committee decided to reject it because it could hinder the FBI in carrying out its law enforcement responsibilities and, further, because the forced disclosure of FBI information could infringe on the individual's right of privacy. I must oppose this amendment for the same reasons.

The FBI has been successful in the past in apprehending criminal offenders and for carrying out its other investigative duties because of one chief and important asset—that is, its ability to obtain information from its informants and private citizens throughout these United States. In many instances it has not solved a crucial case because of deductive reasoning or a specific clue but because a private citizen was not afraid to come forth and offer a piece of information. In the past, the FBI has usually taken the information it receives as a matter of confidence and assured the individual his name would be kept in confidence.

The passage of this proposed amendment would undoubtedly have the effect of inhibiting FBI informants and citizens from coming forth to offer vital bits of information to the FBI. They will no longer feel confident that their names will remain secret from public scrutiny, possibly subjecting them to embarrassment and/or reprisals. The net result will be a crippling effect on the FBI's ability to garner information and obtain successful prosecution in criminal cases.

Moreover, the release of any material into the public domain is likely to cause embarrassment to individuals mentioned in FBI files. This Congress has exhibited a marked increase in the concern for the protection of privacy of U.S. citizens. There are literally dozens of bills being circulated in Congress today with various provisions attempting to protect private citizens from unauthorized disclosure of many Government records which may concern them.

Indeed, I fear that this amendment will work cross-purposes to the bills on criminal justice information systems, such as the measures introduced by the senior Senator from North Carolina (Mr. Ervin) and this Senator.

The basic thrust of these bills is to maintain the confidentiality of law enforcement records. We have held extensive hearing on these bills and throughout these hearings the point has been repeatedly stressed that information in law enforcement files must be kept in confidence to insure that the individual's right to privacy is secure. Yet, this amendment purports to give anyone the right to request and receive some of these very same records. I can think of no other instance where an amendment to a bill has posed such a grave threat to the very thrust of a major bill that is still in committee and has yet to come to the floor.

Mr. President, the threat to personal privacy that such an amendment poses can already be documented. The Department of Justice has adopted regulations which authorize release of files which are over 15 years old to historical researchers. Like the proposed amendment, the regulations provide that the FBI can delete information which might reveal the identity of informants.

In one instance, a researcher asked for the files on the investigation of Ezra Pound for treason. Pursuant to its regulations, the FBI deleted the names of the informants and other information that it thought could reveal his identity. Yet, the research was so knowledgeable about the facts of the case that he was able to link the information in the file to the actual informants. The researcher then went on in his article to criticize these informers for cooperating with the FBI and squealing on their friend, Pound.

Apart from the merits of it, apart from the justice or injustice of it, Mr. President, if it becomes known that files may be released subject to deletions such as those enumerated in the amendment proposed by the Senator from Michigan, if it becomes known and if by deduction and by the supplying of additional extraneous information those names can, in effect, be restored by a researcher, then the forecast can be readily and reliably made that the sources for FBI information will dry up and become fewer and fewer as time goes on. This was an issue in the Pound case that arose more than 15 years after the file was current. But the Department is finding administrative difficulties with the regulations which have been adopted; regulations which are very similar to those which the Senator from Michigan seeks to put into the concrete form of a statute.

Mr. President, a few more instances like that of the Ezra Pound case and the FBI will be hard put to use informants as legitimate law enforcement techniques.

Mr. President, the FBI is very strongly opposed to this amendment. They focus on the point that their files are investigatory for law enforcement purposes, not for the purpose of writing stories. It is for one purpose only, and that is a law enforcement purpose. Since that is their mission and since enforcement of the law is a matter of prime importance to this country, this amendment should be denied and rejected.

The proposed amendment would apply to records of any age, including those most recently compiled. And it is commonsense that the more recent the case and the more recent the forced disclosure of the identity of the informant, the more impact such a disclosure will have on other individuals who may wish to do their part to assist the FBI in enforcing the law.

In my judgment, the mere approval of this amendment, even without any further procedures under it, will have that effect, Mr. President, because there will always be the imminent potential that there will be a release of that document and that there will be, through it, notwithstanding the deletion of names, the ability to trace the informant's name, address, and location.

Furthermore, it is going to be very difficult for the FBI to know how much information can be disclosed without exposing an informant. The FBI cannot know the extent of the requester's knowledge on the subject, what other information the requester may have to link certain items to the informants or even the purpose for which the requester wants to use the information.

Mr. President, I yield myself 5 minutes more.

The identification of an informant, even if accomplished by other information, together with a reference that portions of an FBI file

were obtained, can strike fear in the hearts of those who already have cooperated with the FBI. This fear will be not only for their reputations but also for their own safety and that of their families.

Mr. President, as I already have mentioned, the FBI is operating under guidelines that apply to records over 15 years old. Those guidelines protect categories of information similar to the categories the proposed amendment purports to protect. However, as is clearly documented, the FBI is experiencing some difficulties under standards which go further and protect more information than those proposed in the amendment. In addition to the problem of revealing informants, it is my understanding that the estate of one individual whose file or portions of it were disclosed intends to bring suit against the FBI for invading the privacy and adversely affecting the reputations of the relatives of the individual.

In my view, we should allow the FBI to have more time to gain more experience in this difficult field before we embalm any standards in a statute. Perhaps some of the problems can be ironed out. Let us legislate on the basis of experience, not on unfounded forecasts of what might occur in the future, and certainly not in the vacuum of saying that the public has a right to know without referring to the rights that society possesses, as well as the rights of private individuals who are involved.

Mr. President, we are dealing in this matter with what I believe to be the most important rights, and in some respect the most important rights, an individual may possess, his right to privacy, and his right to personal safety. This amendment poses a threat to those rights.

For that reason, Mr. President, I oppose the amendment, and I urge my colleagues to take the same step when they come to casting their votes.

Mr. President, I ask unanimous consent that there be printed in the Record a statement by the distinguished senior Senator from South Carolina (Mr. Thurmond) on this particular subject and on this particular point, he being absent from the Senate on official business.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT BY SENATOR THURMOND

When the Freedom of Information Act was enacted in 1966, it was well recognized that Congressional intent behind such an Act was directed towards regulatory agencies as distinguished from investigative agencies. This premise is reaffirmed when it is noted that Congress went to great lengths to insure that data contained in investigatory files would not be disclosed to unauthorized agencies or individuals, by specifically listing as one of the nine exemptions to disclosure under the Act exemption seven pertaining to investigatory files. The passage of time has failed to produce worthwhile evidence that would encourage a change from that original stance.

All of us are aware of the general feeling permeating the country that our citizens want to know what their Government is doing and therefore, should have access to the files, of various Governmental agencies. However, by the same token, we are also concerned about a mutual problem of invasion of an individual's privacy. I contend that this fundamental right of privacy is as great, if not greater, than the right owed to the general public for open disclosure.

The FBI, being an investigative agency of the Federal Government, obtains raw, unevaluated data from individuals from all walks of life who furnish this information with the implied or expressed understanding that such information is being furnished the Government in confidence, never to be disclosed unless to an official, authorized individual or agency. Senate Report No. 813 supports this view

by stating in part, "it is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." The House, in Report No. 1497 also took note of exemption seven providing protection for data such as that which is contained in the files of the Federal Bureau of Investigation.

This position has also come under judicial review and has been sustained in a number of legal proceedings. In *Weisberg v. Department of Justice*, which involved a suit by Mr. Weisberg for an FBI Laboratory report which was part of the investigation of the assassination of President Kennedy, the court held that once it has been determined by a District Judge that files, "(1) were investigatory in nature; and (2) were compiled for law enforcement purposes, such files are exempt from compelled disclosure." As recently as May 15, 1974, the Supreme Court denied certiorari in this case.

In a more recent case in which some Members of Congress brought suit against the FBI for any data it might have in its files concerning them, the District Court of the District of Columbia held that in regards to background-type investigations conducted on an individual being considered for Federal employment, such investigations are protected from disclosure under the seventh exemption of the Freedom of Information Act. It is clearly apparent that both Congress and the courts have seen the wisdom of excluding from disclosure data contained in investigatory files compiled for law enforcement purposes.

Departmental Order 528-73 which became effective in July of last year, basically provides that although Justice Department investigatory files are exempt from compulsory disclosure, persons engaged in historical research projects will be accorded access to material of historical interest that is more than 15 years old as a matter of administrative discretion. It is my understanding that since July of last year, the FBI has attempted to implement the provisions of this Order, even though it has been confronted with enumerable problems relating to the invasion of an individual's privacy.

"The New York Times" in its April 21st issue, reported that the researcher, who had requested and received data concerning Ezra Pound from the files of the FBI, was successful in identifying a number of individuals who had furnished the Bureau data concerning Pound. This, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished. The researcher went on and not only identified the individuals furnishing information to the FBI by name, but also described the data they gave as well as expressed surprise that Pound's "closest friends" cooperated with the FBI. This points out the futility of attempting to protect a source of information, by deleting identifying data, from an experienced researcher who can easily put the pieces of the puzzle together.

Disclosures of this type of information can only hinder the investigative responsibilities of the FBI or those of similar agencies whose primary responsibility is to investigate criminal activities. The FBI has always staked its high reputation on the fact that information given to it in confidence is kept secret. It is just such assurance as this that encourages individuals from all walks of life to furnish this agency information felt to come within its investigative responsibilities. If we now attempt, through legislation, to discourage such people from reporting to their Government violations of law because of fear that their identities will be made public, we will be doing a disservice to our country.

Therefore, I am unalterably opposed to any amendment which will weaken the investigative effectiveness of the FBI or other agencies responsible for investigating criminal activities, by shutting off one of their greatest sources of information—the American public.

Mr. HART. Mr. President, I yield 10 minutes to the distinguished Senator from Connecticut.

Mr. HRUSKA. Mr. President, will the Senator yield half a minute to me on my time?

Mr. WEICKER. I yield to the distinguished Senator from Nebraska.

Mr. HRUSKA. Mr. President, reference was made to the standards set forth in the amendment which the Senator from Michigan has offered as an American Bar Association proposal. That suggestion was not made by the Senator from Michigan. He correctly described it as a position recommended by the administrative law section of the American Bar Association. All of us who are familiar with the pro-

ceedings of that association know that that section, when it reports to the House of Delegates, thoroughly canvass and make their effort an additional process. After it has been carefully considered and recommended, it then goes to the House of Delegates.

The Senator has correctly described it. However, it has come to be known as an American Bar Association proposal, and it is not.

Mr. WEICKER. Mr. President, I wish to speak in favor of the amendment offered by the distinguished Senator from Michigan. I think it is a great amendment. I think it relates to a matter that should have received our attention and the attention of the American people a long time ago. If it had and if we had acted, many of the abuses which we place under the heading of Watergate would never have occurred.

Mr. President, I notice in the memorandum distributed by the Federal Bureau of Investigation to various Members of the U.S. Senate, a statement is made in opposition to the amendment of the Senator from Michigan, that the Hart amendment would:

Destroy the confidence of the American people in the Federal investigative agencies.

I have been asked by many young people in my State as to what for me was the greatest surprise of Watergate. I have responded by saying that the greatest revelation was the fantastic scope and quality of abuses committed by the Federal law enforcement and intelligence community; that these various agencies—be they the FBI, the CIA, the military intelligence, or the Secret Service—had escaped accountability for such a long period of time that it was only a matter of time before the little acknowledgements and the little favors snowballed into the types of massive abuses which surfaced before the Senate Select Committee.

There is nothing stated in the Constitution which places any of our law enforcement agencies in some special status separate and apart from either the executive, or congressional or judicial branches.

Yet there is not one Senator who can attest to the fact that we have exercised the type of supervision and have demanded the type of accountability of these agencies as we do of other agencies of the Government. Slowly but surely, as our legislative processes mature, one after another of the sacred bureaucratic cows comes tumbling down. And as they have, we have produced better government.

How long ago was it, for example, that it would have been unpatriotic for us to question the Defense Department? Now, we are long over that hurdle, and we have better defense because of it.

It was not too long ago that we could not question our foreign policy. We will have better foreign policy because Congress participates.

The time is long overdue to say that the intelligence agencies are performing a special function, and that we should not be a part of that function.

Abuses committed are our responsibility because there is nothing in the Constitution that says that we should not act. Rather, it is our responsibility to achieve accountability, to exercise supervision over all agencies of Government.

So when the Senator stated that it would destroy the confidence of the American people in the agencies and that that was a reason to be

against the amendment, let me say that the American faith in those agencies has never been at a lower point, because we have never had the type of legislation as is contained in the amendment offered by Senator Hart this afternoon.

I have already made the statement to the Senator from Michigan and the Senator from Massachusetts that I consider the amendment too weak.

My feeling is that supervision ought to be directed and not via the courts. When I am elected a U.S. Senator from the State of Connecticut, I have my security clearance. It could be that I am a crook or in the pay of a foreign government. Sorry about that. That is one of the risks of a democracy. However, I have faith in that the democratic process minimizes that possibility.

When a man or woman is elected, he or she represents the people. And he or she is the one who should supervise. That is the democratic way.

We should make sure that we get into what every Government agency is doing. Otherwise, how can we tell whether they are performing their function under the Constitution? I cannot assure my constituents that I am performing my duty if I am not allowed to look here or not allowed to look there.

So by our nonaction we have built up a new type of government. It operates under a new Constitution, and that new Constitution and that new type of Government brought us Watergate.

Let me say this insofar as law enforcement is concerned. I remember well an interview several years back Justice Black had with Martin Agronsky.

Martin turned to Justice Black and said:

Because of these recent Supreme Court decisions, doesn't it make it more difficult to convict an individual of any particular crime or, to put it in the words of others, aren't you being soft on the criminal?

Justice Black responded, he said:

Well, of course, it makes conviction more difficult. Have you read the Bill of Rights? The fact that a man is entitled to counsel makes it more difficult to convict him. The fact that you have a right as an American to a trial by jury makes it more difficult to convict an individual.

He went down the whole list of rights that we, as Americans, had, and which makes it more difficult to close that prison door on any one of us.

That is the view that he took upon our rights as American citizens, in making it more difficult, to incarcerate an American.

I make no bones about the fact that from a law enforcement and efficiency standpoint, ours is a very inefficient system of government because its whole emphasis is on the individual rather than society as a whole.

I have heard this term, "What's good for society." If that is the focus, we have lost the greatness that is ours as a nation; for, we have achieved a strength way beyond our head count because each of us has been allowed to flourish, as an individual rather than as a dot in a mob.

It is an inefficient form of government, but a very great form of government.

So I correlate this to what sits before us insofar as this amendment is concerned.

Yes, it is going to make the job of the law enforcement agencies more difficult in that it brings them out into the open. But, let me assure you, the far greater danger lies behind closed doors and in locked files. None of the abuses that we have seen come out of this system would have happened if more people, more eyes, more ears, had been on the scene. I would hope this body would adopt the amendment of the distinguished Senator from Michigan (Mr. Hart) because to sit and groan as to all the horrible things that have happened without action would be ludicrous. A finger-pointing exercise insofar as the executive branch of Government is concerned is not good enough. Congress has to have the guts to stand up and say, "We are doing something." We cannot do something by traveling the old ways.

What is expected of each of us now is that we stand up and look where we have not looked before, and that is exactly what this amendment attempts to achieve, and why it is supported so wholeheartedly. It is not antilaw enforcement, and it is not antipatriotic. This amendment is democracy. This amendment is the patriotism that I stand for.

I thank the distinguished Senator from Michigan.

Mr. HART. Mr. President, I have felt very strongly that this amendment was sound and desirable. I salute the Senator from Connecticut. I have no doubt this is precisely the way we must go. I wish very much, others had been free to hear him.

The Senator from Nebraska correctly cautions us that there is an obligation and a duty and a right of a government to survive. But survival for a society such as ours hinges very importantly on the access that a citizen can have to the performance of those he has hired. That is important to the survival of government, too. That is what this amendment seeks to do. As the Senator from Connecticut stated so eloquently, this is really the meat and potatoes of the society that we so often describe as a free society.

I reserve the balance of my time.

Mr. HRUSKA. Mr. President, I yield myself 5 minutes.

Mr. President, the first duty of a nation is to survive. We figure that usually in terms of national defense where we are supposed to be equipped with such weapons and such military forces that we will be able to withstand and successfully resist invasion.

Yet, it has been written many, many times in political history and in philosophical government discussions that if this Nation is going to fall it is not going to fall because of external pressure or invasion from without. It is going to fall because of events that happened within its interior, and we have witnessed here for the last several decades an on-rush and an increase in crime and increasing problems in the field of law enforcement.

Mr. President, as against any individual rights to see what is in an FBI file, such as those to which we were just referred by the senior Senator from Michigan, what is the price for giving individual citizens a right to go into Government files? There will be a continued and increasing inability of the Government to deal with violators of the law and enforcement of the law, that price is unacceptable, totally unacceptable. This Nation cannot survive if we are not able to deal with the lawless elements.

It is nice to say that our freedoms are valuable and we must have the right to know and to do this and that or the other thing, but if, in the process of getting those things we are going to be unable to deal with organized crime, if we are going to be unable to deal with those who willfully violate our criminal laws and we impair the tools or even do away with the tools that we have available to us now for the purpose of dealing with those violators of law, then indeed we will have been very, very misguided in this business of trying to see that the Nation survives.

I say again that the adoption of this amendment, together with the adoption of the amendment offered here by the Senator from Maine (Mr. Muskie), Mr. President, will gravely endanger the enactment and the effectiveness of the bill before us today.

The better course of wisdom earlier this afternoon would have been to put the substance of the amendment of the Senator from Maine (Mr. Muskie) on a separate and independent basis.

That same thing is true in reference to the pending amendment. Let us put this Freedom of Information Act into a position where it can operate effectively, efficiently and for its declared purposes in those areas upon which we find agreement, and then go onto the proposition of taking substantive amendments to the Freedom of Information Act and treating them on their own merits.

They are two separable problems, and I say the price is just too high; it is too high to pay to try to treat the whole subject in one bill when the passage and the approval of certain of these amendments will actually endanger its becoming law.

It is my hope that the amendment will be defeated.

Mr. WEICKER. Mr. President, will the distinguished Senator from Nebraska yield for a question?

Mr. HRUSKA. I am happy to yield.

Mr. WEICKER. The distinguished Senator from Nebraska refers to the increase in lawlessness, and so forth. How do we deal, since these matters have come to our attention of late, with the lawless elements within the Federal Bureau of Investigation, within the CIA, within military intelligence, within the Secret Service, within the Internal Revenue Service? How do we deal with lawless elements within those Government agencies?

Mr. HRUSKA. The pending amendment does not bear upon that in any way whatsoever, because if we are going to say they must all function in the open, they must all function in total frankness and with total public disclosure, there may well be an erosion of our law-enforcement capabilities.

The answer to the question is simply this: There are regular oversight practices and procedures available to the Congress for the purpose of investigating these abuses, if they are abuses, that come to light. Furthermore, criminal abuses can be prosecuted in the courts.

I cite the case of the narcotics agents in Illinois, who allegedly raided a wrong address in search of heroin or whatever the controlled substance was. For awhile, it was said they may have infringed upon the rights of the individuals. They were tried in court. They were tried in court for lawless entry and a violation of law. Those issues were submitted to a jury and they were found innocent.

Yes, bring to court Government officials who abuse the law if there is any violation of law. Furthermore, as I earlier indicated, we also have adequate procedures here in Congress. We have legislative oversight committees.

Mr. WEICKER. I do not believe that the amendment of the Senator from Michigan involves throwing the FBI open to the mob. The amendment of the Senator from Michigan, as I understand it, employs regular court procedures, Mr. President, and is very restrictive and specific.

I repeat my question: How do we find out? How do we find out unless we have access to information as to the lawlessness that could take place or has taken place in the agencies? How do we find out?

Mr. HRUSKA. There are ways of doing it. We have legislative oversight. We have the courts to resort to where there is a violation of law.

But, Mr. President, there is a more fundamental question involved here: How are we going to find out about illegal doings of the law enforcement agencies?

I ask this question, to which I should like an answer from the Senator from Connecticut: How are we going to investigate effectively violations of law, how are we going to investigate organized crime when, if this amendment is passed, individuals will say, "Nothing doing, Mr. FBI, because if we give you a statement, it will be in that file, and there will be a court order saying that the file should be disclosed. My name may be deleted but there are other ways to find out, and they may identify me, threaten my family, or myself." These are not possibilities I am dreaming up. They can be documented by the examples I referred to earlier.

The question is, therefore, how are we going to investigate successfully to the prosecutorial and conviction stage the violation of law at large in the community?

It is a big, a massive, and a serious proposition, as all of us know.

Mr. WEICKER. I am glad to respond to the Senator from Nebraska. The fact is, there has not been a good job done in those areas of law enforcement where the agencies operated illegally. The problem is that in the quest for law and order, case after case after case after case has been thrown out because the law enforcement and intelligence communities acted illegally. So I do not think we attain any particular status of accomplishment in conquering organized crime, or any crime whatsoever for that matter, with illegal activities resulting in cases being thrown out of court.

I would suggest that the record speaks for itself. Frankly, I never thought the record of former Attorney General Ramsey Clark was that good. But, comparing his record with that achieved by succeeding Attorneys General, he looks like Tom Dewey in his prosecutorial heyday.

Mr. HRUSKA. That record is bad, but do we want to make it worse by adopting this amendment which threatens to tie the hands of the FBI and dry up their sources of information? I say, with that, the soup of the broth is spoiled, and I see no use in adding a few dosages of poison.

The pending amendment should be rejected.

Mr. KENNEDY. Mr. President, I do not recognize the amendment, as it has been described by the Senator from Nebraska, as the amend-

ment we are now considering. I feel there has been a gross misinterpretation of the actual words of the amendment and its intention, as well as what it would actually achieve and accomplish. So I think it is important for the record to be extremely clear about this.

If we accept the amendment of the Senator from Michigan, we will not open up the community to rapists, muggers, and killers, as the Senator from Nebraska has almost suggested by his direct comments and statements on the amendment. What I am trying to do, as I understand the thrust of the amendment, is that it be specific about safeguarding the legitimate investigations that would be conducted by the Federal agencies and also the investigative files of the FBI.

As a matter of fact, looking back over the development of legislation under the 1966 act and looking at the Senate report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the "investigatory file" exemption would be extremely narrowly defined. It was so until recent times—really, until about the past few months. It is to remedy that different interpretation that the amendment of the Senator from Michigan which we are now considering was proposed.

I should like to ask the Senator from Michigan a couple of questions.

Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Mr. HART. The Senator from Michigan is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do.

Mr. President, while several Senators are in the Chamber, I should like to ask for the yeas and nays on my amendment.

The yeas and nays were ordered.

Mr. KENNEDY. Furthermore, Mr. President, the Senate report language that refers to exemption 7 in the 1966 report on the Freedom of Information Act—and that seventh exemption is the target of the Senator from Michigan's amendment—reads as follows:

Exemption No. 7 deals with "investigatory files compiled for law enforcement purposes." These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court.

It seems to me that the interpretation, the definition, in that report language is much more restrictive than the kind of amendment the Senator from Michigan at this time is attempting to achieve, of course, that interpretation in the 1966 report was embraced by a unanimous Senate back then.

Mr. HART. I think the Senator from Massachusetts is correct. One could argue that the amendment we are now considering, if adopted, would leave the Freedom of Information Act less available to a concerned citizen that was the case with the 1966 language initially.

Again, however, the development in recent cases requires that we respond in some fashion, even though we may not achieve the same breadth of opportunity for the availability of documents that may arguably be said to apply under the original 1967 act.

Mr. KENNEDY. That would certainly be my understanding. Furthermore, it seems to me that the amendment itself has considerable sensitivity built in to protect against the invasion of privacy, and to protect the identities of informants, and most generally to protect the legitimate interests of a law enforcement agency to conduct an investigation into any one of these crimes which have been outlined in such wonderful verbiage here this afternoon—treason, espionage, or what have you.

So I just want to express that on these points the amendment is precise and clear and is an extremely positive and constructive development to meet legitimate law enforcement concerns. These are some of the reasons why I will support the amendment, and I urge my colleagues to do so.

The PRESIDING OFFICER (Mr. Domenici). The Senator from Nebraska has 6 minutes remaining.

Mr. HRUSKA. Mr. President, I should like to point out that the amendment proposed by the Senator from Michigan, preserves the right of people to a fair trial or impartial adjudication. It is careful to preserve the identity of an informer. It is careful to preserve the idea of protecting the investigative techniques and procedures, and so forth. But what about the names of those persons that are contained in the file who are not informers and who are not accused of crime and who will not be tried? What about the protection of those people whose names will be in there, together with information having to do with them? Will they be protected? It is a real question, and it would be of great interest to people who will be named by informers somewhere along the line of the investigation and whose name presumably would stay in the file.

Mr. President, by way of summary, I would like to say that it would distort the purposes of the FBI, imposing on them the added burden, in addition to investigating cases and getting evidence, of serving as a research source for every writer or curious person, or for those who may wish to find a basis for suit either against the Government or against someone else who might be mentioned in the file.

Second, it would impose upon the FBI the tremendous task of reviewing each page and each document contained in many of their investigatory files to make an independent judgment as to whether or not any part thereof should be released. Some of these files are very extensive, particularly in organized crime cases that are sometimes under consideration for a year, a year and a half, or 2 years.

Mr HART. Mr. President, will the Senator yield?

The PRESIDING OFFICER. All time of the Senator has expired.

Mr. KENNEDY. I yield the Senator 5 minutes on the bill.

Mr. HART. Mr. President, I ask unanimous consent that a memorandum letter, reference to which has been made in the debate and which has been distributed to each Senator, be printed in the Record.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

MEMORANDUM LETTER

A question has been raised as to whether my amendment might hinder the Federal Bureau of Investigation in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.

However, my amendment would not hinder the Bureau's performance in any way. The Administrative Law Section of the American Bar Association language, which my amendment adopts verbatim, was carefully drawn to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file:

If informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosures;

If the Bureau's confidential techniques and procedures would be threatened, there would be no disclosure;

If disclosure is an unwarranted invasion of privacy, there would be no disclosure (contrary to the Bureau's letter, this is a determination courts make all the time; indeed the sixth exemption in the Act presently involves just such a task);

If in any other way the Bureau's ability to conduct such investigations was threatened, there would be no disclosure.

Thus, my amendment more than adequately safeguards against any problem which might be raised for the Bureau. The point is that the "law enforcement" exemption has been broadly construed to include any investigation by a government agency of a federally funded or monitored activity. The courts only require that the investigation might result in some government "sanction" such as a cutoff of funds—and not necessarily a prosecution. The investigations of auto defects, harmful children's toys, or federally-assisted hospitals could all be hidden completely from public view, and from criticism of government inaction or favoritism, unless my amendment is adopted. This is the danger which the ABA proposal seeks to correct. These are rarely FBI investigations.

Beyond these legitimate concerns, the Bureau's letter presents arguments which reject the entire Freedom of Information Act and all efforts by the press and the public to find out what their government representatives are actually doing.

The Bureau objects that government employees would have to review files to determine whether disclosure would really be harmful, and that someone might sue if he disagrees with an agency's refusal.

But the fundamental premise of the Freedom of Information Act is precisely that the opportunity to seek information is essential to an informed electorate. It is also axiomatic that an official should not be the sole judge of what he must disclose about his own agency's activities.

Surely if the events of the last two years, collectively known as Watergate have taught us anything, they have underlined vividly the wisdom of these two assumptions.

Sincerely,

PHILIP A. HART.

The PRESIDING OFFICER. The question is on agreeing to the amendment. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollings), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel) and the Senator from Rhode Island (Mr. Pastore) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett), the Senator from New York (Mr. Buckley), and the Senator from Idaho Mr. (McClure) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. Thurmond) would vote "nay."

The result was announced—yeas 51, nays 33, as follows:

[No. 220 LEG.]

YEAS—51

Abourezk	Hatfield	Nelson
Aiken	Hathaway	Packwood
Bayh	Humphrey	Pearson
Beall	Jackson	Percy
Biden	Javits	Proxmire
Brooke	Kennedy	Ribicoff
Burdick	Magnuson	Roth
Case	Mansfield	Schweiker
Chiles	Mathias	Stafford
Church	McGee	Stevens
Clark	McIntyre	Stevenson
Cook	Metcalf	Symington
Cranston	Metzenbaum	Taft
Eagleton	Mondale	Tunney
Fong	Montoya	Weicker
Hart	Moss	Williams
Haskell	Muskie	Young

NAYS—33

Allen	Curtis	Huddleston
Baker	Dole	Johnston
Bartlett	Domenici	Long
Bellmon	Eastland	McClellan
Bentsen	Ervin	Nunn
Bible	Goldwater	Randolph
Brock	Griffin	Scott, Hugh
Byrd, Harry F., Jr.	Gurney	Scott, William L.
Byrd, Robert C.	Hansen	Stennis
Cannon	Helms	Talmadge
Cotton	Hruska	Tower

NOT VOTING—16

Bennett	Hartke	Pastore
Buckley	Hollings	Pell
Dominick	Hughes	Sparkman
Fannin	Inouye	Thurmond
Fulbright	McClure	
Gravel	McGovern	

So Mr. Hart's amendment was agreed to.

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. MOSS. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President—

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. I yield to the Senator from Pennsylvania without losing my right to the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. HUGH SCOTT. Mr. President, I thank the Senator from Massachusetts.

The PRESIDING OFFICER. Will the Senator suspend? Who yields time?

Mr. KENNEDY. I yield 5 minutes to the Senator from Pennsylvania, or whatever time he needs.

AMENDMENT OF FREEDOM OF INFORMATION ACT

The Senate continued with the consideration of the bill (S. 2543) to amend section 552 of title 5, United States Code, commonly known as the Freedom of Information Act.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. KENNEDY. Mr. President, I yield myself 1 minute.

The Senator from Kansas has mentioned to me an amendment which he was considering offering to expand one of the exemptions dealing with medical research, and its relationship to the category of confidential information. Although we have no specific information about its impact at this time, I have indicated that I will work with him to review the proposal and make a determination as to its merit. The Senator would then have the opportunity to offer his amendment at a later time, perhaps to a health bill that will be pending.

Mr. DOLE. Mr. President, based on that assurance, I would like to commend the Judiciary Committee's Subcommittee on Administrative Practice and Procedure, under the very capable leadership of the distinguished Senator from Massachusetts (Mr. Kennedy), for its work on this bill to refine the provisions of the Freedom of Information Act.

I think they quite properly endeavored to correct some of the many problems of implementation created by the deficiencies and shortcomings of the existing law under section 552 of title 5, United States Code. However, I am concerned that, as spelled out on the first page of its report, the committee chose not to approach and attempt to resolve the difficulties emanating from the "exceptions to disclosure" contained in subsection (b) of the relevant section.

They did so, apparently, on the premise that such "exceptions" had been substantially clarified through numerous reported court decisions. I would have to take issue with this position, particularly as it involves item 4 pertaining to "trade secrets," and the definition thereof. For there are many yet unsettled questions in this area, probably as the result of our failure to adequately specify by statute exactly what is meant by such a "secret."

Accordingly I had considered offering to S. 2543 the following amendment to which Senator Kennedy has referred:

On page 17, between lines 12 and 13, insert the following new subsection: Section 552(b)(4) of title 5, United States Code, is amended to read as follows: "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential, including applications for research grants based on original ideas."

Mr. President, very briefly, this was a simple amendment intended to clarify in part the application of the Freedom of Information Act

as it directly relates to research grants. I have received several letters on this subject from Kansas educators—especially those associated with medical or other scientific investigations—all expressing criticism of the act's interpretation and ultimate impact on original experimental project studies.

COMPETITION IN RESEARCH

Basically, their arguments have been that research, like any other free enterprise, is highly competitive. And while individuals capable of performing experiments using the ideas of others are rather plentiful, creative individuals with new ideas of their own are much less common. Therefore, it is extremely important that the ideas of such investigators be protected.

It seems to me, then, that the scientist who applies for a research grant, based on his original idea, should not have to risk the exposure of that notion in a public document for anyone to test before he himself has the opportunity to be awarded funds to perform the necessary experiments; that is, the confidentiality of an application for a research grant being the integral part of the granting process that it is, the safeguarding of the ideas contained therein should be imperative.

PROTOCOL OF GRANT APPLICATIONS

This very standard has been generally invoked in the past, as described by Dr. John F. Sherman, Deputy Director of National Institutes of Health, during his testimony before a House subcommittee surveying the granting process in hearings of June 1972. Certain portions of his remarks are particularly pertinent, I think, and merit the attention of my colleagues.

Reading from his statement, Dr. Sherman said that—

The information provided in grant applications submitted to the NIH is treated as confidential. Because research scientists and academic clinicians owe their advancement and standing in the scientific community to their original research contributions, their creative ideas are of critical importance and research scientists carefully protect their ideas. Thus, to the scientists and to the research clinician, research designs and protocols are regarded and treated as proprietary information, just as trade secrets are protected by the commercial and industrial sector.

If we are to encourage vigorous competition in health research, the NIH must respect applicants' ideas and protect them. If they could not be assured of this confidentiality, we believe the NIH review system and its encouragement of scientific competition could not be sustained. Scientists would not supply the explicit details of their proposed research approach and methodology essential for competent review, and the NIH ability to obtain effective evaluation of scientific merit for further programmatic judgments would be markedly hampered.

Mr. President, I ask unanimous consent that the remaining selected extracts of Dr. Sherman's testimony be included in the Record at this point.

There being no objection, the testimony was ordered to be printed in the Record, as follows:

PARTIAL EXTRACT OF TESTIMONY OF DR. JOHN F. SHERMAN, DEPUTY DIRECTOR,
NATIONAL INSTITUTES OF HEALTH, DURING HEARINGS BEFORE A SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS

FLOW OF INFORMATION TO THE PUBLIC REGARDING THE RESEARCH GRANT PROGRAM

1. Applications

While the substance of the research grant applications is considered to be privileged information, a notice of the application is sent to the science information exchange. The science information exchange is an informational system operated by the Smithsonian Institution.

Section 1 of the research grant application is entitled "Research Objectives." This particular sheet contains no privileged information. It includes the name and address of the applicant organization as well as the name and other pertinent information regarding the professional personnel engaged on the project, the title of the project, and an abstract of the proposed project which has been prepared by the principal investigator.

This sheet is sent to the science information exchange and is available from them when the project is funded. The public, particularly the scientific community, may request that information about individual projects or aggregates of projects from that organization. At the time an award is made, this information is also provided to the SSIE, plus information regarding the dollar amount of the award.

2. Research grant awards

Public notices of the research grants awarded by the NIH are made available in a number of publications:

(a) Each year a cumulative list of awards made during the previous fiscal year is published in a series of volumes entitled "Public Health Service Grants and Awards" through the U.S. Government Printing Office. Data with regard to the awards are broken down in a number of fashions. Principally, however, this is by institution, by States, by principal investigator, the project title, the initial review group, the grant number, and the dollar amount.

(b) The Division of Research Grants also issues a two-volume series each year entitled "Research Grants Index," which displays the grant awards by major rubric headings, such as arthritis, brain injury, gastrointestinal circulation, et cetera. The research grants are also indexed by number and alphabetical listings of investigators.

(c) In addition to these formal publications, interim listings of grant awards are also available to interested individuals or organizations, including members of the press. Notice of a grant award is also sent to the congressional Representative in whose district the grantee institution is located.

3. Notification to principal investigator re applications which are disapproved or "approved but not funded"

For those applications which are disapproved or, though approved are not awarded, information summarizing the reviewer's opinions regarding scientific merit will be sent to the principal investigator upon his request. Since this information relates to the original ideas of the principal investigator and reflects on his qualifications as a scientist, it is not released to any other request or without the principal investigator's consent.

Mr. DOLE. Mr. President, in spite of this practice in the treatment of grant applications, the courts have, unfortunately, not always seen fit to accept it as being in compliance with the Freedom of Information Act provisions. And I think this may be due in great part to the vague language used in the previously mentioned "exemptions" subsection.

In fact, in ruling last November that privileged research grant information must be made public, U.S. District Judge Gesell admonished Congress for its “* * * imprecise and poorly drafted freedom of information statute.” I believe the entire backdrop and rationale of that decision—which is currently on appeal—is important in the consideration of this amendment, and ask unanimous consent that the complete memorandum opinion and order be printed in the record.

There being no objection, the decision was ordered to be printed in the record, as follows:

[U.S. District Court for the District of Columbia—Civil Action No. 1279-73]

WASHINGTON RESEARCH PROJECT, INC., PLAINTIFF, VERSUS DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND CASPAR W. WEINBERGER, DEFENDANTS

MEMORANDUM OPINION

Plaintiff invokes the Freedom of Information Act, 5 U.S.C. § 552, and seeks to compel production of certain records from the Department of Health, Education, and Welfare and one of its constituent agencies, the National Institute of Mental Health (NIMH). An injunction and declaratory judgment are sought. Plaintiff's written request for production, inspection and copying of specified records has been fully processed through appropriate administrative channels and the issues are accordingly properly before the Court, which has jurisdiction under 5 U.S.C. § 522(a)(3).

On April 13, 1973, plaintiff requested, with detailed specification, documents relating to eleven designated research grants by the Psychopharmacology Research Branch of NIMH for studies on the drug treatment of children with learning difficulties or behavioral disorders, particularly hyperkinesis. All but two of the research grants involve the use of one or a combination of stimulant or anti-depressant drugs, including methylphenidate (Ritalin), dextroamphetamine, thioridazine and imipramine, on selected school age and/or pre-school children.

All of the grants are administered by public or private non-profit educational, medical or research institutions. None of the grants is concerned with the production of marketing of the drugs being tested. Their purposes include the determination of optimal dosage levels and treatment schedules; the identification of possible harmful side effects such as drug addiction and loss of weight; the measurement of the effect of different drugs on learning, including the existence of state-dependent learning; and the development of improved assessment techniques to measure the efficacy of drug treatment on children.

Following a series of conferences and administrative actions, which need not be reviewed here in any detail, a considerable number of documents were furnished. However, as of July 27, 1973, the following categories of documents were still being withheld, and it is upon these that the litigation has finally focused:

- (a) with regard to previously approved grant applications, the narrative statement and any related exhibits describing in detail the research plan to be followed (sometimes referred to as the research protocol or research design);
- (b) with regard to previously approved continuation, renewal or supplemental applications, the comprehensive progress reports describing the results and accomplishments of the projects since the last such report;
- (c) the entire text of all site visit reports and “pink sheets” prepared by outside consultants and NIMH staff during the agency review of the applications;
- (d) the entire text of all continuation and renewal applications which have not yet been approved.

For the purposes of analysis, these various documents will be referred to simply as grant applications, site visit reports, and “pink sheets.”

After some discovery, the matter came before the Court for final hearing under an arrangement developed at a status conference. The parties presented *in camera* a portion of a single grant file marked to show the type of information defendant believes may properly be withheld under the Act. This file, as marked, was also given plaintiff informally. It was agreed that the determinations, made by the Court based on this example would control the disposition as to other similar material covered by plaintiff's request and presently withheld. After the record was completed, the parties presented argument and were allowed to file post-trial briefs.

I. NIMH grant procedures

Before turning to the conflicting interpretations of the Freedom of Information Act presented by the parties, the nature of the material requested must be elaborated and its significance in the chain of the grant process explained.¹

The National Institute of Mental Health operates a dual system of review for all major research projects. The first stage involves the initial review group (sometimes called a study section or review committee), made up of from 10-20 nongovernmental technical consultants, who are appointed by the Director of NIMH for overlapping terms of up to four years. Each branch or center of the NIMH is served by one or more review groups qualified in a specific field. There are approximately 20 NIMH review groups for research project grants, as well as review groups for long-term program grants, small grants, fellowships and training. There is an Executive Secretary for each review group who is an NIMH employee and a chairman who is appointed by the Executive Secretary.

Each application is assigned by the Executive Secretary to one or more members (assignees) of the initial review group for study and comment. Assignees are selected because of their experience and competence in the areas covered by the proposed research. Non-committee members may also be asked to review a project on an *ad hoc* basis, when the Executive Secretary feels that the committee itself lacks expertise in a necessary area.

When additional information is needed, the Executive Secretary may obtain it through correspondence, by telephone, or by a site visit conducted by the review group assignees. Site visits may also be requested by the assignees themselves when they believe it will aid in their review of the project. Site visits are generally used for unusually large or multidisciplinary applications, or when it is deemed important to meet personally with the investigator and his or her associates in order to observe the physical facilities and equipment which will be used or to observe a particular experimental technique in operation. Visitors may make suggestions for changes in the proposed research plan, and a revised protocol or addendum is sometimes submitted to NIMH following the site visit.

At the conclusion of the site visit, the team meets in executive session to discuss their reactions and to formulate a recommendation. One assignee is delegated to write up the team's findings, sometimes with the assistance of written reports from the other visitors. The site visit reports are prepared on behalf of the team as a whole and they do not identify evaluations with particular members of the site visit team.

The site visit report or, when no site visit was held, a written evaluation prepared by one of the assignees is made part of a grant book which is sent to each member of the initial review group four to six weeks before its meeting. The grant book also contains a copy of the complete grant application for each project which is scheduled to be reviewed.

Initial review groups meet three times a year. The Clinical Psychopharmacology Research Review Committee, which reviewed the grants involved here, considers an average of fifteen applications at each meeting, including supplemental and renewal applications.² Each proposed research project is reviewed separately for approximately 45 minutes to an hour. The principal assignee described the project and presents the findings of the site team visit. The other visitors also present a critique of the project, and NIMH staff may be asked to comment.

Following the discussion and after a consensus has been reached, a formal vote is taken on each project. If it is approved, each member of the committee then assigns a rating to the project, which is used for determining funding priorities. The minutes of each meeting contain a complete attendance list and data on the number of approvals, disapprovals and deferrals of applications considered, but they do not contain a summary of the discussion regarding any application.

After the meeting of the initial review group, an NIMH staff person prepares a Summary Statement ("pink sheet") for each grant, containing in a single docu-

¹ The following textual description of the NIMH grant review process is taken principally from the deposition of Dr. Ronald S. Lipman, Chief of the Clinical Studies Section of the Psychopharmacology Research Branch of NIMH and from the NIMH Handbook for Initial Review Staff (1970), plaintiff's 1 exhibit in evidence.

² Supplemental applications are for additional funds above the amount previously approved for the current or any future project year. Renewal applications are for funds beyond the project period previously approved. Continuation applications are filed at the beginning of each year in the previously approved project period. Generally, supplemental and renewal applications must compete for available funds with other applications, new or otherwise; they are processed through both stages of the review process. Continuation applications are generally noncompeting and not subject to the review process.

ment a brief description of the proposed research or training grant request and the substantive considerations that led to the specific recommendation, including in the case of a split vote the reasons for both majority and minority opinions. The Statement will normally discuss the background and competence of the investigators, any special aspects of the facilities and equipment, and whether the budget is appropriate to the aims and methodology of the project. Where human subjects are involved, the Statement should include the opinion of the review group on the risks involved. In addition, the site visit report, if one has been written, is incorporated by reference into the Statement.

All Review Committee actions are considered to be collective and anonymous. Therefore, the Summary Statement does not attribute evaluations or comments to any individual member. If two or more members voted against the majority recommendation, their opinion is also summarized in the Statement, without identifying the members involved.

The Statements are the principal source of information regarding the application and the recommendation provided to the National Advisory Mental Health Council; they are also used by NIMH staff to provide information concerning disapprovals to applicants and to follow the results of approved projects. According to the NIMH Handbook, at 32, the Statements are "perhaps the most informative document in the history of the grant."

The second stage in the dual NIMH review process involves the National Advisory Mental Health Council, a body set up by statute to "advise, consult with, and make recommendations to, the [Secretary] on matters relating to the activities and functions of the [Public Health] Service in the field of Mental Health." 42 U.S.C. § 218(c). The Council is specifically authorized "to review research projects or programs submitted to or initiated by it in the field of mental health and recommend to the Secretary . . . any such projects which it believes show promise of making valuable contributions to human knowledge with respect to the cause, prevention, or methods of diagnosis and treatment of psychiatric disorders." 42 U.S.C. § 218(c). The members of the Council are the Assistant Secretary for Health, the Chief Medical Officer of the Veterans' Administration, a medical officer designated by the Secretary of Defense, and twelve public members appointed by the Secretary of HEW.

The National Advisory Mental Health Council meets three times a year for two or three days to review the "recommendations" of all of the initial review groups within NIMH. The Council reviews from 500 to 1,000 grants during each meeting. Except where a special request is made, the Council members do not receive individual grant applications. Their decision is based solely on the review group Summary Statements. Except for grants on which a special question is raised (no more than five percent of the grants), the Council approves the recommendations from each review group in a block. Consequently, the Council's concern is with questions of general policy and of program priority, and not with the scientific merit of any individual applications.

Following approval by the National Advisory Mental Health Council, funding of a project is contingent upon the availability of funds. General priorities for funding are determined by the Director of NIMH, with the advice of the National Advisory Mental Health Council. Within these general priorities, 90 percent of the approved grants are funded in the order of numerical priority set by the initial review group. Researchers are notified of the grant award by an award letter and a formal notice, both of which are signed by the NIMH branch chief. The award letter states that the project has been approved by the initial review group and the National Advisory Mental Health Council.

II. The act

These procedures generate a prodigious amount of information concerning the proposed research projects and the allocation of funds among them. NIMH incorporates into its application instructions a warning that some of this information must be made available to the public under the Freedom of Information Act. However, it specifically assures the applicants that the following information does not fall within the terms of the Act and will not be disclosed to the public:

a. Applications for research grant support are considered to be privileged information. Until such time as an application is approved and a grant awarded, no information is disclosed except for the use of Section I of the application form PHS-398 and the notice of research project form PHS-166 by the Science Infor-

mation Exchange in connection with its responsibilities for exchange of information among participating agencies.

b. Section II of the application form PHS-398 or the corresponding material in application form PHS-2590.

c. Details of estimated budgets.

d. Discussions of applications by advisory bodies.^{2a} Plaintiff challenges this interpretation of the Act and NIMH's consequent withholding of substantial portions of the grant applications, "pink sheets," and site visit reports requested.

In resolving this dispute, the Court is faced with the initial difficulty that the Act on its face does not give special consideration to the field of medical research or the problem of grant applications. Accordingly, as is usually the case where the Court must attempt to apply this imprecise and poorly drafted statute to a situation apparently never contemplated by the Congress, it becomes necessary to resolve the controversy by reliance on the high gloss which the learned decisions of this Circuit have been required to place on the legislation.

The initial question for consideration is whether the "pink sheets," site visit reports and grant applications are documents coming within the disclosure provisions of § 552(a). Under the decisions in this Circuit, it is clear that the NIMH initial review groups constitute "agencies" as that term is used in the Act. See, e.g., *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, No. 71-1730 (D.C. Cir. July 3, 1973) ("*Grumman II*"). They "serve as a discrete, decision-producing layer" in the application process and the priorities they set receive only perfunctory review by the National Advisory Mental Health Council. *Id.* at 10. It is equally clear—indeed not contested—that the "pink sheets" represent the final opinions of the initial review groups, presenting authoritative reasons for assigning each application to a particular priority. The site visit reports must be viewed as integral parts of these final decisions, since, as indicated by the sample file, they are incorporated by reference into the "pink sheets" and are cited as a basis for the review groups' final decisions. See *Sterling Drug, Inc. v. F.T.C.*, 450 F. 2d 698, 704-08 (D.C. Cir. 1971); *American Mail Lines, Ltd. v. Gulick*, 411 F. 2d 696, 703 (D.C. Cir. 1968). Both types of documents are therefore subject to disclosure as an agency's "final opinions . . . made in the adjudication of cases . . ." 5 U.S.C. § 552(a)(2)(A). As for the grant applications, they are "identifiable records" of an agency and are therefore subject to disclosure upon specific request, which plaintiff has duly made. See 5 U.S.C. § 552(a)(3); *Bristol-Myers Co. v. F.T.C.*, 284 F. Supp. 745, 747 (D.D.C. 1968).

All of the documents sought by plaintiff must therefore be produced in full unless the Government can establish that certain papers or sections thereof fall within the specific exemptions enumerated in the Act. Defendants suggest that three of these exceptions are applicable to the documents at issue. In considering this claim, the Court must construe the requirement of disclosure broadly and the exemptions narrowly in order to promote "the clear legislative intent to assure public access to all government records whose disclosure would not significantly harm specific governmental interests." *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

Defendants argue that all descriptions of an applicant's proposed research, whether in its application or in agency reports, constitutes confidential material within the terms of the fourth exemption.³ However, that exemption shields only trade secrets and other confidential information that is either "commercial" or "financial" in nature. *Getman v. N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971). None of the applicants for NIMH grant funds are profit-making enterprises, nor are such funds sought for the production or marketing of a product or service.⁴ Whatever Congress may have meant by the admittedly imprecise terms in the fourth exception, the Court cannot, consistent with its duty to construe the Act's exemptions narrowly, find that scientific research procedures to be under-

^{2a} National Institutes of Health, Grant for Research Projects, Policy Statement 14 (1972). This interpretation of the Act is consistent with HEW's more general interpretation, codified at 45 C.F.R. § —

³ 5 U.S.C. § 552(b)(4): "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ."

⁴ In recent testimony before Congress, Dr. John F. Sherman, Deputy Director of the National Institutes of Health, argued that the fourth exemption should apply to grant documents because "to the scientist and to the research clinician, research designs and protocols are regarded and treated as proprietary information, just as trade secrets are protected by the commercial and industrial sector." Hearings on U.S. Government Information Policies and Practices Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 3620 (1972). However, this analysis is only relevant to the extent that Dr. Sherman recognizes that research procedures are not actually trade secrets, nor are research part of the "commercial or industrial sector." His arguments are exceptional * * *.

taken by non-profit educational or medical institutions fall within those terms.⁵ Even if the Court were to find otherwise, however, defendants would not prevail, for they have wholly failed to meet their burden of proving that the particular research designs and protocols at issue in this case contain material that would normally be kept confidential by the researchers themselves, regardless of the agency's own assurances of confidentiality. See *Sterling Drug, Inc. v. F.T.C.*, *supra*, at 709.

Defendants also raise the fifth exemption,⁶ which shields inter- and intra-agency memoranda. However, this Court's finding that the "pink sheets" and site visit reports constitute final agency opinions takes those documents out of the fifth exemption, see *Grumman U*, *supra*, at 13, and the applications are not protected because they were written by non-agency personnel, see *Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063-66 (1973), and contain essentially factual material, see *Bristol-Myers Company v. F.T.C.*, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824 (1970).

Similarly, there is no merit to defendants' claim that the disclosure of any agency reference to the professional qualifications or competence of a particular researcher would constitute a clearly unwarranted invasion of personal privacy under the sixth exemption.⁷ That provision shields only "personnel and medical files and similar files" from disclosure. Although the term "files" has been justifiably criticized as vague, see *K. Davis, supra* note 4, at 798, it cannot be ignored.⁸ The sixth exemption was intended to protect "detailed Government records on an individual." H. Rept. 1497, 89th Cong., 2d Sess. 11 (1966), and it cannot be extended to shield a brief analysis of professional competence written into a final agency opinion.

Perhaps in recognition of this distinction, Congress incorporated another privacy provision into the Act which is not limited to Government files. Immediately following the disclosure requirement in § 552(a)(2), the Act states: "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." Portions of the "pink sheets" and the site visit reports could fall within the terms of this exemption, but the Government has the burden of establishing that disclosure in each instance would be "clearly unwarranted." See *Getman v. N.L.R.B.*, *supra*, at 674.

Upon careful consideration of the competing interests involved, the Court concludes that the Government may, to the extent described below, delete identifying details from statements of opinion concerning the professional qualifications or competence of particular individuals involved in the research project under consideration. Disclosure of such information might substantially injure the professional reputations of researchers, while deletion would not, in most instances, significantly obscure the reasons for assigning an application to a particular priority.

It must be stressed, however, that the holding of this Court is narrowly limited. Normally, only the names of the individuals under discussion may be deleted, leaving the opinions themselves free to be disclosed, *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970) ("*Grumman I*"). If, as is the case with many of the documents sought by plaintiff, the names of the

⁵ The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967), at 34, apparently reached a contrary conclusion, based upon comments in the congressional reports to the effect that "technical data" concerning "scientific or manufacturing processes" would be covered by the fourth exemption. However, Professor Davis points out that the quoted language was derived from a Senate report on an earlier version of the exemption which did not contain the limiting words "commercial or financial," and that the shielding of non-commercial technical information would be contrary to the clear wording of the statute. K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 789-91 (1967). In resolving this dispute in Davis' favor, the Court finds it significant that the D.C. Circuit in *Getman* followed Davis and interpreted the fourth exemption narrowly (although it did not specifically consider the disputed language in the congressional reports), while the Attorney General's Memorandum interpreted it broadly to cover all confidential material.

⁶ U.S.C. § 552(b)(5): "This section does not apply to matters that are . . . 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. . . ."

⁷ U.S.C. § 552(b)(6): "This section does not apply to matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ."

⁸ An earlier version of the sixth exemption shielded the specified files and all "similar matter" (emphasis added), but Congress amended that phrase to use the more limited term "files" throughout, K. Davis *supra* note 4, at 798 n. 94.

researchers have already been disclosed or if for any other reason the deletion of such names would not conceal the identity of the individuals under discussion, the statements of opinion might have to be deleted in their entirety. But in every case the defendants may only delete that minimum amount of information necessary to conceal the identity of those individuals whose privacy is threatened in the manner described above.

As a further limitation, no deletions whatever may be made from documents relating to an application—whether initial, continuation, renewal or supplemental—which has actually been granted, since in such cases the public's interest in knowing how its funds are disbursed surpasses the privacy interests involved. Nor may the identity of an institutional applicant be concealed, because the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association. *K. Davis, supra* note 4, at 781, 799.

Apart from resolution of the instant controversy, plaintiff asks for assistance to insure that subsequent similar requests for information from NIMH will not be delayed and obfuscated by drawn-out negotiations and Court proceedings. Plaintiff's concern is well taken, for the Act should, to the extent practical, be self-operative to assure prompt disclosure as contemplated by Congress. At a minimum, the defendants should promptly modify existing regulations and grant application instructions to bring them into conformity with the decision of this Court. It is particularly important that grant applicants be placed on notice that information submitted pursuant to an application for NIMH grant funds and final agency opinions concerning the award of such funds, as defined above, cannot normally be kept confidential nor withheld from the public.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

GERHARD A. GESELL,
U.S. District Judge.

NOVEMBER 6, 1973.

[U.S. District Court for the District of Columbia—Civil Action No. 1279-73]

WASHINGTON RESEARCH PROJECT, INC., PLAINTIFF, VERSUS DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND CASPAR W. WEINBERGER, DEFENDANTS

ORDER

In accordance with the Court's Memorandum Opinion filed this 6th day of November, 1973, it is hereby

Ordered that the defendants promptly amend all relevant application instructions and agency regulations, including those codified at 45 C.F.R. § 5, to bring them into conformity with the decision of this Court, and it is further

Ordered that the defendants promptly produce and make available to plaintiff for inspection and copying all documents listed in its request for information dated April 13, 1973, except that, if any such document relating to an application that has not been granted contains a statement of opinion by a Government officer, employee or consultant concerning the professional qualifications or competence of an individual involved in the research project under consideration, the defendants may delete from that document any detail which would identify a particular individual as the subject of that statement, or, if such deletion would be impossible or ineffectual, the defendants may delete the statement itself.

GERHARD A. GESELL,
U.S. District Judge.

NOVEMBER 6, 1973.

Mr. DOLE. Mr. President, I think the situation in this case of Washington Research Project, Inc., against Department of Health, Education, and Welfare clearly demonstrates the need for congressional action to insure that research ideas are indeed accorded the confidential status which they deserve. It is for that sole reason that I drafted the said amendment, in anticipation of proposing its adoption.

While it is not our business to preempt the courts in matters of judicial concern, it is our affirmative legislative duty to lay down

proper statutory guidelines. Regardless of the outcome in the cited case, therefore, we still have the obligation to protect against any future unnecessary, unwise, and unfair premature disclosure requirements in the specific area of scientific experimentation.

Certainly, the whole idea of "disclosure" and the public's "right to know" is of paramount importance at this time in our Nation's history. And I have no desire or intention of placing undue restrictions on those fundamental concepts. But I feel very strongly that, in the area of research grants, nondisclosure entitlement is justified—and completely within the spirit of the Freedom of Information Act itself.

It is my sincere hope that my colleagues will agree, and join me at the appropriate time in moving to identify such matters as specifically excepted from categories of information which should be disseminated to the public. I urge this problem to be the subject of special hearings at the earliest opportunity, and that it be resolved coincident with future health legislation, as the distinguished floor manager of the present bill (Mr. Kennedy) has suggested.

The PRESIDING OFFICER. The question is on agreeing to committee amendment in the nature of a substitute, as amended.

The amendment was agreed to.

The PRESIDING OFFICER. The question is on the third reading of the bill.

The bill (S. 2543) was ordered to a third reading and read the third time.

Mr. KENNEDY. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 12471.

The Presiding Officer laid before the Senate H.R. 12471, to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The PRESIDING OFFICER. The bill will be considered as having been read twice by title, and without objection the Senate will proceed to its consideration.

Mr. KENNEDY. Mr. President, I move to strike all after the enacting clause of H.R. 12471 and insert in lieu thereof the language of S. 2543 as amended.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Massachusetts to insert the Senate language as a substitute for the House bill.

The motion was agreed to.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on final passage.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill (H.R. 12471) was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

Mr. GRIFFIN. Mr. President, is the Senator from Nebraska entitled to recognition?

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HRUSKA. Mr. President, I shall take not more than 3 or 4 minutes to recapitulate what has transpired today on this bill.

First, I point out that this bill was reported unanimously and without objection from the Judiciary Committee to accomplish certain procedural changes in the Freedom of Information Act, which was enacted in 1966.

Some substantive changes were offered in committee. They were turned down. The purpose was to make it an effective and an efficient implement and in a very vital field; namely, the right of the public to know, on the one hand, and, on the other hand, to conserve the confidentiality of Federal Government departments and documents and to enable them to function properly and effectively.

Mr. President, it is to be regretted that some major, substantive changes were effected by amendments on the floor of the Senate today.

It is my intention—and I shall do so—to vote against the bill because of the agreement to those amendments. It was my prior intention to vote for the bill, but it is my present intention to call to the attention of the President the very undesirable features of the two amendments.

In my judgment, there has been a disastrous effect upon law enforcement, particularly by the Federal Bureau of Investigation and the law enforcement agencies of our national Government. The amendments will have an effect also on the local law enforcement agencies as well.

I shall urge the President as strongly as I can to veto this measure. It is my belief that it is sufficiently disadvantageous and detrimental that it requires a veto. It is to be regretted, Mr. President, because we had a good bill. We should go forward and make the Freedom of Information Act as effective as possible. I think a fine balance had been worked out with the many interests competing for information that either should be disclosed or should be held confidential, and with other interests such as permitting the courts to review classified documents in camera.

Mr. President, I make this as a statement in connection with the future proceedings on the bill.

Mr. President, I ask unanimous consent that a brief statement summarizing those points be printed in the Record.

There being no objection, the statement was ordered to be printed in the Record, as follows:

STATEMENT

Mr. President, my points of summary are as follows. First as to the Muskie amendment, I fear that we are giving undue latitude to the courts in dealing with a very important national issue. The amendment asks the courts to review documents to determine their effect on the national defense and foreign policy of the United States. Yet the amendment offers the courts no guidance in performing this task. It asks the court to make political judgments.

Indeed, this is a task for which the courts themselves have found that they lack the aptitude, facilities and responsibility. This is not my own flat statement. These are the words the Supreme Court used in *C. & S. Air Lines v. Waterman*:

[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.

Likewise, a Harvard Law Review Developments Note reached the same conclusion.

In discussing the role of the courts in reviewing classification decisions, it states that "there are limits to the scope of review that the courts are competent to exercise," and concludes that "a court would have difficulty determining when the public interest in disclosure was sufficient to require the Government to divulge information notwithstanding a substantial national security interest in secrecy." 85 Harvard Law Review 1130, 1225-26 (1972).

Furthermore, the Attorney General in a letter which I earlier introduced in the Record expressed the opinion that grave constitutional questions arise in the adoption of this amendment. As the Attorney General concluded, "the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason, the constitutionality of the proposed amendment is in serious question."

Second, I believe that the amendment to exemption 7 could lead to a disastrous erosion of the FBI's capability for law enforcement notwithstanding the safeguards and standards contained in that amendment. To be sure, the standards contained in the amendment look well on paper. However, based on the experience that the FBI has accumulated to date under standards similar to these, it is clear that they are difficult if not impossible to administer.

Here are some of the effects which adoption of the Hart amendment could have.

1. It could distort the purpose of agencies such as the FBI, imposing on them the added burden of serving as a research source for every writer, busybody, or curious person.

2. It could impose upon these agencies the tremendous task of reviewing each page of each document contained in any of their many investigatory files to make an independent judgment as to whether or not any part thereof should be released.

3. It could detrimentally affect the confidence of the American people in its Federal investigative agencies since it will be apparent these agencies no longer can assure that their identities and the information they furnish in confidence for law enforcement purposes will not some day be disclosed to the subject of the conversation.

Fourth, and finally, it could set the stage for severe problems regarding the privacy of individuals.

Mr. President, in my view, nothing would be lost by deferring action on this amendment because the FBI is now operating under standards virtually similar to those contained in the amendment. It would be well to allow a suitable interval of experience to be accumulated under these regulations in order to ascertain the wisdom or lack thereof in putting these standards in statutory form.

Mr. President, the highly detrimental and far-reaching impact that these two amendments taken together pose is so grave and sweeping that it is my intention to address a letter to the President urging as strong as I can that he veto this measure if it passes in this form.

Mr. McCLELLAN. Mr. President, will the Senator yield?

Mr. HRUSKA. Mr. President, I gladly yield to the distinguished Senator from Arkansas.

Mr. McCLELLAN. Mr. President, I wish to associate myself with the views expressed by the distinguished Senator from Nebraska. I fully intended to support the measure as it came to the floor of the Senate. However, in view of the amendments that have been agreed to today, which destroys the purpose of the bill, in my judgment, and violate the Nation's security on documents and records, I cannot support the measure. I shall now have to vote against the bill.

Mr. KENNEDY. Mr. President, I yield myself 2 minutes.

The Freedom of Information Act was passed in 1966. This legislation we are considering today is really a response by Congress to the past experience we have found with the failure of Government agencies to respond to the public's legitimate interest in what had been taking place inside their walls. It is precisely the extreme and unreasonable

secrecy of the past that this bill addresses, and I think the overwhelming support by the press and across the country for some legislative response to this secrecy can be answered by this bill.

I should say that the amendments that have been agreed to by a strong vote in the Senate today in no way infringe upon national security or upon the law enforcement agencies and their responsibilities in this country. I think this is the most important legislative action that can be taken to open up the Government to the American people, who require it, who demand it, who are begging and pleading for it.

I want to acknowledge the constructive and supportive efforts of Senator Hruska and his staff in developing this legislation for floor action. I am disappointed that he does not feel that he can support this bill as amended on the floor.

The bill provides ample protection for the legitimate interests of Government agencies. It also insures that they will be open and responsive to the American people.

I hope that the bill will be passed.

I am ready to yield back the remainder of my time.

Mr. HRUSKA. Mr. President, may I ask of my colleagues if there are any requests for time? Apparently there are none, so I yield back the remainder of my time.

Mr. KENNEDY. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The bill having been read the third time, the question is, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from California (Mr. Cranston), the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollins), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from New Mexico (Mr. Montoya), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman), are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from California (Mr. Cranston) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett), the Senator from New York (Mr. Buckley), and the Senator from Idaho (Mr. McClure) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), the Senator from Arizona (Mr. Goldwater), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. Thurmond), would vote "nay."

The result was announced—yeas 64, nays 17, as follows:

[No. 221 Leg.]

YEAS—64

Abourezk	Eagleton	Moss
Aiken	Ervin	Muskie
Baker	Fong	Nelson
Bartlett	Gurney	Packwood
Bayh	Hart	Pearson
Beall	Haskell	Percy
Bellmon	Hatfield	Proxmire
Bentsen	Hathaway	Ribicoff
Bible	Huddleston	Roth
Biden	Humphrey	Schweiker
Brock	Jackson	Scott, Hugh
Brooke	Javits	Stafford
Burdick	Johnston	Stevens
Byrd, Harry F., Jr.	Kennedy	Stevenson
Cannon	Magnuson	Symington
Case	Mansfield	Taft
Chiles	Mathias	Tunney
Church	McGee	Weicker
Clark	McIntyre	Williams
Cook	Metcalf	Young
Dole	Metzenbaum	
Domenici	Mondale	

NAYS—17

Allen	Hansen	Randolph
Byrd, Robert C.	Helms	Scott,
Cotton	Hruska	William L.
Curtis	Long	Stennis
Eastland	McClellan	Talmadge
Griffin	Nunn	Tower

NOT VOTING—19

Bennett	Gravel	Montoya
Buckley	Hartke	Pastore
Cranston	Hollings	Pell
Dominick	Hughes	Sparkman
Fannin	Inouye	Thurmond
Fulbright	McGlure	
Goldwater	McGovern	

So the bill (H.R. 12471) was passed.

Mr. KENNEDY. Mr. President, I move that the vote by which the bill was passed be reconsidered.

Mr. MOSS. Mr. President, I move to lay that motion on the table. The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President, I move that S. 2543 be indefinitely postponed.

The motion was agreed to.

C. SECTION ACTION ON CONFERENCE REPORT, OCTOBER 1, 1974; PP. S17828-S17830 AND S17971-S17972

**FREEDOM OF INFORMATION ACT AMENDMENTS—CONFERENCE REPORT
(REPT. No. 93-1200)**

Mr. KENNEDY. Mr. President, I am pleased to send to the desk the conference report on the Freedom of Information Act Amendments—Report No. 98-1380, on H.R. 12471. The House and Senate conferees met on four occasions last month to discuss and debate a number of the provisions of this significant legislation, and I firmly believe that our final product strikes the proper balance between the rights of the public to know what their Government is doing and the needs of the executive branch and independent agencies to keep certain information confidential. The legislation will promote both faster and freer public access by the public to Government files and records.

During our conference on this bill, I received a letter from President Ford voicing his concern over portions of our proposed amendments. He identified five specific problems, and at the next conference session the conferees discussed each problem and adopted language—either for the bill or for the statement of managers—designed to respond to those concerns. Last week I replied to the President's letter, along with House Conference Chairman William Moorhead, observing that our legislation "would provide support for your own policy of 'open government' which is so desperately needed to restore the public's confidence in our National Government." I ask unanimous consent that President Ford's letter and our reply be printed in the Record at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.
(See exhibit 1)

Mr. KENNEDY. I believe it is significant to note that the conferees approached this legislative effort in a bipartisan spirit. We attempted to accommodate at each turn the needs of the Government agencies affected by our bill. I was pleased that each major issue requiring a final rollcall vote on the part of the Senate conferees was resolved by a unanimous vote. The participation of our ranking minority member, Senator Hruska, in the conference was most constructive, and his contributions extremely helpful. It is because of the active give and take of the conferees on both sides, with continued advice from the executive branch, that we achieved a final product that I believe can and should be enacted without delay.

I hope that our failure to get our senior minority members to sign the conference report does not reflect a decision on the part of the White House to veto this significant legislation. Openness is supposed to be the watchword of the present administration. So far, however, it has been more of a slogan than a practice. A veto of this bill would reflect

a hostility to just the kind of Government openness and accountability which the public must have to regain a full measure of confidence in our National Government.

The legislation approved by our conference committee contains the following major provisions:

Federal courts are empowered to review the validity of agency classification of documents and may examine those documents in determining whether they were properly classified.

Individual Government officials who act arbitrarily or capriciously in withholding information from the public are subjected to disciplinary procedures, to be initiated by the Civil Service Commission.

Investigatory files, which are exempt from mandatory disclosure under present law, are required to be disclosed unless their release will cause some specific harm enumerated in the bill.

Agencies are given definite time limits to respond to requests for information: 10 days for an initial response, 20 days to determine an appeal, with an additional 10 days in unusual circumstances.

A person who must sue to obtain access to information may recover attorneys' fees if he prevails in court.

The Freedom of Information Act, passed by Congress in 1966, guaranteed the public judicially enforceable access to Government information, subject to specific exceptions defined in the law. Hearings before my Subcommittee on Administrative Practice and Procedure last year brought out numerous abuses by Government agencies in administering the act, and in October 1973 I introduced a bill to strengthen the Freedom of Information Act, which has in large part been incorporated into the final conference report filed today.

Our present legislative effort finds support from many quarters. Representatives of the media have strongly advocated adoption of these amendments. The American Bar Association has resolved that Congress move forward with the kinds of reforms contained in our legislation. The American Civil Liberties Union has advocated adoption of this bill and has found it consistent with privacy rights which must also be protected. The American Federation of Government Employees has determined that the sanction provision is acceptable as fair and consistent with Civil Service safeguards. And the American Political Science Association has indicated the special interest of scholars in seeing this bill enacted.

These amendments to the Freedom of Information Act, contained in our conference report, will help open the decisions and actions of Government to the light of public review and understanding. Without them, the Freedom of Information Act will remain a toothless tiger, and the executive branch will continue to be able to delay, resist, and obstruct public access to Government information. With them, the Freedom of Information Act becomes truly worthy of its name.

EXHIBIT 1

THE WHITE HOUSE,
Washington, D.C., August 20, 1947.

DEAR TED: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound

and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government, and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all seek to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective.

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without (a) reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him. Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to his kind of personal liability for the performance of his official duties. Any potential harm to successful complaints is more appropriate, rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations, is in fact, properly classified, following an *in camera* inspection of the document by the court. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. 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. My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security. The Constitution commits this responsibility and authority to the President.

I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This amendment could have that effect if the sources of information or the information

itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime. I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
Washington, D.C., September 23, 1974.

HON. GERALD R. FORD,
*President of the United States,
The White House, Washington, D.C.*

DEAR MR. PRESIDENT: We were most pleased to receive your letter of August 20 and to know of your personal interest in the amendments to the Freedom of Information Act being considered by the House-Senate conference committee. And we appreciate your recognition of the fundamental purposes of this milestone law and the importance you attach to these amendments. They of course would provide support for your own policy of "open government" which is so desperately needed to restore the public's confidence in our national government.

When we received your letter, all of the members of the conference committee agreed to your request for additional time to study the amendments and have given serious consideration and careful deliberation to your views on each of the major concerns you raised. The staffs of the two committees of jurisdiction have had several in-depth discussions with the responsible officials of your Administration. Individual Members have also discussed these points with Justice Department officials.

At our final conference session we were able to reopen discussion on each of the major issues raised in your letter. We believe that the ensuing conference actions on these matters were responsive to your concerns and were designed to accommodate further interests of the Executive branch.

You expressed concern in your letter about the constitutionality and wisdom of court-imposed penalties against Federal employees who withhold information "without a reasonable basis in law." This provision has been substantially modified by conference action.

At our last conference meeting, after extensive debate and consideration, a compromise sponsored by Representative McCloskey and modified by Senate conferees was adopted. This compromise leaves to the Civil Service Commission the responsibility for initiating disciplinary proceedings against a government official or employee in appropriate circumstances—but only after a written finding by the court that there were "circumstances surrounding the withholding (that) raise

questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." The actual disciplinary action recommended by the Commission, after completion of its standard proceedings, would actually be taken by the particular agency involved in the case.

We feel that this is a reasonable compromise that basically satisfies your objections to the original Senate language.

You expressed fear that the amendments afford inadequate protection to truly important national defense and foreign policy information subject to *in camera* inspection by Federal courts in freedom of information cases. We believe that these fears are unfounded, but the conference has nonetheless agreed to include additional explanatory language in the Statement of Managers making clear our intentions on this issue.

The legislative history of H.R. 12471 clearly shows that the *in camera* authority conferred upon the Federal courts in these amendments is *not mandatory, but permissive* in cases where normal proceedings in freedom of information cases in the courts do not make a clear-cut case for agency withholdings of requested records. These proceedings would include the present agency procedure of submitting an affidavit to the court in justification of the classification markings on requested documents in cases involving 552(b)(1) information.

The amendments in H.R. 12471 do not remove this right of the agency, nor do they change in any way other mechanisms available to the court during its consideration of the case. The court may still request additional information or corroborative evidence from the agency short of an *in camera* examination of the documents in question. Even when the *in camera* review authority is exercised by the court, it may call in the appropriate agency officials involved to discuss any portion of the information or affidavit furnished by the agency in the case.

The conferees have agreed to include language in the Statement of Managers that reiterates the discretionary nature of the *in camera* authority provided to the Federal courts under the Freedom of Information Act. We will also express our expectation that the courts give substantial weight to the agency affidavit submitted in support of the classification markings on any such documents in dispute.

Thus, Mr. President, we feel that the conference committee has made an effort to explain our intentions so as to respond to your objections on this important area of the amendments, operating as we must within the scope of the conference authority because of the virtually identical language in both the House and Senate versions of H.R. 12471.

The conference committee has also acted affirmatively to satisfy your major objections to the proposed amendments to subsection (b) (7) of the Freedom of Information Act, dealing with specific criteria for the withholding of Federal investigatory records in the law enforcement area.

The conference committee had already added an additional provision, not contained in the Senate-passed bill, which would permit withholding of information that would "endanger the life or physical safety of law enforcement personnel." This made it substantially identical to the language recommended by then Attorney General Richardson during Senate hearings on the bill and endorsed by the Administrative Law Section of the American Bar Association.

After reviewing the points made in your letter on this point, the conference committee also agreed to adopt language offered by Senator Hruska to permit the withholding of the *information* provided by a confidential source to a criminal law enforcement authority during the course of a criminal or "lawful national security intelligence investigation." The Federal agency may, in addition, withhold the identification of the confidential source in *all* law enforcement investigations—civil as well as criminal.

To further respond to your suggestion on the withholding of information in law enforcement records involving personal privacy the conference committee agreed to strike the word "clearly" from the Senate-passed language.

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.

You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

In conclusion, Mr. President, we appreciate your expression of cooperation with the Congress in our deliberations on the final version of this important legislation. In keeping with your willingness "to go more than halfway to accommodate Congressional concerns," we have given your suggestions in these five key areas of the bill renewed consideration and, we feel, have likewise gone "more than halfway" at this late stage.

We welcome your valuable input into our final deliberations and appreciate the fine cooperation and helpful suggestions made by various staff members and officials of the Executive branch. It is our hope that the fruits of these joint efforts will make it possible for the Senate and House to act promptly on the conference version of H.R. 12471 so that this valuable legislation will be enacted and can be signed into law before the end of the month.

With every good wish,
Sincerely,

EDWARD M. KENNEDY,
Chairman, Senate Conferees.
WILLIAM S. MOORHEAD,
Chairman, House Conferees.

FREEDOM OF INFORMATION ACT AMENDMENTS—CONFERENCE REPORT

Mr. KENNEDY. Mr. President, I submit a report of the committee of conference on H.R. 12471, and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated by title.

The assistant legislative clerk read as follows:

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 the 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 this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

(The conference report is printed in the House proceedings of the Congressional Record of September 25, 1974, at page H9525.)

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The report was agreed to.

Mr. HRUSKA. Mr. President, as a conferee on this bill, I have seen several significant changes made to the bill which, in my view, makes it a more workable measure. However, I do not believe that these corrections go far enough.

While we were in conference, the President sent a letter to the conferees pointing out his objections to the bill. The provision that appears to concern the executive branch the most is the section of the bill that places the burden of proof upon an agency to satisfy a court that a document because it concerns military or intelligence secrets and diplomatic relations is in fact properly classified. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed.

Yet, while this bill transfers the authority to declassify documents from the executive branch to the courts, it provides no standards to govern the review of the documents. The judge is given the documents and then is cast upon a sea without any lighthouses or buoys to point out the shoals and rocks to make his decision whether the documents are properly classified.

No standards are created to guide a judge in reviewing the documents. He can release the documents if, in his own view, they are not properly classified, even if the Secretary of State, the Secretary of Defense, or any other agency head certifies that the documents are properly classified. This is a provision that is not only distrustful in nature; it is unreasonable.

President Ford, in his letter to the conferees cited these concerns and said:

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. My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security. The Constitution commits this responsibility and authority to the President.

Despite these strong words and valid concerns, the majority of the conferees refused to change the provision vesting a power in the courts to declassify documents classified by a Government agency.

Mr. President, I realize that there are some mistakes in judgment about classification and that there are some abuses of the system. But there are administrative procedures for dealing with these mistakes and abuses. If a citizen wants access to a classified document, he may request declassification under Executive Order 11652. If his request for declassification is refused, he may appeal to the head of the agency. If his request is again refused, he can appeal to the Interagency Classification Review Committee—a committee designed to correct erroneous classifications and in general, be a watchdog over the classification system.

This bill, however, ignores this administrative mechanism and vests in the courts the power to declassify documents and release them to all the world.

The President, in his letter to the conferees, said that he could not accept a provision that would risk exposure of our national defense or foreign relations secrets. I cannot accept such a provision either.

Mr. President, I ask, unanimous consent that the text of President Ford's August 20 letter be printed in the Record at this point.

There being no objection, the letter was ordered to be printed in the Record, as follows:

THE WHITE HOUSE,
Washington, D.C., Aug. 20, 1974.

SENATOR EDWARD KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR TED: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all see, to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective.

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without (a) reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him.

Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to this kind of personal liability for the performance of his official duties.

Any potential harm to successful complainants is more appropriately rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations is, in fact, properly classified, following an *in camera* inspection of the document by the court.

If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. 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.

My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security.

The Constitution commits this responsibility and authority to the President. I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security.

Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This

amendment could have that effect if the sources of information or the information itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime.

I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is clearly unwarranted. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

**D. HOUSE ACTION AND VOTE ON CONFERENCE REPORT,
OCTOBER 7, 1974; PP. H10001-H10009**

FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I call up the conference report on the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, and ask unanimous consent that the statement of the managers be read in lieu of the report.

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The Clerk read the statement.

[For conference report and statement, see proceedings of the House of September 25, 1974.]

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, since the text of the conference report has been printed with the amendment and also printed in the Congressional Record of Wednesday, September 25, 1974, I ask unanimous consent that the statement of the managers be considered as read.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield myself such time as I may consume.

(Mr. Moorhead of Pennsylvania asked and was given permission to revise and extend his remarks and include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, on March 14 of this year this important bill to make a number of needed procedural and substantive amendments to the Freedom of Information Act of 1966 was considered by the House and passed by the overwhelming vote of 383 to 8. A Senate version of the bill was considered by that body and passed on May 30 by a vote of 64 to 17. The Senate bill contained several amendments not previously considered by the House, two of which were of considerable significance. One dealt with the imposition of administrative sanctions against Government officials or employees for the improper withholding of information under the law and the second amendment tightens loopholes in the exemption dealing with law enforcement records. There were also a number of important differences in language between the two bills on amendments contained in both the House and Senate versions.

The conference committee met on four separate occasions to resolve differences between the House and Senate bills, reaching final agreement on August 21, except for minor technical changes in language that were resolved after the Labor Day congressional recess.

Mr. Speaker, I will now indicate the major changes in the House bill that have resulted from the conference:

First, the conference version directs each Federal agency to issue regulations covering the direct costs of searching for and duplicating records requested under the Freedom of Information Act. It also provides that an agency may waive the fees if it determines that it would be in the public interest.

Second, the Senate bill contained a provision authorizing Federal courts—in Freedom of Information Act cases—to impose a sanction of up to 60 days suspension from employment against a Federal official or employee which the court found to have been responsible for withholding the requested records without “reasonable basis in law.” This amendment, the most controversial part of the conference committee’s deliberations, was opposed by many House conferees on the grounds that it gave the court such unusual disciplinary powers over Federal employees. After extensive discussion over 3 days of meetings, the conferees reached a reasonable compromise—if the court finds for the plaintiff and against the Government and awards attorney fees and court costs, and if the court makes a written finding that circumstances surrounding the withholding raise questions whether the Federal agency personnel acted “arbitrarily or capriciously,” the Civil Service Commission must initiate a proceeding to determine whether or not disciplinary action is warranted against the responsible Federal official or employee. The Civil Service Commission would then investigate the circumstances, may hold hearings, and otherwise proceed in accordance with regular civil service procedures. The employee has full rights of due process and the right to appeal any adverse finding by the Commission. If the Commission’s decision is against the Federal official or employee, it would submit its findings and disciplinary recommendations for suspension to the affected agency, which would then impose the suspension recommended by the Commission.

Mr. Speaker, there has been some misunderstanding about this sanction provision and I trust that this explanation will help clarify our intent. I seriously doubt that such procedures will actually be invoked except in unusual circumstances. Its inclusion in the law will make it crystal clear that Congress expects that this law be strictly adhered to by all Federal agency personnel and that withholding of Government records be only when clearly authorized by one of the nine exemptions contained in the freedom of information law.

Mr. Speaker, at this point in the Record, I would like to include a letter sent to all members of the conference committee by Mr. John A. McCart, operations director of the AFL-CIO Government Employees Council in which his organization—representing some 30 unions and 1.5 million Federal and postal employees—endorses the compromise sanction provisions contained in this bill:

GOVERNMENT EMPLOYEES COUNCIL—AFL-CIO,
Washington, D.C., September 10, 1974.

HON. WILLIAM MOORHEAD,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MOORHEAD: Because of your membership on the conference committee on H.R. 12471 (Freedom of Information Act Amendments), we believe you will be interested in the views of our organization on the provision affecting Federal officers and employees in connection with alleged violations. Thirty AFL-CIO unions representing more than 1.5 million Federal and postal workers comprise the Council.

Our concern with the original language in the measure is that it permitted Federal courts to impose administrative penalties on employees where violations were confirmed by the courts. This arrangement would deprive postal and Federal employees of due process permitted under existing laws governing disciplinary actions. Moreover, the language could open lower level employees to court imposed discipline, even though they were acting in keeping with instructions from higher level officials.

Section A 4(f) of the measure agreed to by the conferees on August 21 is much less onerous. In cases where Federal courts find a violation exists and believe disciplinary action may be justified, the matter will be referred to the Civil Service Commission for processing through the employing agency. Under this procedure, we assume employees will be entitled to the appellate rights normally available in current statutes applicable to the Federal service.

The Council urges acceptance of the conference agreement of August 21.

Respectfully yours,

JOHN A. McCART,
Operations Director.

Finally, Mr. Speaker, another provision of the Senate bill, not previously considered by the House but included in the conference bill, is an amendment to section 552(b)(7), the exemption in the law dealing with law enforcement records. Under recent court decisions, the language of the present law has been interpreted as almost a blanket exemption against the disclosure of any "law enforcement files," even if they have long since lost any requirement for secrecy.

The bill now contains modified language of the amendment sponsored by the Senator from Michigan, Mr. Hart, and adopted in that body by a vote of 51 to 33, which tightens up the loopholes of the seventh exemption by providing six specific areas of criteria under which agency withholding of information is permitted. Certain of these criteria were the subject of compromise language to accommodate unusual requirements of some agencies such as the Federal Bureau of Investigation.

Mr. Speaker, before yielding to other members of the committee, I would like to refer briefly to communications between the conference committee on this legislation and President Ford. During the meetings of the committee and only a few days after his swearing in, President Ford requested a delay in our proceedings to give him an opportunity to study the bill and agreements already reached by the conferees. We unanimously agreed to this request. On August 20, President Ford sent a letter to the conference committee setting forth his views in four major areas—sanctions, the in camera review language that was virtually identical in both House and Senate bills, the law enforcement exemption amendment, and the provision for discretionary award by the courts of attorney fees and court costs to successful Freedom of Information Act plaintiffs.

Mr. Speaker, the conferees seriously considered each of the points made by President Ford in his letter and have gone "more than half way" to accommodate his views. We modified the sanction provision of the bill. We included language on the in camera review part of the conference report to clarify congressional intent along the lines he suggested. We modified two provisions of the law enforcement exemption language to meet points he raised. We had already acted to clarify our intent that corporate interests not be subsidized by the award of attorney fees and court costs in freedom of information cases. The conference committee made every effort to cooperate with the President in our consideration of this measure and feel that we have acted

responsibly to deal with each of the questions he raised in his letter. I ask unanimous consent to insert in the Record at this point the text of President Ford's letter to me, dated August 20, 1974, and the text of the responsive letter from Senator Kennedy and myself, dated September 23, 1974, which sets forth conference action on each of the major points he raised:

THE WHITE HOUSE,
Washington, D.C., August 20, 1974.

Hon. WILLIAM S. MOORHEAD,
House of Representatives,
Washington, D.C.

DEAR BILL: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government, and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all seek to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective!

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without [a] reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him.

Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to this kind of personal liability for the performance of his official duties. Any potential harm to successful complainants is more appropriately rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations is, in fact, properly classified, following an *in camera* inspection of the document by the court. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. 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. My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security.

The Constitution commits this responsibility and authority to the President. I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This amendment could have that effect if the sources of information or the information itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime. I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

WASHINGTON, D.C.,
September 23, 1974.

HON. GERALD R. FORD,
President of the United States, The White House, Washington, D.C.

DEAR MR. PRESIDENT: We were most pleased to receive your letter of August 20 and to know of your personal interest in the amendments to the Freedom of Information Act being considered by the House-Senate conference committee. And we appreciate your recognition of the fundamental purposes of this milestone law and the importance you attach to these amendments. They of course would provide support for your own policy of "Open government" which is so desperately needed to restore the public's confidence in our national government.

When we received your letter, all of the members of the conference committee agreed to your request for additional time to study the amendments and have given serious consideration and careful deliberations to your views on each of the major concerns you raised. The staffs of the two committees of jurisdiction have had several in-depth discussions with the responsible officials of your Administration. Individual Members have also discussed these points with Justice Department officials.

At our final conference session we were able to reopen discussion on each of the major issues raised in your letter. We believe that the ensuing conference actions on these matters were responsive to your concerns and were designed to accommodate further interests of the Executive Branch.

You expressed concern in your letter about the constitutionality and wisdom of court-imposed penalties against Federal employees who withhold information "without a reasonable basis in law." This provision has been substantially modified by conference action.

At our last conference meeting, after extensive debate and consideration, a compromise sponsored by Representative McCloskey and modified by Senate conferees was adopted. This compromise leaves to the Civil Service Commission the responsibility for initiating disciplinary proceedings against a government official or employee in appropriate circumstances—but only after a written finding by the court that, there were "circumstances surrounding the withholding (that) raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." The actual disciplinary action recommended by the Commission, after completion of its standard proceedings, would actually be taken by the particular agency involved in the case.

We feel that this is a reasonable compromise that basically satisfies your objections to the original Senate language.

You expressed fear that the amendments afford inadequate protection to truly important national defense and foreign policy information subject to *in camera* inspection by Federal courts in freedom of information cases. We believe that these fears are unfounded, but the conference has nonetheless agreed to include additional explanatory language in the Statement of Managers making clear our intentions on this issue.

The legislative history of H. R. 12471 clearly shows that the *in camera* authority conferred upon the Federal courts in these amendments is *not mandatory, but permissive* in cases where normal proceedings in freedom of information cases in the courts do not make a clear-cut case for agency withholdings of requested records. These proceedings would include the present agency procedure of submitting an affidavit to the court in justification of the classification markings on requested documents in cases involving 552(b)(1) information.

The amendments in H. R. 12471 do not remove this right of the agency, nor do they change in any way other mechanisms available to the court during its consideration of the case. The court may still request additional information or corroborative evidence from the agency short of an *in camera* examination of the documents in question. Even when the *in camera* review authority is exercised by the court, it may call in the appropriate agency officials involved to discuss any portion of the information or affidavit furnished by the agency in the case.

The conferees have agreed to include language in the Statement of Managers that reiterates the discretionary nature of the *in camera* authority provided to the Federal courts under the Freedom of Information Act. We will also express our expectation that the courts give substantial weight to the agency affidavit submitted in support of the classification markings on any such documents in dispute.

Thus, Mr. President, to feel that the conference committee has made an effort to explain our intentions so as to respond to your objections on this important area of the amendments, operating as we must within the scope of the conference authority because of the virtually identical language in both the House and Senate versions on H. R. 12471.

The conference committee has also acted affirmatively to satisfy your major objections to the proposal amendment to subsection (b)(7) of the Freedom of Information Act, dealing with specific criteria for the withholding of Federal investigatory records in the law enforcement area.

The conference committee had already added an additional provision, not contained in the Senate-passed bill, which would permit withholding of information that would "endanger the life or physical safety of law enforcement personnel." This made it substantially identical to the language recommended by then Attorney General Richardson during Senate hearings on the bill and endorsed by the Administrative Law Section of the American Bar Association.

After reviewing the points made in your letter on this point, the conference committee also agreed to adopt language offered by Senator Hruska to permit the withholding of the *information* provided by a confidential source to a criminal law enforcement authority during the course of a criminal or "lawful national security intelligence investigation." The Federal agency may, in addition, withhold the identification of the confidential source in *all* law enforcement investigations—civil as well as criminal.

To further respond to your suggestion on the withholding of information in law enforcement records involving personal privacy the conference committee agreed to strike the word "clearly" from the Senate-passed language.

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.

You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

In conclusion, Mr. President, we appreciate your expression of cooperation with the Congress in our deliberations on the final version of this important legislation. In keeping with your willingness "to go more than halfway to accommodate Congressional concerns," we have given your suggestions in these five key areas of the bill renewed consideration and, we feel, have likewise gone "more than halfway" at this late stage.

We welcome your valuable input into our final deliberations and appreciate the fine cooperation and helpful suggestions made by various staff members and officials of the Executive branch. It is our hope that the fruits of these joint efforts will make it possible for the Senate and House to act promptly on the conference version of H.R. 12471 so that this valuable legislation will be enacted and can be signed into law before the end of the month.

With every good wish,
Sincerely,

EDWARD M. KENNEDY,
Chairman, Senate Conferees.
WILLIAM S. MOORHEAD,
Chairman, House Conferees.

Mr. Speaker, our committee has worked for more than 3 years in investigations, studies, legislative hearings, and careful drafting of this legislation to strengthen and improve the operation of the Freedom of Information Act. It has been passed by overwhelming votes in both the House and Senate. The conferees have labored hard and long to reconcile the differences between the two versions of the bill and have arrived at reasonable compromises on each of the major issues in dispute. We have a good bill. We have a fair and workable bill that will plug major loopholes in the present Freedom of Information Law.

In remarks soon after he took office, President Ford pledged to the American people an "open Government." Enactment of these amendments to the freedom of information law and their prompt signing into law will be the important first step toward the achievement of this badly needed objective of "open Government" and a restoration of the faith of the American public in the institution of government—faith that has been so seriously eroded over the last several years.

In conclusion, Mr. Speaker, I would like to call attention to the language of the statement of managers on page 15 of House Report No. 1320 which clarifies the intent of Congress with respect to the impact of this legislation on the Corporation for Public Broadcasting. The gentleman from California (Mr. Van Deerlin) raised such questions during a colloquy when the bill was debated last March. This

language makes it clear that the definition of "agency" for purposes of Freedom of Information Act matters does not include the Corporation for Public Broadcasting.

I had sought assurance that CPB would follow the open government principles of the Freedom of Information Act in its information activities—even though they were not specifically covered by that act—so as to serve the public interest. I am pleased that CPB has reaffirmed that position in correspondence with me. At this point in the Record I include two letters from Mr. Henry Loomis, president of CPB, in which he sets forth such assurances:

CORPORATION FOR
PUBLIC BROADCASTING,
Washington, D.C., September 23, 1974.

HON. WILLIAM S. MOORHEAD,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Washington, D.C.*

DEAR MR. MOORHEAD: On behalf of the Board and Management of the Corporation for Public Broadcasting, I wish to congratulate you and the House Conferees on the Freedom of Information amendments (HR 12471) recently reported by the Conferees. We believe the amendments serve a very real public need and will, when implemented, reward the wisdom and dedication of the House Members in the Freedom of Information area. We are most encouraged by the recognition, in the Conference Reports, of CPB's unique status as a private, nonprofit corporation dedicated to the purposes set out in the Public Broadcasting Act of 1967.

The Conferees' generous and statesmanlike response to CPB's comments on the pending legislation prompt us to reaffirm CPB's traditional commitment to freedom of information principles, and to pledge fullest implementation of these principles in CPB's operations, consistent with its private status and constitutionally protected activities in the area of broadcast program support. You have our full assurance of CPB's continued dedication to the spirit of the Freedom of Information Act.

Sincerely,

HENRY LOOMIS.

CORPORATION FOR
PUBLIC BROADCASTING,
Washington, D.C.

HON. WILLIAM S. MOORHEAD,
*House of Representatives,
Washington, D.C.*

DEAR MR. MOORHEAD: In my letter to you of September 23, it was my pleasure to reaffirm CPB's "fullest implementation of freedom of information principles in CPB's operations, consistent with its private status and constitutionally protected activities in the area of broadcast program support."

In order to add some specifics to that general commitment, I should like to describe current CPB practices regarding the dissemination of information relating to CPB activities, and regarding requests for information about CPB activities from the press and the public.

All of CPB's public information activities are coordinated by our Office of Public Affairs. The Office of Public Affairs is located at the Corporation for Public Broadcasting, 888 16th Street, N.W., Washington, D.C. 20006. Phone (202) 293-6160.

This office publishes the following informational documents relating to CPB activities:

(1) The Annual Report of the Corporation for Public Broadcasting which represents "a comprehensive and detailed report of the Corporation's operations, activities, financial condition, and accomplishments . . . [including] such recommendations as the Corporation determines appropriate", required by the public Broadcasting Act of 1967, as amended (47 U.S.C. 396(i)). This report is submitted to the President for transmittal to the Congress on or before the 31st day of December of each year. After transmittal to the Congress it is available to all who request it from the CPB Public Affairs Office.

(2) The *CPB Report*, a weekly newsletter containing reports of official CPB Board and Management actions and activities, as well as additional information of interest to public broadcasting stations, viewers, listeners, and citizens.

(3) Press releases, containing official reports and statements of the CPB Board and management. Such releases are issued from time to time as, in the opinion of the Public Information Office, they are required.

(4) CPB testimony before legislative, oversight, and appropriations committees and subcommittees of the U.S. Congress. These comprehensive statements on CPB activities financial conditions, projects, and accomplishments are routinely duplicated for convenient public access by request to the Public Affairs Office. In addition, these statements, together with the transcripts of questions and answers before Congressional committees are routinely published and available as Congressional documents.

(5) Technical studies, final grant reports, etc. From time to time, the Corporation commissions research and development or other projects that result in the presentation of reports, monographs, statistical compilations, and other written materials of interest to the public broadcasting community or the public at large. The availability of all these materials is noted in the CPB Annual Report, CPB Reports, or CPB press releases. Copies of these materials are available upon request at the Public Affairs Office (in limited numbers).

Requests for information or documents coming to CPB employees from the press, the general public or others not dealing with CPB in its business operations are routinely referred to the Public Affairs Office. It is the practice of the Corporation to provide information specifically requested in every instance in which furnishing such information will not:

(1) divulge confidential personnel information regarding individual employees without their consent; or

(2) divulge financial or trade secret data acquired from any person under a promise of confidence; or

(3) impair CPB ability to:

(a) conduct its activities free from the "extraneous interference and control" Congress sought to bar in authorizing establishment of CPB as a private non-government corporation [47 U.S.C. 396(a)(6)].

(b) "carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities." [47 U.S.C. 396(g)(1)(D)];

(c) avoid "... any direction, supervision, or control of educational broadcasting; or over the charter or bylaws of the Corporation; or over the curriculum, program of construction, or personnel of any educational institution, school system, or educational broadcasting station or system" by "any department, agency, officer, or employee of the U.S. . . ." [47 U.S.C. 398]; or

(d) conduct its activities as a private, "nonprofit corporation . . . which will not be an agency or establishment of the United States Government." [47 U.S.C. 396(b)]; or

(4) otherwise compromise the constitutionally protected activities of the Corporation, stations, or systems, in the broadcast program area.

I am sure you will recognize that CPB's practices regarding public access to CPB information are consistent with, and in a number of instances, actually exceed principles of access applicable to government agencies under the Freedom of Information Act and the amendments recently considered by House and Senate conferees. I stress again that CPB's voluntary commitment to freedom of information principles is a continuing one, limited only by the sensitive nature of some of its functions. I doubt that you will find another private corporation so committed to public understanding of its work and activities.

Sincerely,

HENRY LOOMIS.

Mr. SEIBERLING. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Ohio.

Mr. SEIBERLING. Mr. Speaker, on a matter of such importance, particularly in the light of what we have gone through this year with respect to Watergate, I would hope we could have enough order so

that all Members of the House who are interested in this can hear what the gentleman is saying.

If I may proceed just a little further, in my mind the whole conspiracy aspect of Watergate was made possible because of the abuses of the power of people in the executive branch to keep matters secret. The distinguished gentleman from Pennsylvania is talking about what the conferees have done to remedy this situation. I think we deserve to understand exactly what the conferees did.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, the gentleman is entirely correct. That is the thrust of the legislation as passed by this body and passed by the other body and reported back through conference.

The other major change in the bill was tightening up loopholes on public access to law enforcement records, and I think the conferees have reached a very good compromise which we can endorse to all the Members of the House.

Mr. ALEXANDER. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I now yield to the able gentleman from Arkansas (Mr. Alexander) a member of our Foreign Operations and Government Information Subcommittee, who has made such a significant contribution to this legislation as a House conferee.

Mr. ALEXANDER. Mr. Speaker, I note that section 3 of this act requires each agency to file an annual report with the Speaker of the House and the President *pro tempore* of the Senate. These annual reports are to contain specific information as enumerated in the act. Following this enumeration there is a requirement that 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" certain information regarding litigation brought under the Freedom of Information Act, as well as a description of action taken by the Department of Justice to encourage compliance with the act.

Is it the intent of this section that the Department of Justice file two annual reports?

Mr. MOORHEAD of Pennsylvania. The answer is yes. The Department of Justice, as an agency, just as any other agency, is required to file an annual report containing specific activities of the Department of Justice in complying with the requests under the Freedom of Information Act; to wit, that additionally the Attorney General is required to file a second report dealing with the activities of the Department of Justice in its role as legal counsel to all of the other agencies under the Freedom of Information Act.

(Mr. Alexander asked and was given permission to revise and extend his remarks.)

Mr. ALEXANDER. Mr. Speaker, truth is the foundation of democracy. Thomas Jefferson said:

Whenever the people are well-informed, they can be trusted with their government; because whenever things get so far wrong to attract their notice, they can be relied on to set them right.

Our democracy is based on truth. Our Declaration of Independence declares that all men are created equal, and that we are endowed with the unalienable right of liberty; that to secure our liberty we

established a representative democracy; and that our Government derives its powers from the consent of the governed.

But, the very survival of democracy depends on an informed citizenry. Therefore, if we are to survive as a free nation, we must not tolerate deception in government. If the basis of government is the consent of the governed from which it derives its just powers; then, clearly, unjust powers of government can also be consented to by the governed.

But, once the consent to unjust power is given, liberty can soon be replaced by tyranny. And, once tyranny is established, it no longer matters whether the governed consent, or not.

That's why government deception supported by official secrecy causes Americans to become frustrated, powerless, and dissatisfied with elected officials.

Our action here today in adopting the conference report on the Freedom of Information Act Amendments may prove to be one of the most significant steps we have taken in returning the U.S. Government to the hands of the American people. Unfortunately, our action did not come early enough to prevent the scandals which have rocked the Nation in the last year and which have rallied all people behind the cause of open government.

For although the people of this country have the power to go to the polls to record their wishes, they are denied the information with which to make wise decisions. Over the years, as our bureaucracy has expanded unchecked, a curtain of secrecy has fallen over its operations, a curtain only slightly less penetrable than the one which surrounds the Communist bloc.

Since the enactment of the first housekeeping statutes under George Washington for the purpose of allowing department heads to adopt regulations governing the custody, use and preservation of Official Government documents, the executive branch has become more and more effective in twisting these laws into an excuse for hiding information and documents from the American people.

Why do we have this secrecy in Government? In many instances, it appears that it is simpler for our Government officials to have a "secret" stamp on hand than to go to the trouble of digging up the information to answer a lot of questions. This same "secret" stamp makes it easier to hide the errors of judgment and the favors of politics which could be damaging to the men in control.

I have read reports of some pretty absurd uses of our information classification system. For instance, during the Korean war, the Department of Labor would not give out the details of the armed services purchase of peanut butter, contending that a clever enemy could deduce from these purchases the approximate number of men in the services. Yet at the same time the Department of Defense was releasing mimeographed sheets with a breakdown of the exact number of men in the Army, Navy, and Air Force.

Things have not improved much over the years, I am afraid, even though the passage of the 1967 Freedom of Information Act was a giant step in returning to the public access to their own public documents.

And although in the 1970's I am not really concerned with supplies of peanut butter, I am most concerned with the price and availability

of the bread it is spread on and the effect that the sale of grain and wheat to Russia has had on its cost to the American consumer.

Now let me briefly outline the difficulties I have had in my unsuccessful efforts to obtain information on this deal.

In the fall of 1973, I began an extensive investigation of the transactions behind the Russian grain deal. As a Member of Congress and as a member of the Intergovernmental Relations Subcommittee of the Committee on Government Operations—the committee charged with the investigative powers of the House of Representatives—I sought information on the wheat subsidies paid to each exporting company since July 8, 1972. I also requested information on the status and background of the investigation being conducted by the Department of Justice on the alleged Kansas City Wheat Market price fixing by certain individuals or grain companies. I made my requests through communication with Secretary of Agriculture Earl Butz, ASCS Administrator Kenneth Frick, Acting Attorney General Robert Bork, FBI Director Clarence Kelly, the Commodity Exchange Authority, and Assistant Attorney General Henry E. Petersen.

In each case, I was told that the information I requested was either not available or that it could not be made available to me. I was told that the FBI could not release the details of the investigation and that we must rely on the FBI's judgment that there had not been any illegal activities connected with the sale.

The investigations were secret, but it was no secret that bread prices were higher and the American people were not ready to accept such a decision from the FBI without having access to the facts that would back up such a judgment.

As long as a man is informed, he can usually take action to insure that his other rights are not violated. If I, as a Member of Congress and the Government Operations Committee, who works daily with the bureaucracy, become frustrated when I am denied access to information vital to the public welfare, what about John Q. Citizen and his efforts to get the information he needs?

In conclusion, let me relate one more "horror" story. In 1971, a public interest group asked the Department of Agriculture for some information on pesticides. The Department told them they would have to be a little more specific as to what they wanted.

The group asked the Department for their index of files on pesticides so that they could specifically state the information needed. In response to this request, USDA not only denied them access to the index, stating that the index itself was a secret, but also restated their refusal to release the information on pesticides without the appropriate index number. Fortunately this particular group had the resources to go to court and sue for the information, which the court ordered released.

However, the case did not end here. Undaunted, USDA replied that they would be glad to release a copy of the information, but it would cost \$91,000 and take a year and a half to get it together.

The group again went to court where USDA was told by the court to stop fooling around and release the information that was requested.

I shudder to think of the amount of time, energy, and money wasted in this process.

The enactment of these amendments to the Freedom of Information Act will put an end to the ridiculous delays, excuses, and bureaucratic runarounds which have denied U.S. citizens their "right to know" and made Americans a captive of their own Government.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Iowa.

Mr. GROSS. Are the amendments adopted by the conference germane to the bill?

Mr. MOORHEAD of Pennsylvania. In my opinion they are.

Mr. YOUNG of Florida. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Florida.

Mr. YOUNG of Florida. Can the gentleman tell us what happens to the provision in the bill where certain judges were permitted to make national security determinations?

Mr. MOORHEAD of Pennsylvania. Yes. The bill contains the requirement, which is in the House bill, that, where there is a stamp, a classification stamp, the court could go behind that, but we specified that the court should give great weight to an affidavit by the Department that this was properly classified. What we are trying to overrule is the situation described in the famous *Mink* case, where the court said to the Congress, no matter how frivolous or capricious the classification should be, that the court could not go behind it.

Mr. ERLNBORN. Mr. Speaker, I yield myself 5 minutes.

(Mr. Erlenborn asked and was given permission to revise and extend his remarks.)

Mr. ERLNBORN. Mr. Speaker, I rise in support of the conference report on H.R. 12471, the Freedom of Information Act amendments.

Mr. Speaker, this bill passed with a rather overwhelming vote in the House, and there were only a few questions to be adjusted by the House and the Senate. These amendments to the Freedom of Information Act I think are those that all members can support. We are acting at this time in a way that is consonant with the times, and that is making information more readily available from the Government to members of the general public.

One of the questions that was raised in the conference, and was most difficult to resolve, was the question of an amendment proposed by the other body. It was incorporated in the bill as passed by the other body and would have allowed a sanction to be imposed by the court against Government employees who are found to have refused to give information to someone who requested it without—and I quote—"a reasonable basis in the law."

I objected to this provision. I think it would have been an unconscionable burden on Government employees. I am happy to report that a compromise was adopted by the conference, one that I am not totally happy with, but I think it does improve the provision to the point where I can support the conference report.

As a matter of fact, the provision that is now in the bill is one that, in my judgment, could never result in the imposition of a sanction against a Federal employee.

The conferees agreed to change the text to that of an employee acting arbitrarily and capriciously rather than just without a reason-

able basis in law. As a matter of fact, before the case ever gets to court, the employee who refuses to give information when a demand is made will have to have been supported by his superior. There will have had to have been an administrative appeal within the agency.

In most agencies this would mean that the general counsel of the agency would support the decision of the employee, and then the case would have to be brought to court by the one who was seeking the information. The Attorney General or the general counsel of the agency would then have to make a decision at that point that the case is sufficiently meritorious to defend. Then possibly the court might find the agency to be wrong, but I think in that circumstance the court could hardly find that the employee who has been sustained all the way along the line had acted arbitrarily or capriciously. Therefore, though we do have a provision in here for a sanction, it is limited to a case where there is action which is found by the court to be arbitrary and capricious.

The court would not make a determination as to the sanction, but would then certify the matter to the Civil Service Commission. The Civil Service Commission would be required to institute a proceeding.

I find that rather interesting, by the way: Proceeding.

I asked the principal sponsor of the Senate provision, Senator Kennedy of Massachusetts, what a proceeding was. He was unable in conference to define it. It is neither defined in the Civil Service law, nor is it defined in the Freedom of Information Act. What kind of proceeding is intended by the compromise of the conferees is really rather vague. Whether the employee would be entitled to counsel and whether there would have to be a public hearing are things which really are rather vague. However, because I expect this provision never to be utilized, I do not think it makes a great deal of difference.

Besides this provision, which was controversial, there are other noncontroversial provisions, some that I think are great advances in the law.

First of all, this does allow a court to review what could, and sometimes, I am sure, in the past, has been an arbitrary decision to classify a document for security reasons. This would not require the court to view the material, but would allow the court—and we make this clear in the conference report—allow the court to look at the affidavits from the affected agency, whether the Department of State or the Defense Department or other, and give great weight to these affidavits.

At that point only, if there was still a question remaining in the mind of the court, the court could conduct an in camera inspection of the material and see whether it had been properly classified within the terms of the Executive order setting forth the procedure for classification.

The SPEAKER. The time of the gentleman has expired.

Mr. ERLBORN. Mr. Speaker, I yield myself 1 additional minute.

Only then would the court have an opportunity to view the material and make a determination as to whether it had been properly classified.

In addition, for those who think that the law has not been applied as it ought to have been in the past, there is one further provision of the act which I think is very helpful. Those who have been denied

information when they have made a demand under the law, and then go to court to prove that their demand was meritorious, the court can—is not required to, but can—award attorney's fees and court costs to the successful litigant.

I think that, on balance, the bill as reported by the conference is a good bill. I was happy to sign the conference report.

I hope that it will be adopted.

The SPEAKER. The time of the gentleman from Illinois has expired.

Mr. ERLBORN. Mr. Speaker, I yield 5 minutes to the gentleman from New York (Mr. Horton).

(Mr. Horton asked and was given permission to revise and extend his remarks.)

Mr. HORTON. Mr. Speaker, I rise in support of the conference report on H.R. 12471, the Freedom of Information Act Amendments of 1974.

Before becoming ranking minority member of the Government Operations Committee, I was a member of the subcommittee which has jurisdiction over this legislation. In that capacity, I have studied for several years how the Freedom of Information Act works and how it can be improved.

Let me assure you that the measure before us today will strengthen the public's right to know what its Government is doing. By strengthening the public's right to know, we make democracy work better. That is an objective we should all support wholeheartedly.

H.R. 12471 eases public access to Government information in several constructive ways. It requires agencies to publish indexes of documents, respond more quickly to requests for data, and submit annual reports to the Congress on their performance under this act. It grants individuals access to material they can reasonably describe—rather than identify with particularity—more prompt resolution of lawsuits they file under the freedom of information law, and an award of attorney fees—at the courts' discretion—in cases in which they substantially prevail. In addition, this bill makes clear that courts have the discretion to examine in chambers all contested records—including classified material—before deciding whether it is properly exempt from public disclosure.

Mr. Speaker, my dedication to freedom of information remains firm. I think the conference report before us is an improvement over the present law in this area. I urge my colleagues to join me in supporting this legislation.

Mr. Speaker, I would like to ask the gentleman from Pennsylvania some questions about section 2 of this bill. Section 2(a) amends paragraph (1) of 5 U.S.C. 552(b) to exempt from the requirements of the Freedom of Information Act matters which are—

(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.

When coupled with section 552(a)(4)(B), as amended in this bill, this provision would permit a court to look behind the security classification given to a document by an agency to determine whether the document was properly classified. This provision is not intended to permit a court free rein to classify information as it wishes, is it?

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, if the gentleman will yield, it certainly is not.

First of all, a court could only determine whether the information was "properly classified pursuant to (an) Executive order." In other words, the judge would have to decide whether the document met the criteria of the President's order for classification—not whether he himself would have classified the document in accordance with his own ideas of what should be kept secret. Second, as we have said in the joint explanatory statement of the committee of conference:

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.

Mr. HORTON. I would like to move now to section 2(b) of the bill. That section rewrites the subsection of the Freedom of Information Act which exempts certain law enforcement records from disclosure to the public. The new language exempts "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would—among other things—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."

I would ask the gentleman two questions about this provision. First, with regard to the phrase "a lawful national security intelligence investigation," exactly what types of investigations does that encompass?

Mr. MOORHEAD of Pennsylvania. Let me quote to the gentleman from the joint explanatory statement of the committee on conference. That statement says:

The term "intelligence" in (the) section (we are discussing) 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.

Mr. HORTON. So it would apply to more than just positive intelligence activities?

Mr. MOORHEAD of Pennsylvania. Yes. It would also apply to counter-intelligence activities and background security investigations.

Mr. HORTON. But it would not apply to investigations which were labeled "national security" but in reality had nothing to do with that subject matter?

Mr. MOORHEAD of Pennsylvania. No, it would not. The national security intelligence investigation must be "lawful" for information compiled in the course of it to be exempted from disclosure under the Freedom of Information Act.

Mr. HORTON. My second question is, this bill exempts from public disclosure confidential information furnished by a confidential source in the course of a criminal investigation if the records were compiled by "a criminal law enforcement authority" and the same kind of information given for a lawful national security intelligence investigation if the records were compiled by "an agency." By using the term "criminal law enforcement authority" in one place and "an agency"

in another, does this provision mean that the two terms are mutually exclusive, and that as a result, confidential information compiled by a criminal law enforcement authority in the course of a national security investigation would not be exempt from public disclosure?

Mr. MOORHEAD of Pennsylvania. No. Again, let me quote from the statement of managers:

By "an agency" the conferees intend to include criminal law enforcement authorities as well as other agencies.

All agencies—criminal law enforcement authorities as well as others—could properly withhold confidential information compiled for a lawful national security intelligence investigation.

Mr. HORTON. Mr. Speaker, I thank the gentleman for his lucid explanations and commend him for the interpretations of the bill which he has given.

I would like to make a separate point with regard to the conference report. Section (1)(b)(2) writes into the Freedom of Information Act a requirement that fees charged by agencies for performing services under the act "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."

Some question has arisen as to the meaning in this provision of the term "document search." As the ranking minority House member of the committee of conference, I wish to express my opinion that this term means not just a search for documents, but also a search within documents to determine which specific portions are subject to public disclosure and which are exempt from the provisions of the act. It does not encompass a review by agency lawyers or policymaking or other personnel to determine general rules which they or other employees later follow in deciding which specific portions are exempt from disclosure.

Let me cite just one example of how the conferees, in my judgment, mean that this distinction should be applied. Suppose someone requested the FBI to provide all documents in its possession relating to investigations of the Communist Party of the United States. The FBI estimates that it has 2 million pages of such documents. The Bureau's lawyers would first have to review samples of this material to formulate guidelines for other personnel to use in applying the exemptions of the act to the entire group of papers. The Agency could not charge fees for this examination. Then the other personnel would search through the documents, page by page, to determine which portions could be made public and which could not. This action would be subject to fees under the act.

The FBI has estimated that the page-by-page search through the documents would consume 225 man-years. Even if each employee participating in the search was paid only \$10,000 per year, the cost of responding to this one request would be more than \$2 million. The committee report on the House bill estimated the cost of the entire bill as \$100,000 per year; the report on the similar Senate bill estimated the cost as \$40,000 annually. Surely, the committee on conference could not have intended that agency expenses in searching through documents to comply with requirements of the law not be reimbursable. If that were the case, the conferees would have written a bill which would

entail expenditures for responding to one request more than 20 times greater than the annual expense of the more costly of the two similar bills they were reconciling.

Mr. Speaker, I thank the gentleman for this time and yield back to him.

Mr. ERLENBERN. Mr. Speaker, I yield such time as he may consume to the gentleman from Nebraska (Mr. Thone).

(Mr. Thone asked and was given permission to revise and extend his remarks.)

Mr. THONE. Mr. Speaker, I rise in support of the conference report on H.R. 12471. This bill amends the Freedom of Information Act of 1966 in several ways, all of them designed to increase the public's access to Government information. As one who has fought for openness in Government for many years, first in Nebraska and now in the Congress, I am proud to add my support to that of other Members advocating passage of this conference report.

Mr. Speaker, I would point in particular to provisions of this legislation which require agencies to respond to requests promptly and actually reimburse some successful plaintiffs who bring suit under the law. Section 1(c) of the measure provides that agencies must respond to requests for information within 10 days, and decide on appeals of decisions to withhold data within 20 additional days. These time limits could be extended only in unusual circumstances defined in the bill, and then only for 10 days. This provision will cure the unfortunate tendency which we have noted in some agencies to delay responding to citizen requests. Section 1(a) permits judges to assess attorney fees against the Government in cases in which complaints substantially prevail. This would surely discourage agencies from keeping matters secret unless they are quite convinced that withheld information would be within the law.

In these ways as in others, this bill represents a great step forward for freedom of information. I strongly support H.R. 12471.

Mr. THOMPSON of New Jersey. Mr. Speaker, as a cosponsor of the original bill that was acted upon earlier this session, I am pleased to support the conference report on H.R. 12471. In many ways it is a stronger and more comprehensive Freedom of Information measure than the bill we passed in March by an overwhelming 383 to 8 vote. I commend the House conferees for their insistence on the basic principles of the House version during the conference deliberations and for their wisdom in accepting several important provisions added by the other body. This is an important bill that will make the Freedom of Information law more effective, more workable, and vastly more meaningful in advancing the public's "right to know" about the affairs of our Federal Government.

During the debate on H.R. 12471 last March, I stated that—

Government secrecy for the purposes of hiding wrongdoing, inept leadership, or bureaucratic errors undermines and can eventually destroy our system of representative government.

Since then, we have seen dramatic evidence of the effects of government secrecy, and the corruption it produced, as a result of disclosures during the impeachment proceedings of the Judiciary Committee. This legislation, when signed into law, will be the first major step for—

ward in helping to restore the confidence of the American people in the institutions of government by purging the body politic of the secrecy excesses which marked the sordid Watergate coverup during the Nixon administration.

Mr. Speaker, I urge the House to adopt this conference report adding these significant strengthening amendments to the Freedom of Information Act.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I have no further requests for time.

Mr. ERLNBORN. Mr. Speaker, I have no further requests for time.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I move the previous question on the conference report.

The previous question was ordered.

The SPEAKER. The question is on the conference report.

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. ANNUNZIO. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 349, nays 2, not voting 83, as follows:

[Roll No. 574]

YEAS—349

Abdnor	Breckinridge	Collins, Tex.
Abzug	Brinkley	Conlan
Addabbo	Brooks	Conte
Alexander	Broomfield	Corman
Anderson, Calif.	Brotzman	Cotter
Anderson, Ill.	Brown, Calif.	Coughlin
Andrews, N.C.	Brown, Ohio	Crane
Andrews, N. Dak.	Broyhill, N.C.	Cronin
Annunzio	Broyhill, Va.	Culver
Arends	Buchanan	Daniel, Dan
Ashbrook	Burgener	Danielson
Ashley	Burke, Fla.	Davis, Ga.
Aspin	Burke, Mass.	Davis, S.C.
Badillo	Burlison, Mo.	Davis, Wis.
Bafalis	Burton, John	de la Garza
Baker	Burton, Phillip	Delaney
Barrett	Butler	Dellenback
Bauman	Byron	Dellums
Beard	Camp	Denholm
Bennett	Carney, Ohio	Dennis
Bergland	Casey, Tex.	Dent
Bevill	Cederberg	Derwinski
Biaggi	Chamberlain	Devine
Biester	Chappell	Dickinson
Bingham	Chisholm	Dingell
Boggs	Clancy	Donohue
Boland	Clark	Downing
Bolling	Clausen, Don H.	Drinan
Bowen	Cleveland	Dulski
Brademas	Cochran	Duncan
Bray	Collier	du Pont
Breaux	Collins, Ill.	Edwards, Ala.

Edwards, Calif.	Hutchinson	Murphy, N. Y.
Eilberg	Ichord	Myers
Erlenborn	Jarman	Natcher
Esch	Johnson, Calif.	Nedzi
Eshleman	Johnson, Pa.	Nichols
Evans, Colo.	Jones, Ala.	Nix
Fascell	Jones, N.C.	Obey
Fish	Jones, Tenn.	O'Brien
Fisher	Jordan	O'Hara
Flood	Karth	Owens
Flowers	Kastenmeier	Parris
Flynt	Kazen	Passman
Foley	Kemp	Patman
Ford	Ketchum	Patten
Forsythe	Kluczynski	Perkins
Fountain	Koch	Pettis
Fraser	Kuykendall	Peysler
Frelinghuysen	Kyros	Pickle
Frenzel	Lagomarsino	Pike
Frey	Landrum	Price, Ill.
Froehlich	Latta	Price, Tex.
Fulton	Leggett	Quie
Fuqua	Lehman	Quillen
Gaydos	Lent	Railsback
Gettys	Litton	Randall
Gibbons	Long, La.	Rangel
Gilman	Long, Md.	Regula
Ginn	Lott	Reuss
Goldwater	McClory	Riegle
Gonzalez	McCollister	Rinaldo
Goodling	McCormack	Robinson, Va.
Gray	McDade	Robison, N. Y.
Green, Oreg.	McEwen	Rodino
Green, Pa.	McFall	Roe
Griffiths	McKay	Rogers
Gross	McKinney	Roncalio, Wyo.
Grover	McSpadden	Roncallo, N. Y.
Gubser	Macdonald	Rooney, Pa.
Gude	Madden	Rose
Gunter	Madigan	Rosenthal
Guyer	Mann	Rostenkowski
Haley	Martin, Nebr.	Roush
Hamilton	Matsunaga	Rousselot
Hanley	Mayne	Roybal
Hanrahan	Mazzoli	Ruppe
Hansen, Wash.	Meeds	Ruth
Harrington	Melcher	Ryan
Harsha	Metcalf	St Germain
Hastings	Mezvinsky	Sandman
Hawkins	Michel	Sarasin
Hechler, W. Va.	Milford	Sarbanes
Heckler, Mass.	Miller	Satterfield
Heinz	Minish	Scherle
Helstoski	Mink	Schneebeili
Henderson	Mitchell, Md.	Schroeder
Hicks	Mizell	Sebelius
Hillis	Moakley	Seiberling
Hogan	Mollohan	Shiple
Holifield	Montgomery	Shriver
Holt	Moorhead, Calif.	Shuster
Holtzman	Moorhead, Pa.	Sisk
Horton	Morgan	Skubitz
Howard	Mosher	Slack
Huber	Moss	Smith, Iowa
Hungate	Murphy, Ill.	Smith, N. Y.

Spence	Traxler	Wilson, Charles H., Calif.
Staggers	Treen	Wilson, Charles, Tex.
Stanton, J. William	Udall	Winn
Stanton, James V.	Van Deerlin	Wolf
Stark	Vander Jagt	Wright
Steed	Vander Veen	Wyatt
Steiger, Ariz.	Vanik	Wydler
Steiger, Wis.	Veysey	Wylie
Stephens	Vigorito	Wyman
Stokes	Waggonner	Yates
Stubblefield	Waldie	Yatron
Stuckey	Walsh	Young, Alaska
Studds	Wampler	Young, Fla.
Sullivan	Ware	Young, Ga.
Talcott	Whalen	Young, Ill.
Taylor, N.C.	White	Young, Tex.
Thompson, N.J.	Whitten	Zablocki
Thomson, Wis.	Wiggins	Zion
Thone	Williams	
Thornton	Wilson, Bob	

NAYS—2

Burluson, Tex.

Landgrebe

NOT VOTING—83

Adams	Hays	Preyer
Archer	Hébert	Pritchard
Armstrong	Hinshaw	Rarick
Bell	Hosmer	Rees
Blackburn	Hudnut	Reid
Blatnik	Hunt	Rhodes
Brasco	Johnson, Colo.	Roberts
Brown, Mich.	Jones, Okla.	Rooney, N. Y.
Burke, Calif.	King	Roy
Carey, N. Y.	Lujan	Runnels
Carter	Luken	Shoup
Clawson, Del.	McCloskey	Sikes
Clay	Mahon	Snyder
Cohen	Mallary	Steele
Conable	Maraziti	Steelman
Conyers	Martin, N.C.	Stratton
Daniel, Robert W., Jr.	Mathias, Calif.	Symington
Daniels, Dominick V.	Mathis, Ga.	Symms
Diggs	Mills	Taylor, Mo.
Dorn	Minshall, Ohio	Teague
Eckhardt	Mitchell, N. Y.	Tiernan
Evins, Tenn.	Murtha	Towell, Nev.
Findley	Nelsen	Ullman
Gaiimo	O'Neill	Whitehurst
Grasso	Pepper	Widnall
Hammerschmidt	Poage	Young, S.C.
Hanna	Podell	Zwach
Hansen, Idaho	Powell, Ohio	

So the conference report was agreed to.
The Clerk announced the following pairs:

Mr. Rooney of New York with Mr. Dorn.
Mr. Hébert with Mr. Blatnik.
Mr. Dominick V. Daniels with Mrs. Burke of California.
Mr. Sikes with Mr. Clay.
Mr. Stratton with Mr. Mahon.
Mr. Adams with Mr. Nelsen.
Mr. Carey of New York with Mr. Minshall of Ohio.
Mr. Giacomo with Mr. Hansen of Idaho.
Mr. Mathis of Georgia with Mr. Hosmer.
Mr. Roberts with Mr. Martin of North Carolina.
Mr. Hays with Mr. Maraziti.
Mr. Conyers with Mr. Luken.
Mr. Reid with Mr. Mallary.
Mr. Diggs with Mr. Tiernan.
Mr. Teague with Mr. Cohen.
Mr. Ullman with Mr. Brown of Michigan.
Mr. Pepper with Mr. King.
Mr. Preyer with Mr. Blackburn.
Mr. Roy with Mr. Hinshaw.
Mr. Hanna with Mr. Carter.
Mrs. Grasso with Mr. Bell.
Mr. Jones of Oklahoma with Mr. Conable.
Mr. Mills with Mr. Archer.
Mr. Rarick with Mr. Robert W. Daniel, Jr.
Mr. Runnels with Mr. Del Clawson.
Mr. Eckhardt with Mr. Findley.
Mr. Evins of Tennessee with Mr. Hammerschmidt.
Mr. Murtha with Mr. Hudnut.
Mr. Symington with Mr. Lujan.
Mr. O'Neill with Mr. Hunt.
Mr. Mitchell of New York with Mr. Mathias of California.
Mr. Steelman with Mr. McCloskey.
Mr. Pritchard with Mr. Powell of Ohio.
Mr. Shoup with Mr. Rees.
Mr. Widnall with Mr. Snyder.
Mr. Symms with Mr. Steele.
Mr. Taylor of Missouri with Mr. Zwach.
Mr. Whitehurst with Mr. Towell of Nevada.

The result of the vote was announced as above recorded.
A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the Freedom of Information conference report just agreed to.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

E. PRELIMINARY HOUSE ACTION ON PRESIDENTIAL VETO, NOVEMBER 18, 1974; PP. H10705-H10706

FREEDOM OF INFORMATION ACT—VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 93-383)

The SPEAKER laid before the House the following veto message from the President of the United States:

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 that 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 determination 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.*

The SPEAKER. The objections of the President will be spread at large upon the Journal, and the message and bill will be printed as a House document.

The question is: Will the House, on reconsideration, pass the bill H.R. 12471, the objections of the President to the contrary notwithstanding?

MOTION OFFERED BY MR. MOORHEAD OF PENNSYLVANIA

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I move to postpone further consideration of the bill and veto message from the President on H.R. 12471, to amend the Freedom of Information Act, until Wednesday, November 20, and before moving the previous question on my motion I would like to address myself briefly to the President's veto action.

(Mr. Moorhead of Pennsylvania asked and was given permission to revise and extend his remarks and include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I was shocked and dismayed by the President's unfortunate and ill-advised action on October 17 in vetoing H.R. 12471; the bill makes a series of strengthening amendments to plug loopholes in the Freedom of Information Act of 1966.

This bipartisan legislation, overwhelmingly approved in both the House and Senate after more than 3 years of oversight and legislative hearings, will help restore the confidence of the American public in their Federal Government by providing greater access to Government records. As we have dramatically witnessed during the Water-gate tragedy, unnecessary secrecy and an almost paranoid desire to hide the business of Government from the people and their elected representatives brought about the most grave constitutional crisis in our Nation in more than 100 years.

Mr. Speaker, President Ford's pledge of "open government" made to the American people soon after he took the oath of office had indicated a recognition of the destructive effects of the "government secrecy mania" that helped bring about his predecessor's resignation. Less than 2 months ago, President Ford expressed to me, as chairman of the House-Senate conference committee on H.R. 12471, his commitment to "open government" and the Freedom of Information Act. In a letter dated August 20, 1974, he stated:

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open government than the philosophy underlying the Freedom of Information Act.

In that letter, Mr. Speaker, he raised certain questions about specific provisions of H.R. 12471, most of which had already been tentatively agreed to by the House-Senate conferees during earlier sessions of the conference committee. Nevertheless, we carefully studied President Ford's arguments, discussed them in subsequent meetings of the conference committee and did make a number of changes he requested in both the bill language and in the conference report to help allay his concerns. As I told the House when the conference version of the bill was finally acted upon and sent to the White House on October 7—

We have gone "more than half-way" to accommodate his views.

But 10 days later, he vetoed the freedom of information bill. It is now clear, Mr. Speaker, that congressional cooperation is not sufficient for the President, and only total capitulation to the White House viewpoint will suffice. I refuse to abdicate my duties as a Member of this House and hope that an overwhelming vote by our colleagues to override this senseless veto will make it clear to the President that cooperation is a two-way street.

As in the Watergate debacle, the umbrella of "national security" is now being raised in the veto message to cover the real reasons for the bureaucrat's opposition to the public's right to know. The message itself is filled with inaccurate statements, misconceptions, and warped interpretations of the bill language that raised questions as to whether anyone really knowledgeable about the law even took the trouble to read and analyze the provisions of H.R. 12471. Contrary to the President's expressed view, the bill would not in any way bare our Nation's secrets, nor would it jeopardize the security of sensitive national defense or foreign policy information.

Mr. Speaker, 8 years ago when Congress passed the original freedom of information bill, President Johnson was urged to veto the measure by every single Federal agency. Bureaucrats said that it was unconstitutional; some said it would bring the business of Government to a halt; others foolishly claimed that it would give away our vital defense secrets to foreign powers. But Lyndon Johnson was well versed in the ways of the Federal bureaucracy. He was not fooled by their rantings and ravings. He courageously rejected their silly arguments and signed the bill into law. In his statement he reaffirmed the people's right to know when he said:

No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

This year the House and Senate approved the conference version of H.R. 12471 to add needed teeth to the original 1966 freedom of information law to plug loopholes used by Federal bureaucrats to hide information from the public. The House rollcall vote was 349 to 2 and the Senate approved it by voice vote. During our hearings, every executive branch witness opposed any strengthening changes to the present law. The Nixon White House and Justice Department operatives lobbied vigorously in the other body in a vain attempt to kill the freedom of information legislation.

When H.R. 12471 was cleared by Congress and sent to the White House, the Federal bureaucracy predictably geared up an all out effort to persuade President Ford to veto it. As in 1966, almost every Federal agency recommended a veto. Many of the same old discredited arguments which President Johnson had rejected were dusted off and fed into the White House. Such overused cliches as "administrative burden," "flexible criteria," "compulsory disclosure," and the old reliable bureaucratic standby "national security" were all sprinkled throughout the veto message. Thus, President Ford succumbed to the old scare slogans of the bureaucrats, who apparently have so much to hide from the public.

But the obvious public need for truly "open government" must not be sacrificed on the altar of bureaucratic secrecy, suspicion, and meaningless slogans. The hard lessons learned from the tragic Watergate coverup must certainly result in some positive achievement to prove to the American people that Congress—at least—is sensitive and responsive to the fundamental need for "open government" in the conduct of our public business.

Mr. Speaker, our colleagues in the House will have the opportunity to vote to override this misguided Presidential veto of the Freedom of Information Act amendments on Wednesday, November 20 by the motion I have just offered. I stress the fact that this is not partisan issue that divides us along party lines. Our effort to override this veto is being led by both Republicans and Democrats on our Government Operations Committee, as shown by the "dear colleague" letter sent to all Members today and signed by: Chairman Chet Holifield; the ranking minority member of the full committee, the gentleman from New York (Mr. Horton); by the ranking minority member of our subcommittee, the gentleman from Illinois (Mr. Erlenborn); and by myself, as chairman of the Foreign Operations and Government Information Subcommittee. With our letter we enclosed a reprint containing a representative selection of editorials from across the Nation urging that Congress override this veto. Every Member should have in his office, a copy of this reprint and our letter.

Mr. Speaker, we urge our colleagues of both parties to join us in this fight for more responsible "open government." We trust that we can—by an overwhelming vote to override this veto—show the American people the sincerity of our pledge of truly "open government" and the willingness of Members of Congress to stand up and be counted on this vital issue.

Mr. Speaker, the "dear colleague" letter is as follows:

WASHINGTON, D.C.,
November 18, 1974.

DEAR COLLEAGUE: A vote will be taken in the House on Wednesday, November 20, on overriding the veto of H.R. 12471, the Freedom of Information Amendments of 1974.

We will vote "Aye"—to override—and hope you will join with us.

We have worked for more than 3 years in the bipartisan development of these amendments to the Freedom of Information Act. We received much detailed testimony about the issues raised in the veto message—both pro and con—and carefully worked to make certain our bill would protect the people's right to know without infringing upon the need for government secrecy in some areas.

The objections cited by the President in his veto message, therefore, were not new to us. They had also been called to our attention in the course of our conference sessions. We took them seriously and made changes, both in the language of the bill and in the conference report. We believe the President's objections were accommodated by these changes.

H.R. 12471 passed the House March 14 by a vote of 383 to 8, and the conference report won approval by a 349 to 2 roll call vote.

We believe the American people will have more confidence in their Federal government if we can enact these Freedom of Information Amendments into law over the President's veto. This legislation will help to restrain our civil servants and will help to make them more responsive to the people who pay their salaries.

The attached reprint of some of the representative newspaper editorials over the past several weeks—from all parts of the country—indicates the broad support for overriding the veto.

We suggest that President Ford must have listened more carefully to the bureaucracy than to the Congress and the people when he decided on his veto.

I hope you will join in voting to override the Freedom of Information Act veto on Wednesday, November 20.

Sincerely,

CHET HOLIFIELD,

Chairman, House Government Operations Committee.

WILLIAM S. MOORHEAD,

Chairman, Foreign Operations and Government Information Subcommittee.

FRANK HORTON,

Ranking Minority Member, House Government Operations Committee.

JOHN N. ERLENBORN,

Ranking Minority Member, Foreign Operations and Government Information Subcommittee.

Mr. Speaker, I reserve the balance of my time.

Mr. Speaker, I move the previous question on the motion.

The previous question was ordered.

The motion was agreed to.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I ask unanimous consent that the gentleman from Illinois (Mr. Erlenborn) be permitted to revise and extend his remarks at this point in the Record and that all Members may have permission to revise and extend their remarks on this subject.

THE SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

**F. HOUSE ACTION AND VOTE ON PRESIDENTIAL VETO,
NOVEMBER 20, 1974; PP. H10864-H10875**

**FREEDOM OF INFORMATION ACT AMENDMENTS—VETO MESSAGE
FROM THE PRESIDENT OF THE UNITED STATES**

The SPEAKER. The unfinished business is the further consideration of the veto message of the President on H.R. 12471, an act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The question is: Will the House on reconsideration, pass the bill, the objections of the President to the contrary notwithstanding?

The Chair recognizes the gentleman from Pennsylvania (Mr. Moorhead) for 1 hour.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield myself 5 minutes.

(Mr. Moorhead of Pennsylvania asked and was given permission to revise and extend his remarks, and include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, it is a rare experience for any Member of this distinguished body to lead off the debate in an effort to override a Presidential veto. In my almost 16 years of service here, it has never before been my responsibility to handle a legislative measure in this situation, under the procedures prescribed in section 7 of article 1 of the Constitution. It is an awesome task for any Member and one that requires the deepest reflection and most careful consideration of such a course of action.

A little more than 6 weeks ago when I stood here in the Chamber and urged approval of the conference report on H.R. 12471, the Freedom of Information Act amendments, it never occurred to me that a Presidential veto might be forthcoming. I explained in detail on that October 7 the changes agreed to by the House-Senate conferees, how they differed from the bill originally passed by the House on March 14 of this year, and the sincere efforts which the conferees of both parties made to accommodate the specific concerns raised by President Ford. I included at pages H10002-H10004 of the Record the full text of the President's letter outlining these concerns and the text of our letter to the President detailing each of the significant modifications which we made to allay his concerns.

Other distinguished members of the conference committee, including the ranking minority member of the full Government Operations Committee, the gentleman from New York (Mr. Horton), and the ranking minority member on our subcommittee, the gentleman from Illinois (Mr. Erlenborn), spoke in strong support of the bipartisan compromise legislation which we had produced in almost 2 months of conference committee deliberations.

Every single House member of our conference committee had signed the conference report. Congress certainly went "more than half-way" to accommodate the President's views. We had been led to

believe by administration officials that the Freedom of Information Act amendments would promptly be signed into law by the President since major Ford amendments were incorporated in the bill.

After all, he had so clearly stated upon assuming the Presidency that he and his administration were fully committed to a restoration of "open government." Surely, these amendments to the basic law to assure more "open government" within the Federal bureaucracy would provide to the President an early opportunity to prove to the disillusioned and still suspicious American public that, in fact, he really meant what he said that day on nationwide television. By signing into law with a flourish these much needed amendments to the Freedom of Information Act, he could strike a ringing blow for credibility in Government. By a stroke of the pen, he could have taken a giant stride forward to reverse the public's cynical distrust of governmental institutions and public officials. By an overwhelming bipartisan vote of 349 to 2, the Members of this body approved the conference report on H.R. 12471 and sent the bill to the White House, it having been unanimously approved by voice vote in the Senate a few days earlier. By our votes we spoke clearly for open government and for an end of excessive Government secrecy that has eroded public confidence in government, politics, and politicians. We overwhelmingly gave President Ford the golden opportunity to sign into law a bill to dramatically fulfill his 2-month-old pledge of open government in America—a bill on which our committee and this Congress had tediously worked 3 years and 4 months to finally produce in virtually unanimous bipartisan form.

Mr. Speaker, how on earth—we reasoned—could President Ford not avail himself of this golden opportunity to restore desperately needed confidence in Government by signing H.R. 12471 into law as soon as possible?

But alas, Mr. Speaker, something went awry on the way to the Presidential signing ceremony to proclaim the fulfillment of open government in the Ford administration. Incredibly, and to the amazement of virtually everyone concerned, President Ford vetoed H.R. 12471 on October 17, just prior to commencement of the congressional recess. The big question, Mr. Speaker, is: Why did he really veto the freedom of information open government bill?

Certainly, there is little evidence to answer that question to be gained from reading and rereading his veto message. We can only speculate as to what the real reasons might be. We do know that virtually all Federal agency bureaucrats opposed these amendments in our hearings, in written reports, and in their lobbying efforts against H.R. 12471. We do know that almost every segment of the Federal bureaucracy recommended that President Ford veto the legislation. We all have experienced the depth of commitment of the Federal bureaucrats to the principles of "open government" and have generally found it sadly wanting. We also know, Mr. Speaker, that 8 years ago, when the original Freedom of Information Act was passed by Congress—every single agency within the Federal bureaucracy also urged that President Johnson veto the measure. In that instance, President Johnson wisely disregarded the advice of the self-serving bureaucrats and promptly signed the bill into law. In

his statement he said—and these words are particularly significant today in view of what has transpired during the past several years—

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

Mr. Speaker, I can only speculate on what bureaucratic advice President Ford—by contrast—relied upon to exercise his veto power over this needed legislation. It is clear from the wording of certain portions of his veto message—particularly those dealing with the permissive judicial review of classified material authorized in H.R. 12471—that there is little understanding of either the clear meaning of the language of these parts of the bill or the intent as spelled out in detail in the conference report to meet what was a previous misunderstanding on the President's part of such language. For example, the veto message states:

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. . . .

Mr. Speaker, this is just not true. The bill does not say that, it does not mean that, and no one familiar with the legislative history could ever imagine that Members of Congress could almost unanimously vote to write into law such an obviously dangerous provision.

The President went on to say in his veto message:

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.

Mr. Speaker, in the procedural handling of such cases under the Freedom of Information Act, this is exactly the way the courts would conduct their proceedings. An agency, in defending an action in Federal court that involves a Government document having classification markings, normally submits an affidavit to the court explaining the basis for the particular classification assigned to it as authorized under the provisions of Executive Order 11652 and the implementing regulations of the agency involved. The court would then review such affidavit to determine the proper use of classification authority. If there was doubt, or if the affidavit was not sufficiently detailed to permit a clear decision, the court can request supplementary detail from the agency involved.

It can discuss the affidavit with Government attorneys in camera, or employ other similar means to obtain sufficient information needed to make a judgment. Only if such means cannot provide a clear justification for the classification markings would the court order an in camera inspection of the document itself. If the examination and subsequent discussions of the affidavit from the agency indicate that the classification assigned to the particular document is reasonable and proper under the Executive order and implementing regulations,

the court would clearly rule for the Government and order the requested document withheld from the plaintiff. But if the examination and subsequent discussions of the affidavit from the agency could not resolve the issue, the court could then order the production of the document and examine it in camera to determine if the classification marking was properly authorized.

Such discretionary authority for in camera review is authorized in H.R. 12471, and properly so, to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the Government bureaucracy. Abuses of the classification stamp are well known. As former President Nixon said in issuing the present classification and declassification Executive order in March 1972:

The many abuses of the security system can no longer be tolerated . . . Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations . . .

Former Defense Secretary Melvin Laird also said in a 1970 speech:

Let me emphasize my convictions that the American people have a right to know even more than has been available in the past about matters which affect their safety and security. There has been too much classification in this country.

Mr. Speaker, even if a district court ordered the release of a classified document in dispute, after following all of the procedural steps just described and including in camera review of the document itself, such decision may—of course—be appealed by the Government to the circuit court of appeals, and, if necessary, to the Supreme Court. I find it totally unrealistic to assume—as apparently the President's legal advisers have assumed—that the Federal judiciary system is somehow not to be trusted to act in the public interest to safeguard truly legitimate national defense or foreign policy secrets of our Government.

Similarly ludicrous legal arguments are made later in the veto message with respect to investigatory law enforcement files and time limits placed in the Freedom of Information Act for agency responses. For example, the veto message states:

I propose that more flexible criteria govern the 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.

Mr. Speaker, no one wants to burden law enforcement agencies or to take their attention away from the difficult job of fighting the growing menace of crime in America. The language of section 2(b) of H.R. 12471 in no way places an undue burden on such agencies. The conference committee specifically took into consideration the potential problem that might be created within an agency if it received a request for the type of "particularly lengthy" records mentioned in the veto message. We wrote into the law a provision that additional time could be obtained by an agency in cases involving "a voluminous amount of separate and distinct records which are demanded in a single request." Obviously, the President's lawyers did not notice this part of the bill before drafting the veto message.

Moreover, Mr. Speaker, we also include language requested by the President in his August 20 letter to the conference committee to authorize the courts to grant a Federal agency additional time to respond to a request under the Freedom of Information Act if the agency is "exercising due diligence in responding to the request." Here again the veto message ignores specific language already included in the bill.

Mr. Speaker, as I have attempted to explain in detail during my remarks, this veto is without merit and represents a shocking lack of understanding of the workings of the present law, court procedures, and the clear language in the bill which has already dealt with the major objections raised against H.R. 12471.

As strongly as I know how, Mr. Speaker, I urge the Members of this House to join in voting "aye" to override this ill-advised veto of the Freedom of Information Amendments contained in H.R. 12471.

Let our voices here today make clear to the doubting citizens of America that Congress, at least, is totally committed to the principle of "open government."

By our votes to override this veto we can put the needed teeth in the freedom of information law to make it a viable tool to make "open government" a reality in America, not merely a preelection slogan to be erased by the pressures of secrecy-minded bureaucrats.

Mr. Speaker, during the past several days, I have inserted into the Appendix of the Record more than 20 articles and editorials from all parts of the Nation urging that Congress override President Ford's veto of H.R. 12471, the Freedom of Information Act amendments we will vote on today. Many of our House colleagues have also placed in the Record other editorials from papers in their own districts, also condemning the unwise veto and calling for an override.

At this point, Mr. Speaker, I would like to include at this point another excellent editorial entitled "Congress Must Override Veto of Information Act Changes," from the November 7, 1974, issue of the Denver Post. The executive editor of the Post, Mr. William Hornby, is also chairman of the Freedom of Information Committee of the American Society of Newspaper Editors. I would like to express our appreciation to the officers and members of the many news media organizations who have helped spearhead the fight to preserve the public's right to know. They include the ASNE, whose president is Howard H. Hays, Jr., editor-publisher of the Riverside, Calif., Press-Enterprise; the National Newspaper Association, its executive vice president Theodore A. Serrill and William Mullen; Sigma Delta Chi, the Society of Professional Journalists; the Radio-Television News Directors Association; and the Association of American Publishers. Other national organizations participating in the effort were Common Cause; Public Citizen; the AFL-CIO and individual unions including the United Auto Workers and the American Federation of Government Employees' Government Employment Council; the American Civil Liberties Union; and the Consumer Federation of America.

Mr. Speaker, I also include the editorial today from the Washington Post entitled "Federal Files: Freedom of Information" and other timely editorials from the Jackson, Miss., Citizen Patriot; the Des

Moines Register; the Philadelphia Inquirer; the Tucson, Ariz., Daily Star; and the Wichita Falls, Tex., Times and the Wichita Falls, Tex., Record News:

[From the Denver Post, Nov. 7, 1974]

CONGRESS MUST OVERRIDE VETO OF INFORMATION ACT CHANGES

When Congress reconvenes after the election recess, it ought to act promptly—and decisively—to override President Ford's veto of essential amendments to the Freedom of Information Act.

The amendments, embodied in the bill H.R. 12471, are designed to improve the seven-year-old FOI law by removing bureaucratic obstacles in the way of freer public access to governmental documents.

Mr. Ford's veto of H.R. 12471 is in direct contradiction of his avowal of an "open administration." Further, his demands for more concessions from Congress on FOI amendments raise additional questions about the credibility of his openness pledge.

Congress has gone more than halfway to meet administration objections to the original FOI changes considered on Capitol Hill.

The House-Senate conference committee bill that emerged was a genuine compromise between congressional representatives and Justice Department experts.

Mr. Ford got four out of the five changes he recommended to the committee. Yet not only did Mr. Ford veto the final bill, but he added a new demand to his original proposals.

In his veto message, President Ford contended for the first time that lengthy investigatory records should not be disclosed on the grounds that law enforcement agencies do not have enough competent officers to study the records. He also restated his earlier demand that Congress should not give the courts as much power as the bill provides to decide on whether documents should be withheld for reasons of national security.

Mr. Ford's veto also prevented other improvements in the FOI law ranging from the setting of reasonable time limits for federal agencies to answer requests for public records to requiring agencies to file annual reports on compliance of the law.

The amendments to strengthen the FOI law represent a true consensus of Congress: H.R. 12471 passed the House with only two dissenting votes and there was no opposition in the Senate.

If Mr. Ford will not follow through on his open administration pledge, then Congress ought to do it for him by overriding his veto.

[From the Washington Post, Nov. 20, 1974]

FEDERAL FILES: FREEDOM OF INFORMATION

Just before the election recess, President Ford used his power to veto and sent back to the Congress a piece of very important legislation, the 1974 amendments to the Freedom of Information Act. Those amendments were important because they strengthened a law that was fine in principle and purpose but poor in practical terms. The Freedom of Information Act had been enacted in 1966 in the hope of making it possible for the press and the public to obtain documents from within government to which they are entitled. Because of cumbersome provisions of the act, however, obtaining such information proved very difficult.

This year, after long hearings, much haggling between House and Senate and two resounding votes, a series of amendments was ready for presidential signature. They shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to keep information secret that should be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, sadly, Mr. Ford yielded to the arguments of the bureaucracy and vetoed the legislation.

Since then, a number of journalists' and citizens' groups have criticized that action by the President and urged Congress to override the veto. Today in the

House and tomorrow in the Senate, those votes are scheduled to take place. We would urge a strong vote in support of the legislation, particularly in light of two recent disclosures made possible by the Freedom of Information Act.

Recently a Ralph Nader-supported group on tax reform turned up the fact the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS. As we have had occasion to say in the past, the tax laws were not intended to be used for political harassment. The interesting point about these latest disclosures is that they were made possible by the utilization of the Freedom of Information Act.

In the same vein, the Justice Department released a report earlier this week on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act. Attorney General William Saxbe felt compelled, on the basis of what the Justice Department had been forced to release about the program, to order a study of what the FBI had done. Mr. Saxbe found aspects of the program abhorrent. But FBI director Clarence M. Kelley actually defended the practices of his predecessor, J. Edgar Hoover. This is a good example of how important it is that this country have a strong Freedom of Information law that will make it possible for the public to learn of such activities—and such attitudes on the part of officials in sensitive and powerful jobs—and to learn of them as quickly as possible.

The Freedom of Information Act is not a law to make the task of journalists easier or the profits of news organizations greater. It is, in other words, not special interest legislation in the sense that the term is ordinarily used. It is special interest legislation in that it is intended to assist the very special interest of the American people in being better informed about the processes and practices of their government. This is a point President Ford's advisers missed badly at the time of the veto. One of them is alleged to have said that if the President vetoed the bill, "who gives a damn besides The Washington Post and the New York Times?" The truth of the matter is that this legislation goes to the heart of what a free society is about. When agencies of government such as the FBI and IRS can engage in the kind of activity just revealed, it is serious business. That's why we should all give a damn—especially those who are to cast their votes today and tomorrow.

[From the Jackson (Miss.) Citizen Patriot]

JOB NEEDS FINISHING

Issue: Should Congress override President Ford's veto of a bill amending the federal Freedom of Information Act?

Almost lost in the campaign rhetoric was the President's veto of a bill that had taken three years of cooperative work between congressmen, public groups, and the press.

It would have made the federal bureaucracy more responsible for classifying documents and refusing to open them to public inspection.

In its final form, the bill, amending the 1966 Freedom of Information Act, passed the Senate by voice vote because of the minute opposition, and the House voted 349-2 in favor of it.

Back in 1966, Congress established the policy of the public's right to know what and how well government was doing.

The present bill was opposed by several federal agencies, and as a result, President Ford proposed five modifications. Congress agreed to four of them.

Then President Ford, who launched his administration with a pledge of openness in government, vetoed the measure because Congress didn't grant him the fifth requested modification.

The bill does not jeopardize national security, safeguards having been built in. It does jeopardize overzealous bureaucrats who want to operate in their own private vacuums.

At issue between the President and Congress (and the various non-governmental backers of the measure) is a provision that would allow the courts to determine reasonableness of classifications.

As written, the bill would fill a chink in the 1966 act, by allowing persons to sue, then be bound by the court's ruling. It also establishes specific time limits on both parties so that no unreasonable time period would thwart the intent of the law.

Ford's position is that the amendments to the 1966 Freedom of Information Act would compromise military and intelligence secrets and diplomatic relations while placing unrealistic burdens on various agencies by setting time limits for response to requests for data.

However, nine specific exemptions are provided. They are secret national security or foreign policy information; internal personnel practices; information specifically exempted by law; trade secrets or other confidential commercial or financial information; inter-agency or intra-agency memos; personal information; personnel or medical files; law enforcement investigatory information; information related to reports on financial institutions; geological and geophysical information.

What it boils down to is that the employees of the various federal agencies don't like opening the doors to what's going on.

The Watergate-related activities, among others, prove there is good cause to fight such an attitude.

The President seems to have dumped his open-administration policy in favor of restrictions on the public as dictated by the bureaucracy and Cabinet.

We strongly urge Congress to override the veto when it resumes business later this month. After enacting this legislation by such an overwhelming majority, it would be irresponsible for Congress to do otherwise.

[From the Des Moines Register, Nov. 5, 1974]

THIS SHOULD BE VETOPROOF

One of the first pieces of business for Congress after the election is to consider overriding President Ford's veto of the bill strengthening the Freedom of Information law. Since the House approved the bill by a vote of 349 to 2, and the Senate adopted it by voice vote with no dissent, there should be ample support for overriding the veto, whether a "veto-proof" Congress is elected or not.

All Iowa's congressmen voted for the bill, and we hope the delegation from this state will vote the same way.

The amendments are vitally needed to make the Freedom of Information law more effective and to live up to the political promises (including those of President Ford) for more open government. The ability of the Nixon administration to keep material secret during the Watergate scandal shows the importance of the reforms in the law to make information available to the public.

The most important amendment is one permitting court review of national security secrecy classifications. The law says that documents can be kept from the public if "specifically required by executive order to be kept secret in the interest of national defense or foreign policy." The U.S. Supreme Court ruled in 1973 that not even the courts could question the validity of secrecy stamps placed on government documents.

However, the court opinion invited Congress to change the law to authorize judicial review of such secrecy. Congress has now done this overwhelmingly, and President Ford has vetoed it.

President Ford evidently allowed himself to be argued into this position by the traditional secrecy hounds in the Defense Department, as well as officials in other departments who do not want the public prying into their affairs.

Other amendments in addition to the national defense item require agencies to respond more promptly to complaints filed under the act and establish formal procedures making it easier for the public to get answers to requests for documents.

President Ford's veto of this measure is indefensible and is a repudiation of his own pledge to the American people. It should be overridden decisively and promptly.

[From the Philadelphia Inquirer, Oct. 21, 1974]

CONGRESS SHOULD OVERRIDE THE FORD ANTISECRECY VETO

In 1966, when both houses of Congress passed the important but limited Freedom of Information Act, virtually every department in the executive branch urged a veto. President Johnson signed it into law. Somehow, government survived.

President Ford would have done well last Thursday to have followed the example. Instead, he vetoed an immensely important, widely supported and overdue bill to extend the 1966 act. His veto should be overridden by the Senate and House as an early order of business when they reconvene Nov. 18.

Since 1966, and intensely for most of the past four years, the earnest enemies of arbitrary secrecy in government have been laboring to broaden reasonably the 1966 law. The principal opponents have been the often faceless, nameless functionaries of government who by their nature seem to find it either too troublesome or too dangerous for the people of the United States to know what business is being done on their behalf.

Watergate and all its obfuscation, stonewalling and outright lying added fuel to the movement. Ultimately the Senate last June passed an amending bill by a vote of 64 to 17; the House passed a somewhat different version, 363 to 8.

Responding to pressures from executive agencies, and raising some conscientious concerns, President Ford last August submitted to the Congress written objections to the pending measure. A House-Senate conference committee made significant compromises and resolved conflicts. The conference-approved bill was passed 349 to 2 by the House and by unanimous voice vote in the Senate.

Then came Mr. Ford's veto, urged by every department of the executive branch except the Civil Service Commission and—somewhat astonishingly—the Department of Defense.

The President's veto message focused mainly on the bill's assignment to the judiciary the authority to rule on the appropriateness of secrecy classifications erected by executive agencies, and on enforcement provisions—including time limits on bureaucratic stalling and rather mild penalties for violating the law.

The same objections were raised by Mr. Ford in August. Serious attention was given them. Significant adaptations were made to avoid any possibility of excess.

We are convinced that the only real danger the final bill raised was to threaten the anonymous and arbitrary excesses of power often used by government servants to evade accountability. Mr. Ford's invocations of unconstitutionality and national security—especially in the aftermath of the Watergate experience—are not only flimsy in their logic; they are offensive in their insensitivity to public dismay.

With the Congress in adjournment, its members are at home, pursuing votes in an election year made tumultuous by the very concerns about government secrecy and unaccountability the Freedom of Information bill sought to help remedy.

Those legislators' constituents—you—would do well to demand how each of them will stand when it comes time in November to override Mr. Ford's unwise and ill-considered quashing of the public's right to know what its servants are doing in Washington's back stairs.

[From the Tucson (Ariz.) Daily Star, Oct. 27, 1974]

THE INFORMATION VETO

The President has vetoed proposed amendments to the Freedom of Information Act that would have gone far in holding accountable the headless mass of federal bureaucracy. His veto must be overridden.

The amendments would have required agencies to keep an index of the tons of information they record each year for use by the consumer-taxpayer. It would have required agencies to produce information on request by general subject matter rather than much less-accessible file numbers. It would have provided for court review of each refusal of information.

Bureaucrats would be required to report annually to Congress the number of times information was withheld, by whom and why; whether appeals were made under the act and the outcomes of those appeals. The law was specifically applied to the executive department, the Pentagon, government corporations, government-controlled corporations and independent regulatory agencies. Those individuals who withhold information without firm basis would be subject to civil service discipline.

But President Ford was persuaded by the FBI, the CIA and others that such law would dangerously inhibit them in their work. They want to be totally exempted.

In fact, the amendments provide numerous safeguards to the conduct of active police investigation, foreign intelligence and counter-intelligence. Specifically exempted was information classified for national defense, information that would fowl a criminal case, deprive a defendant of fair trial, constitute an unwarranted invasion of privacy, disclose the identity of a confidential source, disclose unusual procedures and techniques or endanger the life of an officer.

If all that failed there would be the courts to make the determination behind closed doors.

The American system of government can afford no isolated enclaves of non-responsiveness—certainly not after the revelations of the past two years that the FBI and CIA have been employed for extensive political services.

The conduct of criminal law enforcement and legitimate foreign intelligence would not be hampered by the amendments. It would make agencies like the FBI and CIA, not used to being held accountable, accountable, and that is their real objection.

[From the Wichita Falls (Tex.) Times, Oct. 31, 1974]

PRESIDENT BLOCKS RIGHT TO KNOW

Congressional improvements in the Freedom of Information (FOI) Act adopted in 1966, have been blocked with a veto by President Ford.

The Times, concerned with our readers' right to know, believes Congress should override the veto when it convenes after the election recess.

The President vetoed amendments to the FOI Act at the insistence of many federal agencies, including the Justice Department.

The measure went to the White House Oct. 7 after the House approved the conference report by the overwhelming vote of 349 to 2. The Senate had approved the conference report by voice vote Oct. 1.

The FOI amendments were approved by Congress to facilitate public access to information. The FOI Act requires the federal government and its agencies to make available to citizens, upon request, all documents and records, except those which fall into certain exempt categories.

Studies of operation of the law indicate that major problems in obtaining information are bureaucratic delay, the cost of bringing suit to force disclosure, and excessive charges levied by agencies for finding and providing requested information.

It was to correct these problems that Congress approved the 1974 amendments to the law.

The FOI amendments have been three years in development. Spokesmen for the American Society of Newspaper Editors believe every reasonable effort has been made to cooperate with governmental bureaucracy in shaping legislation where legitimate national security matters are concerned.

In ensuring a basic American right, Congress should lose no time in overriding the presidential veto when it convenes after the elections.

[From the Wichita Falls (Tex.) Record News, Nov 6, 1974]

CITIZENS' RIGHT TO KNOW

An important question before Congress is whether or not President Ford's veto of the freedom of information amendments to the FOI Act of 1966 is to be allowed to stand. Congress will consider an attempt to override the veto after members return from the general election recess, Nov. 18.

Purpose of the amendments was to close some glaring loopholes in the 1966 law which had negated its intent. Although the amendment, H.R. 12471, passed both House and Senate with only two dissenting votes, Ford vetoed it because of disagreement with three provisions, review of classified documents, time limits and costs, and investigatory records.

The President felt the review of classified documents provisions might adversely affect national security. Of course newspapers have heard this argument before, and have seen it misapplied more often than not.

News is perishable, thus quick reaction to requests for information is essential. If enough time lapses, such as sometimes is the case under present law, the information sought becomes worthless.

Fear that compulsory disclosure of FBI and other investigatory law enforcement files will eliminate confidentiality also is an ultra cautious approach. The White House is giving the FBI, the CIA, Department of Justice and the fears of every document classification official in Washington the benefit of doubt over the citizens' right to know.

Attitude of the federal government is personified by a White House aide's remark about the veto: "Who gives a damn except the Washington Post and New York Times whether he vetoes them?"

Well, we also care. And so should every citizen who is fed up with the secrecy with which the public's business too often is being transacted, not only in Wash-

ington, but by bureaucrats everywhere whose qualifications have never been passed on by the voters.

Major problems in obtaining information under present law of bureaucratic delay, cost of bringing suit to force disclosure and excessive charges levied by agencies for developing and providing requested information. Correction of these problems should be given top priority, not the negativism that the amendments are designed to counter.

The key to overriding the veto, which will help restore openness in our government, rests with the people. An expression of support for the amendments from individual citizens to their representatives in the U.S. House and Senate could make the difference. We suggest it of every interested person.

Mr. REID. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I will be happy to yield to the gentleman from New York, a former member of the subcommittee.

Mr. REID. I commend the gentleman on his statement as to the action on the conference report.

I believe very strongly that the Freedom of Information amendment bill before us is clearly a step forward. In addition to setting important time limits by which Government agencies would be required to respond to cases and lawsuits, it would authorize a court "to enjoin the agency from withholding agency records," "to determine the matter de novo," and to "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" later in the bill. As the bill emphasizes, "the burden is on the agency to sustain its actions."

The in camera inspection provision included in this bill would overturn the 1973 Supreme Court decision, EPA against Mink, in which the Court held that in-chambers inspection is ordinarily precluded under the act. Such inspections was also denied in a case in which I was involved—with Mr. Moss—relating to the Pentagon papers. In this case, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia held that in camera inspection would not be appropriate. While the language added by the managers of the conference points out that this inspection procedure is discretionary and not mandatory, and that courts will "accord substantial weight to an agency's affidavit" arguing that documents may be exempt for defense or foreign policy reasons, I am hopeful that this language would be construed exceptionally narrowly. The courts, in my view, have a duty to look behind any claim of exemption, which all too often in the past has been used to cover up inefficiency or embarrassment even in foreign policy matters which, many times, are fully known by other countries but not printable in our own—supposedly the most democratic and most open in the world.

This bill also makes some important redefinitions of exemptions from the act. While in the original act, there was a blanket exemption for all national security matters, these amendments limit that exemption to those matters: First, specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and second, are in fact properly classified pursuant to such Executive order.

Finally, this bill redefines the law enforcement exemption, narrowing it significantly compared to previous law. Rather than affording all law enforcement matters a blanket exemption, this bill requires that the Government specify some harm in order to claim the exemption. When one considers that in the past the law enforcement ex-

emption has been construed by agencies to preclude access to meet inspection reports, OSHA safety reports, airline safety analyses and reports on medical care in federally supported nursing homes, one can easily see the need for plugging the loophole in the old law.

The gentleman in the well and I both, I think, would have liked to see it stronger in some of the criteria, particularly as concerns what constitutes national security, which is frequently used to bar the door to information. But sometimes I believe in clear violations of the Constitution. I believe the steps narrowing the criteria in section 552 which sets forth the requirement for prompt consideration by the courts of what constitutes appropriate action within the meaning of the Executive order and the criteria of the Executive order are precisely the kind of accountability that the American people must have if we are to have freedom of information, both for the public, the press and the Congress.

I think an override is an essential first step to make further progress in this area, and I think the arguments presented in the conference report are clear and overwhelming.

Mr. Speaker, I hope and urge that the veto will be overridden.

Mr. ADAMS. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Washington.

Mr. ADAMS. Mr. Speaker, I commend the gentleman from Pennsylvania for bringing this matter to the floor today.

I strongly support the public's right to know about their Federal Government and, therefore, I am voting today to override President Ford's veto of the freedom of information bill—H.R. 12471.

The arguments for overriding this veto are well set forth in the following editorial from the Seattle Post-Intelligencer:

[From the Seattle Post-Intelligencer]

CONGRESS MUST GUARANTEE PUBLIC'S RIGHT TO KNOW

One of the vital issues facing Congress when it returns from the election recess will be President Ford's veto of the 1974 Freedom of Information Act.

Congressmen should override the President's veto of the measure—designed to make it easier for citizens to gain access to federal documents.

The 1974 version of the act would close loopholes in the 1966 Freedom of Information Act that have frustrated the public's right to know. The new act would shift the burden of proof from individuals seeking information to those agencies denying access to federal documents.

Under the present act, information often has been withheld simply because it might serve to embarrass an agency or cause a bit of effort by the government employees. Individuals have had to go to court to obtain federal documents.

A dramatic example of why the new act is needed was provided last week with the end of a local couple's five-year struggle to see Internal Revenue Department tax audit records.

Philip and Sue Long of Bellevue finally secured access to the records after spending \$20,000 of their own money in the quest for IRS tax information.

It is the first time that this information has been made available to the public, the press or even Congress.

The new Freedom of Information Act would reduce the leeway of law-enforcement agencies to withhold information for "confidential" reasons and shorten by a few days the amount of time an agency has to comply with a request. It would also permit the Civil Service Commission to discipline bureaucrats if the courts find that they have "arbitrarily or capriciously" withheld information.

During the House debate on the 1974 bill, Rep. Bill Alexander, Arkansas Democrat, said he had been unsuccessful last year when he tried to find out how much wheat subsidy had been paid to grain exporters for their sales to the Soviet Union.

Alexander concluded: "If I, as a member of Congress, become frustrated when I am denied access to information vital to the public welfare, what about John Q. Citizen and his efforts to get the information he needs?"

What about John Q. Public indeed?

When President Ford took office in August, he declared his administration would be an "open" one. Despite that promise, he has taken a step backward in vetoing the Freedom of Information Act.

Congress should act promptly to re-affirm the public's right to know what its government is doing.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I now yield 5 minutes to the ranking member of the subcommittee, the distinguished gentleman from Illinois (Mr. Erlenborn).

(Mr. ERLENBORN asked and was given permission to revise and extend his remarks).

Mr. ERLENBORN. Mr. Speaker, I rise in support of the motion to override the veto of the amendments to the Freedom of Information Act.

Mr. Speaker, the original Freedom of Information Act was a bipartisan effort. It originated in this House in the first term during which I served in Congress.

One of the Republican cosponsors of that effort was my colleague, the gentleman from Illinois, Don Rumsfeld, who now serves President Ford in the White House.

The bill before us is also the result of a bipartisan effort in our Subcommittee on Foreign Operations and Government Information of the Government Operations Committee. We started out with the same goals in mind, with some divergent opinions, and in our subcommittee, I think in the best tradition of bipartisanship, we resolved what differences we did have, and came to the floor with a bill that was very substantially supported by this House.

President Ford had his first opportunity to have input as President on this bill when it was in conference, and he did make his views known to the conferees. I think in great measure the conferees responded to the concerns that President Ford articulated to us, and when we then brought the effort of the conference committee to the floor it was supported overwhelmingly.

I believe the concerns that the President states in his veto message are not sufficient to warrant the support of this veto.

I would like to address myself to those concerns that the President enumerated in his veto message. The first has to do with the section of the bill that clearly reverses the Supreme Court decision in the case of *EUA* against *Mink*. That decision held that there was no authority under the act to look behind the stamp of classification in a document that was classified. We clearly intend to overturn that decision. The question that arises is what weight of evidence must there be for the court to find that a document has been improperly classified. We do not spell out in the conference report a particular rule of weight of evidence, but I think the normal rule in civil cases or preponderance would apply. The President asks that the classification be supported, and the court not have authority to overturn it if there is any reasonable basis to support the classification. He uses as an argument a corollary of the decisions coming from regulatory agencies. I do not believe that the corollary is apt. The decisions of regulatory agencies are reached ordinarily as a result of adversary proceedings, public proceedings, and the making of a record.

The decisions whether to classify a document are made usually on an arbitrary basis of some employee of the executive branch, deciding whether or not the document falls within the system of classification as outlined in the Executive order. Therefore, I think that the weight of the evidence or the preponderance of the evidence is the proper test.

Second, the President would have longer time limits for response.

Mr. HORTON. Mr. Speaker, will the gentleman yield?

Mr. ERLBORN. I yield to the gentleman from New York.

Mr. HORTON. Mr. Speaker, I thank the gentleman for yielding to me. This is on the first point the gentleman made:

One of the points, as I read the President's veto message, and the explanation which was given, was that there might be instances in which they did not want to produce sensitive documents with regard to the in camera inspection so that the document would not be presented to the court. We did try to cover that situation in the language of the conference report, and I thought it might be appropriate to put on the record what we said in the conference report:

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects 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.

The SPEAKER pro tempore. The time of the gentleman has expired.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield 2 additional minutes to the gentleman from Illinois.

Mr. ERLBORN. I yield to the gentleman from New York (Mr. Horton):

Mr. HORTON. I thank the gentleman for yielding.

In other words, we did make it possible that the court would not have to have the document, and we indicated that it would not necessarily have to have the document produced and that it could be determined on affidavit.

Mr. ERLBORN. The gentleman is correct, and I think that we made it clear. We anticipated the court would give great weight to the affidavit, coming from the executive branch, and would not in most cases even view the document but only if the court felt it was necessary to do so in camera.

Mr. CONTE. Mr. Speaker, will the gentleman yield?

Mr. ERLBORN. I yield to the gentleman from Massachusetts.

Mr. CONTE. I thank the gentleman for yielding.

Mr. Speaker, I am compelled to stand and speak for this bill, despite the veto by my President.

The issues in this legislation go far beyond whether we will have "openness and candor" in this particular administration. This is a struggle over constitutional interpretation. How the Congress decides the fate of this bill shall have a grave effect upon the interpretation of the first amendment and the people's right of access to their Government.

A century ago, the British Prime Minister, Benjamin Disraeli, said: From the people and for the people, all springs and all must exist.

A decade later, President Lincoln wrote that we have a— Government of the people, by the people and for the people.

This quotation states the essence of our democracy and our freedoms. We cannot take them for granted. They can perish if the Government is allowed to become a separate and independent entity from the people.

The bill that has been returned to this House, the Freedom of Information Act amendments, embodies the spirit of "government of the people, by the people, and for the people." These amendments provide greater access to Government records. They provide a mechanism for tearing away some of the layers of official secrecy without endangering our national security.

This bill has come before this House twice before and passed by overwhelming margins. On March 14, the House passed this bill on a vote of 383 to 8. Then last month, on October 7, the House adopted the conference report on a vote of 349 to 2.

The purpose of the Freedom of Information Act amendments is to strengthen the public's right to know what its Government is doing. When this right to know is bolstered, democracy will work better. This is an objective that all Members of Congress support overwhelmingly.

Mr. Speaker, the value of the Freedom of Information Act has been demonstrated time and time again since it was enacted in 1966. Recently, it was instrumental in exposing some dubious, if not illegal, activities by the Internal Revenue Service and the Federal Bureau of Investigation. The Washington Post ran an incisive editorial on the act in this morning's edition, which I submit for the RECORD. It explains clearly why my colleagues should pass this bill over the veto of the President. The article follows:

[From the Washington Post, Nov. 20, 1974]

FEDERAL FILES: FREEDOM OF INFORMATION

Just before the election recess, President Ford used his power of veto and sent back to the Congress a piece of very important legislation, the 1974 amendments to the Freedom of Information Act. Those amendments were important because they strengthened a law that was fine in principle and purpose but poor in practical terms. The Freedom of Information Act had been enacted in 1966 in the hope of making it possible for the press and the public to obtain documents from within government to which they are entitled. Because of cumbersome provisions of the act, however, obtaining such information proved very difficult.

This year, after long hearings, much haggling between House and Senate and two resounding votes, a series of amendments was ready for presidential signature. They shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to keep information secret that should be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, sadly, Mr. Ford yielded to the arguments of the bureaucracy and vetoed the legislation.

Since then, a number of journalists' and citizens' groups have criticized that action by the President and urged Congress to override the veto. Today in the House and tomorrow in the Senate, those votes are scheduled to take place. We would urge a strong vote in support of the legislation, particularly in light of two recent disclosures made possible by the Freedom of Information Act.

Recently, a Ralph Nader-supported group on tax reform turned up the fact the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS. As we have had occasion to say in the past, the tax laws were not intended to be used for political harass-

ment. The interesting point about these latest disclosures is that they were made possible by the utilization of the Freedom of Information Act.

In the same vein, the Justice Department released a report earlier this week on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act. Attorney General William Saxbe felt compelled, on the basis of what the Justice Department had been forced to release about the program, to order a study of what the FBI had done. Mr. Saxbe found aspects of the program abhorrent. But FBI director Clarence M. Kelley actually defended the practices of his predecessor, J. Edgar Hoover. This is a good example of how important it is that this country have a strong Freedom of Information law that will make it possible for the public to learn of such activities—and such attitudes on the part of officials in sensitive and powerful jobs—and to learn of them as quickly as possible.

The Freedom of Information Act is not a law to make the task of journalists easier or the profits of news organizations greater. It is, in other words, not special interest legislation in the sense that the term is ordinarily used. It is special interest legislation in that it is intended to assist the very special interest of the American people in being informed about the processes and practices of their government. This is a point President Ford's advisers missed badly at the time of the veto. One of them is alleged to have said that if the President vetoed the bill, "who gives a damn besides The Washington Post and the New York Times?" The truth of the matter is that this legislation goes to the heart of what a free society is about. When agencies of government such as the FBI and IRS can engage in the kind of activity just revealed, it is serious business. That's why we should all give a damn—especially those who are to cast their votes today and tomorrow.

Mr. BROOMFIELD. Mr. Speaker, will the gentleman yield?

Mr. ERLNBORN. I yield to the gentleman from Michigan.

Mr. BROOMFIELD. I thank the gentleman for yielding.

Mr. Speaker, I rise in support of the motion to override the President's veto of H.R. 12471 consisting of amendments designed to improve the Freedom of Information Act and urge my colleagues to do the same.

As you know, one of the amendments would permit Federal judges to make an in camera examination of classified documents to determine whether they had been properly classified. The author of the Freedom of Information Act, the gentleman from California (Mr. Moss); has stated that was the original intention of the act when it was passed 8 years ago during the Johnson administration. But the courts said the issue was not that clear.

Although a Federal agency's affidavit that a document is properly classified should be given due consideration by the courts, that assertion simply cannot be and should not be the final word in the matter. We should remember that a number of the "political enemies" documents in the Watergate investigation carried false classification labels based on national security.

The abuse of classification labels by any administration should be open to challenge. It does not require an oracle to know when something does not meet specific classification requirements. You do not have to be a chicken to know when an egg is bad and that is what we are talking about. I have faith that in genuinely gray areas, Federal judges will tend to rule in favor of national security. But when something clearly does not meet the test, it is going to come out. And it should for the sake of good government. That sort of thing helps the American people make an informed judgment on whether its governmental leaders are doing a good or bad job.

Mr. Speaker, I include the following editorial on this subject from the Detroit Free Press:

FORD LAPSES ON PROMISE TO OPEN UP GOVERNMENT

In light of the new era of openness President Ford has pledged to bring to the federal bureaucracy in Washington, his recent veto of changes in the Freedom of Information Act was unfortunate and misguided.

The act was passed in 1966, and was designed to make it easier, not harder, for the public to know what its government was doing. The law, however, contained numerous loopholes which have allowed insensitive federal agencies to continue the aura of secrecy which for far too long has permeated government thinking.

The new amendments to the act were designed to eliminate some of the key loopholes, and were passed overwhelmingly by both houses of Congress.

The amendments would put a time limit of 10 working days on a federal agency to decide whether it would honor a request to make information public, and 20 working days to decide appeals when access to information is denied. These are not unreasonable limits, and they would force agencies to come to grips with the public's right to know, instead of indulging in bureaucratic foot-dragging. Another amendment called for judicial review of classified national security information, if its release is sought, before it could be withheld.

Within the government, opposition to the amendments has come mainly from officials connected with foreign policy and national defense policy. It was on their objections that President Ford apparently acted in announcing his veto.

The President said he would submit proposals of his own to Congress. We hope he will do so, and soon, for there are good reasons otherwise why Congress should try to override this veto. While it is true that newsmen and newswomen are among those who have been pressing for passage of the amendments, all of the public has a stake in them.

Over the last decade, we have seen the fruits of governmental secrecy—in the conduct of the war in Vietnam, the decisions that led to and increased American involvement there, in the secret decisions to bomb Cambodia, and in the aftermath of the Watergate scandals. What all of these events have shown is that government governs worst when it does not trust the people, and is unwilling to tell the people what it is doing. That is why the public should support efforts to strengthen the Freedom of Information Act, and why President Ford is wrong to veto such efforts.

Mr. ROUSSELOT. Mr. Speaker, will the gentleman yield?

Mr. ERLENBORN. I yield to the gentleman from California.

Mr. ROUSSELOT. I thank the gentleman for yielding. Mr. Speaker, I will vote to override the President's veto of H.R. 12471, the Freedom of Information Act Amendments of 1974.

In vetoing this legislation, the President cited three reasons:

First. The legislation would authorize a Federal judge to examine agency records privately to determine whether these records can be properly withheld under the Freedom of Information Act, and that this provision could endanger our diplomatic relations and our military and intelligence secrets;

Second. The bill would permit access to additional law enforcement investigatory files; and

Third. The President believes that the time limits for agencies to respond to requests for information—10 days on furnishing the document, and 20 days for determinations on appeal—to be unreasonable.

During the debate on the House floor on October 7 on the conference report on H.R. 12471, the first two points which the President used as reasons for the veto were specifically discussed in an exchange between Congressmen Horton and Moorhead of Pennsylvania, both of whom serve in ranking positions on the House Government Operations Committee, the committee which had jurisdiction over this legislation. During this exchange, it was brought out that the "judge would have to decide whether the document met the criteria of the President's order of classification—not whether he himself

would have classified the document in accordance with his own ideas of what should be kept secret," and that before the Court orders an in camera inspection, the Government would be given the opportunity to establish in testimony and detailed affidavits that the documents in question are exempt from disclosure. The conference report clearly states that an in camera investigation would not be automatic.

With regards to exempting national security and law enforcement investigatory information, the conference language is very specific on this issue. The legislation protects materials which have been—

(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;

* * * * *

(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;

* * * * *

It is my view that this legislation is necessary in order to give the citizens of this Nation access to their Government—a Government which was created to serve them, and which they support through their tax dollars. Although I respect the President's position and his willingness to approve similar legislation once it has been amended as he suggests, I cannot in this instance agree with him. I believe that this bill does protect those lawful sensitive areas of Government, and I think that the time allowed for agencies to respond to citizen's requests for information—10 days for agencies to respond to a request, with provisions for an additional 10-day extension under "unusual circumstances," and 20 days for agencies to respond to appeals—is reasonable.

I urge my colleagues to join with me in continuing to support this legislation.

Mr. ERLNBORN. Mr. Speaker, I want to make the second two points. Under the bill before us the time limits for response to a request are reduced to 10 working days for the original response, 20 working days for an administrative appeal, and then 10 additional days' extension in cases where there are particular difficulties. This would be a total of 40 working days or a total of 8 weeks. I think that is long enough.

The President suggests in his veto message and the amendments he sent here to the House, 30 days, plus 15 for extension, plus 20 for the administrative appeal. That would be 65 working days or 13 weeks before a final decision would be made. I think that is an unreasonable delay. In either event, whether it be under the proposal of the President or in the bill, there is the opportunity for court intervention to give additional time in cases where there are particular difficulties.

Lastly, on the question of opening up investigatory records, at the present time under the law all investigatory files are exempt, and we found that there have been abuses in this regard. Under the bill we

would open up nonexempt records that are within exempt files. I think that there are reasonable safeguards in the bill, and I hope that the veto will be overridden.

The SPEAKER pro tempore. The time of the gentleman has expired.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield 5 minutes to the distinguished author of the original bill, the gentleman from California (Mr. Moss).

(Mr. Moss asked and was given permission to revise and extend his remarks.)

Mr. ASPIN. Mr. Speaker, will the gentleman yield?

Mr. MOSS. I yield to the gentleman from Wisconsin.

Mr. ASPIN. I thank the gentleman for yielding.

Mr. Speaker, we vote today on a bill which would put an end to 7 years of bureaucratic foot-dragging and guarantee the openness in Government which the original Freedom of Information Act was designed to promote.

The overwhelming margin by which this House passed H.R. 12471 when it was first before us testifies to the broad support which these goals command.

But the President has chosen to veto this bill. He returns it to us with his reasons for refusing to sign it. Our job is to consider whether those reasons are cogent.

First, he argues that the provisions of the act with respect to classified material would compromise national security, because no presumption of reasonableness is created for an administrative classification. The language of the veto message suggests that the provisions of H.R. 12471 are dangerous innovations, that they would "violate constitutional principles."

Yet there is nothing unprecedented in this bill. It merely treats challenges to classification under the Freedom of Information Act as those challenges are treated when suit is filed on other grounds.

Why should the courts presume that an administrative classification is reasonable? Surely we are familiar by now with the extent to which any document tending to embarrass any agency tends to become an instant top secret. I am often reminded of the Russian story about the man sentenced to 23 years in prison for saying "Brezhnev is a fool": 3 years for insulting the party secretary, and 20 for revealing a state secret.

No, by their own actions the managers of those classification stamps have forfeited any presumption that their actions are reasonable. Let the courts decide.

The second objection raised in the veto message is simply a matter of administrative convenience. It is claimed that too great a burden is placed on the bureaucracy to act quickly and to demonstrate document by document that there is a need for secrecy. If the agencies had a history of cooperation with the spirit of freedom of information, if we did not have before us their history of stubborn, protracted, trench warfare, yielding nothing except under compulsion, then these arguments might carry some weight. But the record being the record, I cannot work up any great degree of sympathy for the administration's position. The President would have us build in loopholes for the agencies to snipe through: I see no reason to do so.

This bill, as we passed it before, is a major advance. I hope my colleagues support overriding the President's veto.

(Mr. Aspin asked and was given permission to revise and extend his remarks.)

Mr. Moss. Mr. Speaker, this legislation deserves to be finally enacted by the overriding, in this instance, of an ill-advised Presidential veto. I think that the advice upon which President Ford acted in vetoing this bill came in many instances from the same top and middle echelons in the Government, the same group of people who so vigorously urged the late President Lyndon Johnson to veto the original legislation.

In drafting the original legislation, there were many compromises made which, in my judgment, should not have been made, but they made it possible to accomplish something toward opening the Government wider to the American people. After all, it is their Government, not only their Government, but they are the ultimate governors of this Nation, and that they have in the final analysis the greatest need for information.

The bill upon which we are voting today, the matter of overriding the veto, represents compromise in the finest tradition, compromise of the views of the Congress, and it should have been the views of the Executive, because they were carefully considered. I know that I personally agreed to modification of positions that I had carefully thought through in an effort to go more than half way toward meeting the objections of the Executive. I think every legitimate objection that could have been supported has been met in the bill before us.

I think it is the minimum that we should do as a Congress to insure more openness in Government.

Mr. REID. Mr. Speaker, will the gentleman yield?

Mr. Moss. I yield to my friend, the gentleman from New York (Mr. Reid), who worked so hard on the original Freedom of Information Act.

Mr. REID. Mr. Speaker, I thank the chairman for yielding.

As coauthor of the original Freedom of Information Act along with the chairman, I share his view. I would like merely to make one point and ask a question.

First I share the gentleman's concern about what constitutes executive privilege, and to the extent it does exist it should be construed extraordinarily narrowly in my judgment. I hold that it does not, for instance, extend to foreign policy or national security information which is essential to the legislative and oversight purposes of the Congress under the Constitution.

But my question goes beyond that to the experience the gentleman and I had with respect to the Pentagon papers and I believe Judge Gesell. By the time the court acted, the Pentagon and Secretary Laird had declassified about 80 percent of the papers; the court at that time in their opinion held they could not then look behind the Government's judgement—determined by the then Pentagon attorney Fred Buzhardt—on the remaining 20 percent.

So when the gentleman in the well says we are dealing here with a very minimum somewhat more stringent standard and much prompter action by the court, we nonetheless are dealing with an area which is still very, very broad. I personally think well over 90 percent, perhaps 98 percent of the Pentagon papers could have been declassified at that time. And unless the courts can act to hold some kind of accountability

in this kind of determination, then our Republic lacks defenses for the right of the people to know that which it is imperative for us to know.

Mr. MOSS. I thank the gentleman.

I am not going to take further time other than to urge that we send a loud and strong and clear message downtown: This is the people's business. This must be public and this Congress insists that it be public to the extent provided by this series of amendments.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield 5 minutes for the purpose of debate to the ranking minority member of the Government Operations Committee, the distinguished gentleman from New York (Mr. Horton), who has helped so much in the construction of this legislation.

(Mr. HORTON asked and was given permission to revise and extend his remarks.)

Mr. HORTON. Mr. Speaker, I rise in strong support of overriding the President's veto of H.R. 12471, the Freedom of Information Act Amendments of 1974.

This bill is the result of long, careful, and reasonable consideration by the Committee on Government Operations, on which I am proud to serve as ranking minority member. The committee began its review of the Freedom of Information Act in this Congress with two bills, one principally sponsored by the gentleman from Pennsylvania (Mr. Moorhead) and one principally sponsored by myself in which I was joined by the gentleman from Illinois (Mr. Erlenborn) as a cosponsor. After hearing the views of many individuals—including several representatives of executive branch agencies—we recommended to the House a measure which combined the best features of both bills. I am pleased that this product passed the House by a vote of 383 to 8. The conference report, which does not differ greatly from the House bill, passed by an equally impressive margin—349 to 2.

I was disappointed that the President vetoed this bipartisan legislation.

Mr. Ford has found three parts of H.R. 12471 objectionable.

First, he says in his veto message that courts should not have authority to review "reasonable" decisions by executive agencies as to what information should be classified for reasons of national security. In asking us to revise the pertinent section of our bill, however, he explicitly reserves to judges the right to determine which decisions are "reasonable" and which are not. Under Mr. Ford's proposal then, judges themselves would still be able to decide when they would view classified documents in chambers and when they would not. Mr. Speaker, that is what H.R. 12471 does. The President's proposed language makes no real change in this part of the bill. Objection No. 1 is, very frankly, without substance.

Second, the President says that the time limits we have prescribed for agencies to respond to public requests for information are too short. Agencies need more time, according to Mr. Ford—65 days instead of 40. Mr. Speaker, I think we should ask here exactly what actions are required within these time limits. The bill does not stipulate that agencies physically produce all requested documents within these periods. It does not even stipulate that agencies say within the time periods which specific documents of the ones requested will be

produced. It merely states that officials of the executive branch tell requestors within certain amounts of time whether their inquiries will be complied with or not. Again, the conference report makes this clear. It also states quite clearly that further action shall occur promptly—it does not use the word “immediately.” Mr. Speaker, this does not seem an onerous requirement to me. Its effect would be demand of executive officials that they process information requests quickly, not that they disrupt their activities to fulfill their requests. To my mind, objection No. 2 is also without merit.

Third, the President says that the bill places unreasonable demands on law enforcement agencies and should be amended to provide that the heads of such agencies need not comply with the law when doing so would be difficult. Mr. Speaker, this proposal is extraordinary. It just does not make sense as a matter of public policy. Suppose we enacted a law that people need not pay income taxes whenever completing an income tax form would be difficult. Of course that would be absurd. What we have been asked to do here is similar in concept, and it is equally nonsensical. The real problem, as I understand, is that searching through records in response to some requests may be time consuming and expensive for law enforcement agencies. As I explained in detail during the original debate on the conference report, under H.R. 12471, agencies could charge members of the public the actual cost of these searches through records. So objection No. 3 is without merit as well.

Mr. Speaker, we have an opportunity now to strike a blow for the public's right to know what its Government is doing. I urge all Members to join with me in striking that blow by voting to override the President's veto of H.R. 12471.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I now yield 3 minutes to the gentleman from Arkansas (Mr. Alexander), a very able member of the subcommittee.

Mr. ALEXANDER. Mr. Speaker, President Ford's surprising veto of the amendments to the Freedom of Information Act passed by Congress last month makes a mockery of his promise of “open government.”

Like patriotism being the “last refuge of scoundrels,” Mr. Speaker, the withholding of information from the public is the “last refuge” of the bureaucrat. Have we not had enough of Government secrecy just for the sake of hiding mistakes, political embarrassment, or covering up criminal behavior?

Have the bureaucrats not learned anything from the Watergate scandal?

Has the White House not learned that Government secrecy is the real enemy of democracy?

Our subcommittee worked long and hard for more than 3 years to produce a workable, enforceable, and effective series of amendments to make the Freedom of Information Act more viable.

The bill, with bipartisan support, was unanimously reported by the full Government Operations Committee. This body passed H.R. 12471 last March by a vote of 383 to 8. It was likewise passed in the Senate in May by a one-sided vote.

Mr. Speaker, as a member of the conference committee, I can assure our colleagues that we afforded every possible consideration to

the concerns expressed by the President about certain provisions of the bill.

We made a number of significant changes in the language of the bill to help meet the objections of his advisers.

We had every assurance that these changes would make it possible for him to sign the bill into law promptly.

But the executive bureaucrats who had fought H.R. 12471 were successful in persuading him to veto it and it is now our clear responsibility to override that unwise and unwarranted veto.

I urge an overwhelming "aye" vote to restore credibility to our governmental processes and preserve the public's right to know.

Mr. TIERNAN. Mr. Speaker, I rise in support of H.R. 12471, the Freedom of Information Amendments Act, the President's veto notwithstanding. If there was ever a time in our National Government's history for candor and truth that time is now. I regret very much that President Ford accepted the bad advice to veto this legislation. It does not wash with his goal of an "open" administration.

The right of the public to know what their Government is doing was never so much needed as it is today. A recent editorial in the Providence Evening Bulletin speaks to the issue when it said:

If Congress meant what it seemed to say in overwhelmingly supporting these amendments, one of the first orders of business when it reconvenes after the elections will be a vote to override and a clear message to the White House that Americans are demanding the kind of open administration that Mr. Ford in his inaugural address promised to maintain.

Mr. Speaker, without objection I include this editorial of October 21 as part of my remarks:

[From the Providence Bulletin, Oct. 21, 1974]

INFORMATION FREEDOM

There were no ruffles and flourishes when President Ford vetoed the Freedom of Information Act Amendments last week. As quietly as possible the press was informed late Thursday afternoon that the President considered the legislation "unconstitutional and unworkable" although he said it had "laudable goals."

Ironically, the Senate-House conference committee, which labored four months over a compromise measure, had altered various provisions in an effort to satisfy White House reservations expressed soon after Mr. Ford took office. When the final version was completed, Mr. Ford took no position and it was approved—by voice vote in the Senate and 349 to 2 in the House.

Ironically, the President's most serious objection is to a provision authorizing the courts to review secret government information to determine whether it had been properly classified. Mr. Ford said this would permit the courts to make what amounts to "the initial classification decision in sensitive and complex areas where they have no expertise." An important point he failed to acknowledge, however, is that the courts now have this authority in criminal cases.

Other objections cited in the veto message include these provisions: 1. giving the courts discretionary authority to grant court costs and attorneys' fees to successful petitioners; 2. establishing a procedure for disciplinary action when a court found that a federal employee had acted capriciously or arbitrarily in withholding information; and 3. setting time limits of 10 working days for an agency to respond to a request for information, 20 days to answer an appeal from an initial request; and 30 days to respond to a complaint filed in court under the act—limits we view as eminently reasonable.

In vetoing the amendments, President Ford has given in to pressure from executive agencies whose opposition may be understandable in terms of bureaucratic convenience but is wholly without merit in terms of open government and the public's right to know.

If Congress meant what it seemed to say in overwhelmingly supporting these amendments, one of the first orders of business when it reconvenes after the

elections will be a vote to override and a clear message to the White House that Americans are demanding the kind of open administration that Mr. Ford in his inaugural address promised to maintain.

Mr. WHALEN. Mr. Speaker, we assemble here in the aftermath of an election in which only 38 percent of the American people participated. It was the lowest voter turnout in more than a quarter century.

That is troubling news, because it appears to confirm the contention that we now face the most serious problem that can arise in a democracy: The people are alienated from their Government. Millions of Americans believe that the "government of the people" has become a government very separate from the people.

And no wonder. The Watergate scandal confirmed the worst suspicions about secrecy, deception, and Government officials' contempt for the American citizen.

Fortunately, the Constitution authored nearly two centuries ago was resilient enough in 1974 to enable us to survive Watergate. Our task now, however, is to revive the confidence of the people in their government by insuring that Government is responsive to the people.

The fact is that many agencies of Government are not open. Too often the public interest is subservient to the institutional interest. Secrecy prevails.

In 1966, Congress enacted the Freedom of Information Act so that the public could obtain information about the policies being formulated and the tax dollars being spent by government departments. The act was a vital first step, but its usefulness has been limited because officials have devised ways to impede public inquiry into the public's business. For instance, documents simply are stamped "secret." Or citizens are told that there will be indefinite delays. Or individuals are charged exorbitant prices for obtaining copies of documents.

Now, however, after 3 years of bipartisan effort, 17 amendments to the act have been passed by the House and the Senate by overwhelming margins. Apparently accepting the advice of the Government agencies who opposed the act in 1966, President Ford vetoed the Freedom of Information Act amendments.

In my view, it is imperative that the representatives of the people override the veto and enact these amendments into law. If we sanction continued Government secrecy by sustaining the veto, we will damage—perhaps irrevocably—efforts to revitalize government and return it to the people.

The amendments require Government agencies to maintain an index of documents so that citizens can know where to look for information. A time limit for agency response is established to eliminate bureaucratic foot-dragging. Excessive charges will be prohibited—the Government will be able to charge only what it costs to provide requested material. The "secret stamp" cannot be used to shield material that need not be secret, since the amendments provide for court review of classified documents. The amendments also require that the Civil Service Commission initiate proceedings to determine if disciplinary action is warranted in cases where a court finds that an official acted "arbitrarily or capriciously" in denying information.

This carefully drafted legislation exempts materials that must be kept private, including medical reports, trade secrets, and legitimate national defense information.

The years that have elapsed since the original Freedom of Information Act was passed are replete with the tragic evidence of the consequences of secrecy in Government. If the spirit of the law had been alive during the past 8 years, we might have been spared the agonies of Vietnam and Watergate. The spirit of the law has not been sufficient, however to penetrate a detached Government bureaucracy.

Thus, the letter of the law must be strengthened. These amendments do just that. When the amendments are enacted into law, the people who want to participate will have the law on their side.

Mr. DENT. Mr. Speaker, if I had not already made up my mind to vote to override President Ford's unwarranted veto of the Freedom of Information Act, I would certainly have been influenced by the editorial which appeared in the Valley Independent of Monessen, Pa. It is a short editorial but very much to the point and I recommend its reading to my colleagues. The editorial follows:

MORE INFORMATION

Soon after the Freedom of Information Act took effect in 1967 it became evident that the law did not guarantee quite as much public access to government documents as had been expected. It is gratifying that Congress has at last completed work on revisions designed to strengthen access.

The law is basically a good one. In general it permits access to information from federal agencies, and also provides the machinery for court appeal of official decisions to withhold data. Exceptions are made in certain areas—trade secrets, investigatory records of law enforcement agencies, and so on.

Problems arose from the start, however. About three years ago Congress began the task of improving the Act. Matters were complicated by a Supreme Court ruling in 1973 which allows the president to screen documents from judicial review.

This ruling will in effect be overturned by the new legislation. It authorizes federal courts to make a determination as to whether a secrecy stamp on any given piece of information is actually justifiable under terms of the law. Nor will the courts have unbridled discretion in classifying questioned documents. They will be obliged to decide whether the criteria of an executive order for classification are met by a document.

All this is in aid of the people's right to know what their government is up to. Let us hope that President Ford, whose earlier objections have largely been met by congressional compromise, will sign the bill.

The past 2 years have done anything but win the confidence of the American people for an unquestioned support of our system, especially in the area of the accessibility of information regarding actions of the Government. It is discouraging to report to the Congress that, to the best of my knowledge, there is not one agency of Government that can give you an accurate and, an honest answer to inquiries pertaining, for example, to imports and exports in such a way that the average American citizen can understand them.

Is it not curious that when this great Republic was founded, it was founded upon the intentions of people who were tired of hearing nothing from Mother England save dictums as to how to conduct their affairs and where they were to send their taxes. Nearly 200 years later we hear again of the distrust and disgust of the people with their Government, precisely because they feel, in large part, that some great, secret machinery is operating in Washington, D.C., and they have very little access to its inner workings.

You know, a machine can be a very ominous, frightening thing. Our form of government was not meant to be ominous or frightening, and yet in various ways the public is confronted with the closed door, the closed envelope, and the closed file in attempting to deal with the workings of our Federal system.

We have gone through a frightening period in this last summer, a chain of events that should have effectively pointed out the dangers of secrecy in government. The "imperial Presidency" of Richard Nixon is over, halted by vigilance, and yet we may be now in danger of perpetuating the attitudes of the Nixon administration if we should allow the Ford veto to stand on the Freedom of Information Act amendments.

I voted for Congressman Gerald Ford's selection to the Vice Presidency of the United States. If I had the opportunity, I would vote to make him a Member of Congress again because in that position he could not do as much harm as he has done in his short stint in the White House. He takes the easy way out by continuing to criticize Congress for anything and everything, yet he knows that between his use of the Presidential veto power, and the inherent rules and criteria-making powers of the bureaus and departments of the executive branch, Congress has become the fifth wheel on a hearse.

For instance, I have just been informed that the Labor Department is interpreting the recently highly acclaimed Pension Reform Act of this Congress in such a manner that any resemblance between the intent of Congress and the rules and criteria that they are promulgating is strictly accidental. And this has become true in nearly every area of legislative enactment.

Particularly is this true in the enactment of the so-called Kennedy round of trade agreements. It has been administered without regard of any kind to the intent, or the goals, or the letter of the law. The present administration of the Kennedy round, although perhaps well intended, seems now to be aimed at the destruction of American international trade, rather than to keep the promise made by that act that it would create jobs in America, support prosperity in America, and above all, bring peace to the world.

This morning, within a 2-hour span of having breakfast and answering mail, I watched at least three TV stations, and their various news presentations and I believe now that I can recite President Ford's toast to the Emperor of Japan, verbatim. However, I did not hear more than a single line about the Chrysler Corp. starting a massive layoff, shutting down production in several more plants; about Greyhound Bus Lines going on strike and stranding thousands of travelers; about the coal miners' dissatisfaction with what their president, Arnold Miller, called a reasonable and good contract; about Bethlehem Steel threatening to close down part of its operation permanently.

While I sat and contemplated the great damage these various economic upheavals could do in the next month, the President was promising the Japanese a continuance of the policies we have followed in regard to Japan. Mr. Ford's "openness" was bright and shining in his pronouncements to the Japanese, even in the light of his veto of this bill, a veto which will effectively maintain a "closedness" here at home.

I will venture to say that there are Arab leaders who have better access to information concerning trade, arms and energy in the United States than do most of the American people. And this has all come about at the behest of that inveterate globetrotter Dr. Henry Kissinger, whose "openness" with the Arabs we do not need, but who obviously was holding something from us in the Chilean upheaval.

There just may be a few dozen Arab sheiks in the Middle East who know more about the United States than we in Congress know and the only way we are going to improve the situation is to override this veto.

I opened by quoting the concerns of one of my local papers. I might effectively close by quoting from this morning's Washington Post:

FEDERAL FILES: FREEDOM OF INFORMATION

Just before the election recess, President Ford used his power of veto and sent back to the Congress a piece of very important legislation, the 1974 amendments to the Freedom of Information Act. Those amendments were important because they strengthened a law that was fine in principle and purpose but poor in practical terms. The Freedom of Information Act had been enacted in 1966 in the hope of making it possible for the press and the public to obtain documents from within government to which they are entitled. Because of cumbersome provisions of the act, however, obtaining such information proved very difficult.

This year, after long hearings, much haggling between House and Senate and two resounding votes, a series of amendments was ready for presidential signature. They shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to keep information secret that should be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, sadly, Mr. Ford yielded to the arguments of the bureaucracy and vetoed the legislation.

Since then, a number of journalists' and citizens' groups have criticized that action by the President and urged Congress to override the veto. Today in the House and tomorrow in the Senate, those votes are scheduled to take place. We would urge a strong vote in support of the legislation, particularly in light of two recent disclosures made possible by the Freedom of Information Act.

Recently, a Ralph Nader-supported group on tax reform turned up the fact the Nixon White House instigated Internal Revenue Service investigations of social actions groups on the left and in the black community. The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS. As we have had occasion to say in the past, the tax laws were not intended to be used for political harassment. The interesting point about these latest disclosures is that they were made possible by the utilization of the Freedom of Information Act.

In the same vein, the Justice Department released a report earlier this week on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act. Attorney General William Saxbe felt compelled, on the basis of what the Justice Department had been forced to release about the program, to order a study of what the FBI had done. Mr. Saxbe found aspects of the program abhorrent. But FBI director Clarence M. Kelley actually defended the practices of his predecessor, J. Edgar Hoover. This is a good example of how important it is that this country have a strong Freedom of Information law that will make it possible for the public to learn of such activities—and such attitudes on the part of officials in sensitive and powerful jobs—and to learn of them as quickly as possible.

The Freedom of Information Act is not a law to make the task of journalists easier or the profits of news organizations greater. It is, in other words, not special interest legislation in the sense that the term is ordinarily used. It is special interest legislation in that it is intended to assist the very special interest of the American people in being better informed about the processes and practices of their government. This is a point President Ford's advisers missed badly at the time of the veto. One of them is alleged to have said that if the President vetoed the bill, "who gives a damn besides The Washington Post and the New York Times?" The truth of the matter is that this legislation goes to the heart of what a free society is about. When agencies of government such as the FBI and IRS can engage in the kind of activity just revealed, it is serious business. That's why we should all give a damn—especially those who are to cast their votes today and tomorrow.

Mr. UDALL. Mr. Speaker, at the time of the President's veto of H.R. 12471, the freedom of information bill, I thought that action to have been ill-timed to an extreme and contrary to his pledge to "go more than halfway" to meet the Congress efforts to pass this important legislation.

Mr. Speaker, the President again raised the specter of abuse of national defense secrets in his veto message. If there is a more transparent and bedraggled banner to wave in this post-Watergate era, it is the one bearing national security as a shield against the public's right to know.

The committee working on this legislation labored for more than 3 years to come up with a bill that provided necessary security safeguards, but provided improved public access to Government information.

It is a vital bill at a vital time. The public is skeptical of its Government. It is suspicious of the security agencies and the repositories of such information as tax records. The public is questioning the candor of such agencies as the Atomic Energy Commission and the Food and Drug Administration and whether or not these agencies are telling all the facts about the water we drink, the food we eat, and the safety of use of nuclear energy for power production.

Mr. Speaker, the President's veto of the amendments to the Freedom of Information Act ought to be overridden for at least two very basic reasons: First, it eases public access by requiring the agencies to be more accountable to the Congress and gives the people new opportunities to force disclosure of information not classified and not vital to the Nation's security; and second, enactment of this bill at this time will serve notice to the people of this Nation that we have learned at least one lesson from Watergate, that the old politics of supersecrecy and basic suspicion have been replaced by candor and openness.

Mr. Speaker, a recent editorial in the Arizona Daily Star of Tucson, Ariz., called for override of the President's veto.

In that editorial, the Star stated:

The American system of government can afford no isolated enclaves of non-responsiveness—certainly not after the revelations of the past two years that the FBI and CIA have been employed for extensive political services.

Mr. Speaker, I can only add my full concurrence with those sentiments and I rise in support of the resolution to override.

Ms. ABZUG. Mr. Speaker, when President Ford took office he promised the Nation more openness and candor in government. Since then he has taken some actions which have raised serious doubts about his commitment to a more open government. The most recent such action was the ill-advised veto of H.R. 12471, the Freedom of Information Act amendments. The veto of this legislation was clearly contrary to the public interest. In my view, H.R. 12471 would make a number of responsible and highly desirable changes in the Freedom of Information Act—changes which would greatly improve the access of the American people to the business of government. It would shift the burden of proof from individuals seeking information to those agencies denying access to Federal documents; it would permit the Civil Service Commission to discipline bureaucrats, if the courts find that they have "arbitrarily or capriciously" withheld infor-

mation; it would allow courts to review classified documents and classification procedures; and it would also shorten the length of time an agency has to comply with a request. In short, the amendments give the Freedom of Information Act some teeth.

Why the President would veto such a bill on the heels of his pledge to more openness is exceedingly difficult to understand. In his veto message of October 17, 1974, the President asserted that the courts had neither the expertise nor the constitutional jurisdiction to question the classification of documents. This allegation is reminiscent of the argument used by the former President Nixon in his attempt to keep the Watergate tapes secret—an argument which, I might add, was rebuked by a unanimous Supreme Court in the case of United States against Nixon.

The American people want and deserve more candor in the conduct of the public's business. They do have a right to know what their Government is doing. To protect, to expand, and to strengthen that right are the purposes of the Freedom of Information Act amendments. The bill is the product of careful study and deliberations extending over a period of more than 3 years. If ever a veto deserved to be overridden, it is this one.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I will at the appropriate time ask for general leave to extend; but having no further requests for time, I move the previous question.

The previous question was ordered.

The SPEAKER. The question is, Will the House, on reconsideration, pass the bill (H.R. 12471) the objections of the President to the contrary notwithstanding?

Under the Constitution, this vote must be determined by the yeas and nays.

The vote was taken by electronic device, and there were—yeas 371, nays 31, not voting 32, as follows:

[Roll No. 634]

YEAS—371

Abdnor	Biaggi	Burke, Mass.
Abzug	Biester	Burlison, Mo.
Adams	Bingham	Burton, John
Addabbo	Blackburn	Burton, Phillip
Alexander	Blatnik	Butler
Anderson, Calif.	Boland	Byron
Anderson, Ill.	Bolling	Carey, N. Y.
Andrews, N. C.	Bowen	Carney, Ohio
Andrews, N. Dak.	Brademas	Carter
Annunzio	Breaux	Casey, Tex.
Archer	Breckinridge	Cederberg
Armstrong	Brinkley	Chappell
Ashbrook	Brooks	Chisholm
Ashley	Broomfield	Clancy
Aspin	Brotzman	Clark
Badillo	Brown, Calif.	Clausen, Don H.
Bafalis	Brown, Mich.	Clawson, Del.
Barrett	Brown, Ohio	Clay
Bauman	Broyhill, N. C.	Cleveland
Bell	Buchanan	Cochran
Bennett	Burgener	Cohen
Bergland	Burke, Calif.	Collins, Ill.
Bevill	Burke, Fla.	Conte

Conyers	Grover	McKay
Corman	Gude	McKinney
Cotter	Gunter	McSpadden
Coughlin	Guyer	Macdonald
Crane	Haley	Madden
Cronin	Hamilton	Madigan
Culver	Hammerschmidt	Mahon
Daniel, Dan	Hanley	Mallary
Daniel, Robert W., Jr.	Hanna	Mann
Daniels, Dominick V.	Hansen, Idaho	Maraziti
Danielson	Hansen, Wash.	Martin, Nebr.
Davis, S.C.	Harrington	Mathias, Calif.
de la Garza	Harsha	Mathis, Ga.
Delaney	Hawkins	Matsunaga
Dellenback	Hays	Mayne
Dellums	Hechler, W. Va.	Mazzoli
Denholm	Heckler, Mass.	Meeds
Dennis	Heinz	Melcher
Dent	Helstoski	Metcalf
Derwinski	Henderson	Mezvinsky
Devine	Hicks	Michel
Dickinson	Hillis	Milford
Diggs	Hinshaw	Miller
Dingell	Holifield	Mills
Donohue	Holt	Minish
Dorn	Holtzman	Mink
Downing	Horton	Minshall, Ohio
Drinan	Howard	Mitchell, N. Y.
Dulski	Huber	Mizell
Duncan	Hudnut	Moakley
du Pont	Hungate	Mollohan
Eckhardt	Hunt	Moorhead, Calif.
Edwards, Ala.	Ichord	Moorhead, Pa.
Edwards, Calif.	Johnson, Calif.	Morgan
Eilberg	Johnson, Colo.	Mosher
Erlenborn	Johnson, Pa.	Moss
Esch	Jones, Ala.	Murphy, Ill.
Evans, Colo.	Jones, Okla.	Murphy, N. Y.
Evins, Tenn.	Jones, Tenn.	Murtha
Fascell	Jordan	Myers
Findley	Karth	Natcher
Fish	Kastenmeier	Nedzi
Flood	Kazen	Nelsen
Flowers	Kemp	Nix
Flynt	Ketchum	Obey
Foley	Kluczynski	O'Brien
Ford	Koch	O'Hara
Forsythe	Kyros	O'Neill
Fountain	Lagomarsino	Owens
Fraser	Landrum	Parris
Frenzel	Latta	Passman
Frey	Leggett	Patman
Froehlich	Lehman	Patten
Fulton	Lent	Pepper
Fuqua	Litton	Perkins
Gaydos	Long, La.	Pettis
Gettys	Long, Md.	Peyser
Gaiamo	Lott	Pickle
Gibbons	Lujan	Pike
Gilman	Luken	Poage
Ginn	McClory	Powell, Ohio
Goldwater	McCloskey	Preyer
Gonzalez	McCollister	Price, Ill.
Grasso	McCormack	Pritchard
Green, Pa.	McDade	Quie
Griffiths	McEwen	Quillen
Gross	McFall	Railsback

Randall	Sikes	Van Deerlin
Rangel	Sisk	Vander Veen
Rees	Skubitz	Vanik
Regula	Slack	Vigorito
Reid	Smith, Iowa.	Waldie
Reuss	Smith, N. Y.	Walsh
Rinaldo	Snyder	Wampler
Roberts	Spence	Whalen
Robinson, Va.	Staggers	White
Robison, N. Y.	Stanton, J. William	Whitehurst
Rodino	Stanton, James V.	Whitten
Roe	Stark	Widnall
Rogers	Steed	Wiggins
Rooney, Pa.	Steele	Wilson, Bob
Rose	Steelman	Wilson, Charles H., Calif.
Rosenthal	Steiger, Wis.	Wilson, Charles, Tex.
Rostenkowski	Stephens	Winn
Roush	Stokes	Wolff
Rousselot	Stubblefield	Wright
Roy	Stuckey	Wyatt
Roybal	Studds	Wyder
Ruppe	Sullivan	Wylie
Ryan	Symington	Yates
St Germain	Symms	Yatron
Sandman	Talcott	Young, Alaska
Sarasin	Taylor, Mo.	Young, Fla.
Sarbanes	Taylor, N.C.	Young, Ga.
Satterfield	Thompson, N.J.	Young, Ill.
Schneebeli	Thone	Young, S. C.
Schroeder	Thornton	Young, Tex.
Sebelius	Tiernan	Zablocki
Seiberling	Traxler	Zion
Shipley	Udall	Zwach
Shriver	Ullman	

NAYS—31

Arends	Gubser	Ruth
Beard	Hanrahan	Scherle
Bray	Hosmer	Shuster
Broyhill, Va.	Hutchinson	Steiger, Ariz.
Burleson, Tex.	King	Stratton
Collier	Landgrebe	Treen
Collins, Tex.	Martin, N. C.	Waggonner
Davis, Wis.	Montgomery	Ware
Fisher	Price, Tex.	Williams
Frelinghuysen	Rhodes	
Goodling	Runnels	

NOT VOTING—32

Baker	Hastings	Roncalio, Wyo.
Boggs	Hébert	Roncallo, N. Y.
Brasco	Hogan	Rooney, N. Y.
Camp	Jarman	Shoup
Chamberlain	Jones, N. C.	Teague
Conable	Kuykendall	Thomson, Wis.
Conlan	Mitchell, Md.	Towell, Nev.
Davis, Ga.	Nichols	Vander Jagt
Eshleman	Podell	Veysey
Gray	Rarick	Wyman
Green, Oreg.	Riegle	

So, two-thirds having voted in favor thereof, the bill was passed, the objections of the President to the contrary notwithstanding.

The Clerk announced the following pairs:

Mrs. Boggs with Mr. Baker.
 Mr. Hébert with Mr. Conlan.
 Mr. Rooney of New York with Mr. Eshleman.
 Mr. Mitchell of Maryland with Mr. Davis of Georgia.
 Mr. Riegle with Mr. Hogan.
 Mr. Jarman with Mr. Camp.
 Mr. Jones of North Carolina with Mr. Kuykendall.
 Mr. Teague with Mr. Chamberlain.
 Mr. Gray with Mr. Rarick.
 Mr. Nichols with Mr. Roncallo of New York.
 Mr. Roncalio of Wyoming with Mr. Conable.
 Mrs. Green of Oregon with Mr. Hastings.
 Mr. Shoup with Mr. Thomson of Wisconsin.
 Mr. Towell of Nevada with Mr. Wyman.
 Mrs. Vander Jagt with Mr. Veysey.

The result of the vote was announced as above recorded.

The SPEAKER. The Clerk will notify the Senate of the action of the House.

GENERAL LEAVE

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks, and include extraneous matter, on the bill just passed.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

**G. SENATE ACTION AND VOTE ON PRESIDENTIAL VETO,
NOVEMBER 21, 1974; PP. S19806-S19823**

FREEDOM OF INFORMATION ACT—VETO

The PRESIDING OFFICER. Under the previous unanimous consent agreement, the hour of 1 o'clock having arrived, the Senate will now proceed to the consideration of the veto message on H.R. 12471.

The PRESIDING OFFICER (Mr. Talmadge) laid before the Senate a message from the House of Representatives, which was read, as follows:

The House of Representatives having proceeded to reconsider the bill (H.R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act," returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

The PRESIDING OFFICER. The question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

The time for debate will be limited to 1 hour, to be equally divided between and controlled by the majority leader and the minority leader or their designees.

Who yields time?

Mr. ROBERT C. BYRD. I yield myself 1 minute.

Mr. President, on behalf of the distinguished majority leader, I take this time merely to express appreciation to Mr. Stafford, Mr. Randolph, and Mr. Cranston, for their consideration of the time element that developed as a result of the desire on the part of various Senators to speak earlier this morning on another subject. These Senators—Mr. Stafford, Mr. Randolph, and Mr. Cranston—certainly deprived themselves of time which they had hoped to use in their discussions of the necessity of overriding the President's veto.

I want to express appreciation on behalf of the leadership for their understanding and their splendid cooperation.

Mr. President, how much time does the distinguished Senator from Massachusetts desire?

Mr. KENNEDY. Is the minority leader going to control the time?

Mr. ROBERT C. BYRD. Mr. President, on behalf of the majority leader, I yield the time to the distinguished Senator from Massachusetts (Mr. Kennedy) for his control on this side of the aisle.

Mr. KENNEDY. I thank the Senator from West Virginia.

Mr. President, at the outset, I ask unanimous consent that the following persons, who are members of staffs of affected committees in connection with this measure, be permitted the privilege of the floor: Bert Wise, James Davidson, Al From, Jan Alberghini, and Mr. Sussman.

Mr. HRUSKA. Mr. President, will the Senator yield for the purpose of adding the name of Douglas Marvin, a member of the staff of the Committee on the Judiciary?

Mr. KENNEDY. I add that name, Mr. President. I ask unanimous consent that those persons have the privilege of the floor during the discussion of this matter and the vote.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I yield myself such time as I may take.

Mr. President, the Senate is today faced with an important challenge. We are moving out of the "Watergate era," and are focusing our attention and our energies on the pressing economic issues of the day. But one question that our children, and our children's children, will surely ask in the years to come is how our Nation and its elected representatives responded to the abuse and misuse of the institutions of government, and to the corruption of the political processes, that characterized Watergate.

We will surely tell them about how the Senate Watergate Committee and the House Judiciary Committee laid bare the evidence of official misfeasance and malfeasance, leading to the resignation of a President and the prosecution of some of the highest officials in the executive branch.

We will tell them that Congress enacted campaign finance reforms to begin to free our election processes from the corroding influence of large private campaign donors.

I hope we can tell them about legislation enacted to protect individual privacy, and to guard against future misuse of governmental institutions.

I also hope, Mr. President, that we can tell them about how Congress stood up against a hostile bureaucracy and passed, over a Presidential veto, legislation to give the public greater access to Government information.

President Ford last summer promised the American people an "open Government." Congress gave him a chance to give substance to that promise when it sent to the White House last month H.R. 12471, a bill to strengthen the Freedom of Information Act. With his veto of this bill, however, returned to the Congress just minutes before our recess on October 17, the President yielded to the pressures of his bureaucracy to keep the doors shut tight against public access in many areas.

I do not believe that President Ford personally harbors any desire to perpetuate the kind of insidious secrecy that characterized the Watergate years. But that is precisely the result of his veto of the Freedom of Information Act amendments. The President's former press secretary, Mr. terHorst, stated the problem most clearly in the Star-News earlier this month when he wrote:

The Nixon holdovers in the Administration have sandbagged the new President's pledge of new openness in government. . . . The lesson for Ford is that there still remains an excessive amount of anti-media zeal among the Nixonites in government, despite his own desire that federal agencies make more, not less, information available to the public.

I think that a vote today to override the President's veto must be viewed not as any affront to the President, but rather as a visible and concrete repudiation by Congress of both the traditional bureau-

cratic secrecy of the federal establishment and the special antimedia, antipublic, anti-Congress secrecy of the Nixon administration.

The late Chief Justice Earl Warren made the need for this override clear last year when he observed—

If we are to learn from the debacle we are in, we should first strike at secrecy in government whenever it exists, because it is the incubator for corruption.

Extensive hearings in both the House and Senate have brought out clearly the need to broaden and strengthen the 1966 Freedom of Information Act. Court construction of some loosely drafted provisions in the law have opened gaping loopholes which have engulfed entire buildings of Government files. Even where the law clearly and unambiguously requires disclosure of certain documents, bureaucratic sleights of hand continue to keep them out of reach of the public and the press.

Our hearings identified the problems. In the course of extensive subcommittee, committee, floor, and conference deliberations the legislation was sharpened, clarified, adjusted, and readjusted. At each stage, agency views were heard, considered, debated, and accommodated.

The end product was H.R. 12471. The bill was passed by the House and Senate overwhelmingly; the conference report was approved by both bodies again overwhelmingly. This legislation, Mr. President, was given close attention at each stage of the legislative process.

President Ford objects to the legislation. Last week before a journalists' group he called his objections "minor differences" that could be ironed out if Congress would go along. He intimated that his proposed changes were fresh and new and that Congress should look at them carefully, as if for the first time.

Unfortunately, the President's proposals, which he sent up a few weeks ago, are simply warmed-over agency suggestions which have been made time and again at each level of congressional deliberation. They involve the shopworn incantation that our bill threatens national security and imposes extreme burdens on the already overworked Federal bureaucracy. The difference is that now the old national security scare tactic and the bureaucrat's perennial lament of overwork have been emblazoned with a Presidential seal.

These proposals would give us more of precisely what our bill was carefully designed to avoid—more secrecy, more footdragging, and ultimately more Government irresponsibility. Let me discuss each of the administration objections and suggested changes in turn.

First, the administration wants to tie the hands of Federal judges in reviewing executive classification decisions. This, we are told, is necessary to protect our national security.

This national security argument should be placed in its proper perspective. John Ehrlichman gave us a clue to how the executive branch views national security when he told President Nixon, during a discussion of the Ellsberg break-in, "I would put the national security tent over this whole operation." National security improvements to the San Clemente swimming pool; national security wiretaps on journalists; national security burglaries. The White House taped conversation of April 17, 1973, has the President summing up the Watergate coverup thusly.

It is national security—national security area—and that is a national security problem.

What about the operation of the formal classification system, carried out under Executive order by Federal officials with specially delegated authority? The former President shed some light on this system too, when he said:

The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

We know too well how the classification system has been overused and misused. We know too well that of the millions of documents marked "secret," most should rightfully be open to scholars, journalists, and the interested public.

Yet the administration proposes to limit review of classification decisions, allowing courts to require disclosure only if the Government had no reasonable basis whatsoever to classify them. This would make the secrecy stamp again practically determinative.

The President writes the classification rules in his Executive order. If those rules are inadequate to protect important information vital to our national defense, then let the President change the rules. But make the Government abide by them. Judicial review means executive accountability. Judicial review will be effective only if a Federal judge is authorized to review classification decisions objectively, without any presumption in favor of secrecy. That is what our system of checks and balances is all about.

I think Senator Ervin best presented the issue of judicial review standards to the Senate during our debate on the original legislation—

The ground ought to be not whether a man has reached a wrong decision reasonably or unreasonably. It ought to be whether he had reached a wrong decision.

This bill is not going to endanger military secrets or defense information. It will not require disclosure of sensitive international negotiations or confidential military weapons research.

Our conference statement of managers makes clear that we expect an agency head's affidavit to be given considerable weight in judicial determinations on classified material. But if the agency cannot produce enough evidence to justify keeping a document secret, then that document should be released. If the agency can show that it has properly classified the document in the interest of national defense or foreign policy, then that document should be withheld, and the courts will so rule.

I therefore reject out of hand the President's argument against this bill's provisions for de novo judicial review of classified material, and I reject along with it his proposed changes.

Second, there is the issue of time limits. Our bill provides an agency 10 working days to respond initially to a request for information, 20 working days on appeal, and an additional 10 working days where unusual circumstances are present. That gives the agency 40 working days, or almost two calendar months—more than enough time for any agency to complete the process of finding and reviewing requested documents.

If a person sues the agency after that time, and the agency is still diligently trying to complete review of the materials under exceptional circumstances, then we have another escape valve in the bill—added

by specific request of the administration during our conference. The agency may ask for, and the court is authorized to grant, additional time pending completion of such review.

The President has asked Congress to add 25 working days to the time limits in our bill. This, Mr. President, is even more time than the administration asked for when the bill was before the Judiciary Committee. And it is certainly longer than any journalist or member of the public should have to wait to get information from the Government.

Let me give a most recent example of agency delays. The IRS just released documents relating to the Special Services Group requested over a year ago. Little wonder that this agency, which is probably the most dilatory of all in responding to citizen requests for information, waited a year before handling over the documents; they show that the IRS had been gathering intelligence, at White House request, on groups like the Americans For Democratic Action, the National Council of Churches, the Congress of Racial Equality, the Urban League, the Unitarian Society, and the John Birch Society. I should note for the record that even after a year, it took a law suit to disgorge the requested records.

The administration also wants us to allow the agency to go to court on its own initiative to get unlimited extensions of time to respond to an information request. This suggestion may not only be unconstitutional—since it puts the Government in Federal court where no “case or controversy” exists—but it is assuredly unconscionable. With information like justice, delay can be tantamount to denial. That is just what we want to avoid, and that is just what the administration’s proposal would give us.

The third issue relates to the cost of Freedom of Information Act implementation. Extensive testimony during our hearings made clear that fees and charges have been imposed by agencies as “toll gates on public access,” and H.R. 12471 attempts to remedy this problem. Yet the administration would allow charges in excess of \$100 to be levied against a person requesting information where agency review and examination of records is involved. This \$100 minimum is totally meaningless. An agency could easily drive up the cost of access to any record simply by adding layers of review and examination, or by convening committees or using higher-level officials to discuss the matter. And then when this review and examination is through, the documents may not even be turned over.

I should note that this is one issue where we thought we had met the administration’s objections way back at the committee stage. For we had heard no complaint on this point until the President sent up his suggested changes to the vetoed bill. This is just one more indication that the administration is not just proposing last minute changes to iron out minor differences, but is really trying to reopen the entire bill and start from scratch again.

There is no evidence that excessive or unreasonable expenditures have been required to implement the Freedom of Information Act over the past 7 years. In fact, the evidence points in just the opposite direction—that agencies have been overcharging and using fees to block release of public records. We continue specific authorization for agencies to charge for search and copying, and these, with the require-

ment that records be reasonably described in the request, should serve as an adequate deterrent to any idle request by the curious busybody for voluminous files.

Government agencies spend millions of dollars to promote dissemination of information they want the public to have. It is not too much to ask that they use some of these funds to provide the public and press with information they specifically request.

Speculation on future costs cannot justify our taking the chance or imposing the substantial barriers to access contained in the administration's proposal. In any event, freedom of information should not be for sale only to the highest bidder.

Finally, the President has asked that we allow agencies to deny access to records where the agency considers a review of the records to be impractical and concludes that they probably contain only investigatory records. This is but another attempt, hardly disguised, to shut the door to access to FBI files, and Congress should reject it resoundingly.

I would like to point out and emphasize that the President does not object to our opening investigatory files to public access. We have been most careful to protect privacy and law enforcement interests to the utmost in the bill we passed. The objection in this area is stated solely in terms of administrative burden, an argument we have heard before—first when Congress passed the Administrative Procedure Act in 1945, and again in 1966 when we enacted the Freedom of Information Act. That argument is even less sound today, where we have such a recent history of documented abuses of investigatory processes of Government.

Two cases clearly illustrate why even some administrative burden is worth the cost, where it results in greater public disclosure. In the case where NBC newsman Carl Stern took the FBI to court to obtain documents relating to counterintelligence programs, the Bureau took the position that those documents were "investigatory files." The FBI argued this point strongly, but a Federal judge even more forcefully found it lacking in substance. The judge responded:

The government has not demonstrated that the requested documents, which are couched in broad generalities, relate to any ongoing investigation or that disclosure would jeopardize any future law enforcement proceedings.

No doubt this is just the kind of document—revealing a program that earlier this week the Justice Department itself characterized as involving "practices that can only be considered abhorrent in a free society"—that the FBI would find impractical to review and unlikely to be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about.

Then there is the case of Congressman Koch and two of his colleagues who requested access in their own FBI files. The FBI first denied it had such files. Only after suit was filed did the Bureau turn over some correspondence and newspaper clippings from those so-called "investigatory" files. Only court action in this instance forced the FBI to even admit that it had the requested files.

As these cases illustrate, not even the FBI should be placed beyond the law, the freedom of information law. Watergate has shown us that unreviewability and unaccountability in Government agencies breeds irresponsibility of Government officials. In this light, Mr. President,

I would think the FBI would welcome the reviewability and accountability which the Freedom of Information Act amendments carry with them.

Mr. President, the list of groups and individuals urging Congress to override the veto of the Freedom of Information Act amendments is lengthy. Some of the media, consumer, and public interest groups, and labor organizations, which have taken a special interest in seeing this legislation enacted over the President's veto include the National Newspaper Association, the Radio-Television News Directors Association, the American Society of Newspaper Editors, the Consumer Federation of America, the American Civil Liberties Union, Common Cause, Public Citizen, the United Auto Workers, and AFL-CIO.

Hundreds of editorials across the Nation supporting override attest to the interest of the American press in this vital legislation. I ask unanimous consent that following my remarks a list of newspapers giving editorial support to this legislation be printed in the RECORD, along with a sampling of some of the columns that have recently appeared.

The PRESIDING OFFICER. Without objection, it is so ordered.

[See exhibit 1.]

Mr. KENNEDY. Mr. President, this is far from special-interest legislation. Mr. President, its beneficiaries will include every American who wants to keep his Government accountable, his society open, and his Nation free. I urge my colleagues today to vote to override the President's veto of the Freedom of Information Act amendments.

EXHIBIT 1

[From the Arizona Daily Star, Oct. 27, 1974]

THE INFORMATION VETO

The President has vetoed proposed amendments to the Freedom of Information Act that would have gone far in holding accountable the headless mass of federal bureaucracy. His veto must be overridden.

The amendments would have required agencies to keep an index of the tons of information they record each year for use by the consumer-taxpayer. It would have required agencies to produce information on request by general subject matter rather than much less-accessible file numbers. It would have provided for court review of each refusal of information.

Bureaucrats would be required to report annually to Congress the number of times information was withheld, by whom and why, whether appeals were made under the act and the outcomes of those appeals. The law was specifically applied to the executive department, the Pentagon, government corporations, government-controlled corporations and independent regulatory agencies. Those individuals who withheld information without firm basis would be subject to civil service discipline.

But President Ford was persuaded by the FBI, the CIA and others that such law would dangerously inhibit them in their work. They want to be totally exempted.

In fact, the amendments provide numerous safeguards to the conduct of active police investigations, foreign intelligence and counter-intelligence. Specially exempted was information classified for national defense, information that would foul a criminal case, deprive a defendant of fair trial, constitute an unwarranted invasion of privacy, disclose the identity of a confidential source, disclose unusual procedures and techniques or endanger the life of an officer.

If all that failed there would be the courts to make the determination behind closed doors.

The American system of government can afford no isolated enclaves of non-responsiveness—certainly not after the revelations of the past two years that the FBI and CIA have been employed for extensive political services.

The conduct of criminal law enforcement and legitimate foreign intelligence would not be hampered by the amendments. It would make agencies like the FBI and CIA, not used to being held accountable, accountable, and that is their real objection.

[From the Des Moines (Iowa) Register, Oct. 22, 1974]

ENDORISING COVERUP

The Freedom of Information Act adopted by Congress in 1966 listed among the documents that could be kept from the public those "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy."

President Ford's veto last week of amendments to the Freedom of Information Act is an indefensible effort to preserve this massive loophole.

The U.S. Supreme Court ruled in 1973 that not even the courts could question the validity of the secrecy stamps placed on government documents.

The high court agreed that the purpose of the Freedom of Information Act is to provide greater public access to government information, but it said the legislative history prevented the courts from reviewing the classifications given to documents. The court made clear that Congress could change the law and authorize judicial review.

This Congress has now done, by overwhelming margins in both houses. The judicial review provision is one of several amendments to the Freedom of Information Act intended to make it easier for the public to learn about government actions.

In vetoing the measure, President Ford was critical chiefly of the court review provision. He declared that it would have an adverse impact on national security by permitting courts to pass on matters in which they lack expertise.

A major function of the courts is to hear arguments on disputed issues and rule on the validity of the arguments. The courts do this on a vast array of complex issues. Judges are no less capable of ruling on the validity of security classification decisions than on other decisions by government officials.

It is essential that government officials not be vested with unreviewable power to hide information. Justice Potter Stewart declared in the 1973 opinion that Congress:

"... has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been. . . . Without disclosure . . . factual information available to the concerned executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed."

Government officials notoriously overclassify documents and misuse secrecy stamps to hide their mistakes. "National security" has become almost a catch-all phrase to justify keeping Congress and the public in the dark about matters they have a right to know.

The Watergate scandal revealed how government officials used "national security" to justify illegal wiretaps and a host of other improper activities. It is distressing to find President Ford ignoring this recent history and invoking "national security" to defend the same old secrecy practices which enabled the White House "horrors" to occur.

He is the man who promised open government when he took over in the wake of the Nixon secrecy and distortion of facts about government.

Congress has an obligation to override the veto and declare in unmistakable terms that it has had enough of cover-up by secrecy stamp.

[From the Kansas City Star, Oct. 21, 1974]

AN UNFORTUNATE FORD VETO ON INFORMATION FREEDOM

President Ford's veto of a good bill to strengthen the Freedom of Information Act of 1966 is puzzling. We can only assume that he got some bad advice from the executive agencies for which most routine disclosures of business would be inconvenient or embarrassing or both.

The proposed amendments to the 1966 act were entirely in order, and language was changed in the conference committee a few days ago to take account of the President's reservations. Nevertheless the veto has fallen, and it has wiped out a lot of good work. If the veto stands or unless Congress can come back with a good bill that can survive, the people will continue to remain in the dark concerning a lot of subjects they need to know more about.

The essential purpose of the law and its refinements was to prevent federal agencies, their political overseers and vested bureaucrats from hiding information from the public under the guise of "national security" or classifications with even less to recommend them. A 1973 Supreme Court decision had said in effect, that if a document is stamped "classified," a citizen can do little but accept the label. The document is exempt from the law.

That gets to the heart of the question. Proponents of a more open policy are not trying to pry top secret material from the Pentagon or the Department of State. If they were, they hardly would pursue such a public route to covert knowledge. They are trying, instead, to find examples of the bureaucratic waste and political excess that abound in both the military and civilian sectors of the great Washington scene. They are, in fact, trying to get at the very information that is conveniently stamped "classified" and hidden away from the public.

It is difficult to imagine that Mr. Ford really was cognizant of the bill or what was involved beyond bureaucratic discomfiture. The language in the message does not sound like his. There is talk of a "federal district judge" being able to "overturn a determination by the secretary of defense that disclosure of a document would endanger our national security." Of course, this is nonsense. The proposal would allow a judge to examine contested materials privately (*in camera*) to determine if they were properly *exempted* under any legal category. It ought to be assumed that our federal judges can be trusted not to betray the security of the country.

And if, indeed, any document is sheltered by the secretary of defense, it is hard to believe that a federal judge would not be reasonable. The act is not intended to put the secretary of defense in an untenable position regarding state secrets. It is intended to nail the petty (and sometimes not so petty) brass that may be trying to hide behind the authority of the secretary of defense.

But it is in the civil sector that the act could take on its greatest significance. The nation has just gone through a tumultuous era in which a President was overthrown because information was hidden and lied about. There was a concerted effort to pass off the Watergate break-in as an operation of the Central Intelligence Agency and thereby foist off investigation by the Federal Bureau of Investigation. If this was not a matter that would have been uncovered by the Freedom of Information Act, at least the direction of malfeasance was in the same spirit.

This is hardly the time for the executive branch to act as if it can be business as usual in secreting what ought to be public information.

The Freedom of Information Act is useful only in so far as the people can use it. As it stands, the individual citizen has had no luck in running up against the great brick wall of government reticence and concealment unless he is able to spend a fortune on lawyers.

President Ford has vetoed a good bill and has not given good reasons for his most disappointing action.

[From the Louisville (Ky.) Times, Oct. 24, 1974]

A FORD VETO THAT CONGRESS SHOULD UPSET

By the time they return to Washington after the election recess, most congressmen will surely have heard enough about the widespread distrust of government to convince them of the importance of overriding President Ford's veto of important amendments to the Freedom of Information Act.

The bill, which would strengthen the basic law passed in 1966, was passed by majorities of more than two thirds in both the House and the Senate. Members of both houses should stick to their guns when they act on the veto during the lame-duck session in November and December.

It was to combat the federal bureaucracy's inclination toward secrecy that Congress passed the original act. The purpose of the law was to help citizens keep

track of what their government was doing by giving them access to the documents, reports, records and files that are the life's blood of official Washington. Nine categories of material are exempt, including national security information, trade secrets and law enforcement investigatory files.

Because civil servants have an unfortunate instinct for delay and concealment, reinforced no doubt by similar tendencies in the Nixon White House, the law has turned out to be less effective than Congress intended. Requests for information sometimes go unanswered for months. Controversial material that ought to be available to the public can be hidden behind a national security classification.

The high cost of litigation has discouraged journalists and others from challenging an agency's decision to withhold a document.

The bill Mr. Ford vetoed contains a number of amendments designed to remedy these problems. One of the more controversial amendments, and one to which the President objected in his veto message, would permit federal judges to examine classified documents in secret to determine whether the classification is justified by the government's undisputed need to keep some material confidential. Under the law now, the courts cannot review a security classification.

Congress has recognized that there must be some procedure for balancing the public's right to know with the need to keep certain national defense and diplomatic matters secret. Mr. Ford said that federal judges lack the expertise to make such decisions. But as Sen. Sam Ervin has pointed out, if a federal judge can't recognize a national secret after hearing arguments for and against the release of a document, then he has no business being a judge.

Other important provisions would require government officials to reply to a request for information within 10 days, provide for disciplinary action against federal employees who arbitrarily withhold information, and require the government to pay the legal fees of citizens who successfully challenge bureaucratic secrecy in court.

It is indeed unfortunate that a government established to work for the people should have to be forced to let the people know what it is doing. But the obstacles encountered by citizens who ask for information, particularly information that might cast the agency involved in a disadvantageous light, convinced Congress of the need for a freedom of information law. The proposed amendments should make the law work better and would give the citizen new tools for extracting the material he needs from an often unwilling bureaucracy. Congress would be derelict if it did not override Mr. Ford's totally unjustified veto.

[From the Detroit (Mich.) Free Press, Oct. 26, 1974]

FORD LAPSES ON PROMISE TO OPEN UP GOVERNMENT

In light of the new era of openness President Ford has pledged to bring to the federal bureaucracy in Washington, his recent veto of changes in the Freedom of Information Act was unfortunate and misguided.

The act was passed in 1966, and was designed to make it easier, not harder, for the public to know what its government was doing. The law, however, contained numerous loopholes which have allowed insensitive federal agencies to continue the aura of secrecy which for far too long has permeated government thinking.

The new amendments to the act were designed to eliminate some of the key loopholes, and were passed overwhelmingly by both houses of Congress.

The amendments would put a time limit of 10 working days on a federal agency to decide whether it would honor a request to make information public, and 20 working days to decide appeals when access to information is denied. These are not unreasonable limits, and they would force agencies to come to grips with the public's right to know, instead of indulging in bureaucratic foot-dragging. Another amendment called for judicial review of classified national security information, if its release is sought, before it could be withheld.

Within the government, opposition to the amendments has come mainly from officials connected with foreign policy and national defense policy. It was on their objections that President Ford apparently acted in announcing his veto.

The president said he would submit proposals of his own to Congress. We hope he will do so, and soon, for there are good reasons otherwise why Congress should try to override this veto. While it is true that newsmen and newswomen are among those who have been pressing for passage of the amendments, all of the public has a stake in them.

Over the last decade, we have seen the fruits of government secrecy—in the conduct of the war in Vietnam, the decisions that led to and increased American involvement there, in the secret decisions to bomb Cambodia, and in the aftermath of the Watergate scandals. What all of these events have shown is that government governs worst when it does not trust the people, and is unwilling to tell the people what it is doing. That is why the public should support efforts to strengthen the Freedom of Information Act, and why President Ford is wrong to veto such efforts.

[From the Charlotte (N.C.) Observer, Oct. 28, 1974]

KEEP IT SECRET—THIS VETO DOES JUST THAT

Take away Linus's blanket and this usually mild-mannered inhabitant of the Peanuts comic strip becomes a tiger. Bureaucrats sometimes react similarly when someone threatens to take away their precious "top secret" classification stamps. In their efforts to keep information from the people, they now have received a boost from President Ford.

Aware when he assumed office that people were sick and tired of secrecy, of being lied to, and of finding that Washington was a Byzantium on the Potomac, President Ford promised to make candor and openness the touchstones of his Administration. But now he is buying the tried arguments that have been invoked so many times to defend secrecy.

In his veto of a bill to strengthen the Freedom of Information Act, he said it was a threat to American "military intelligence secrets and diplomatic relations." He also said it would give the courts power in an area they were unfamiliar with and complained that it would require too much bureaucratic work which would be required to go through those mountains of classified documents in complying with requests for information.

The intent of the amendments was to strengthen the bill, particularly by putting the burden not on the citizen seeking information but the bureaucrat withholding it. When the act passed in 1966, it was hailed as a breakthrough for citizens and newsmen anxious to know what their government was up to. But the act has not lived up to its billing, and part of the reason is that bureaucrats are able to frustrate requests for information through administrative hurdles and the courts.

The bill would have changed this by cutting the time limit for agency responses to requests for information, setting administrative penalties for arbitrary refusal and permitting recovery of legal fees by successful petitioners. The courts would have been allowed to review classified documents and classification procedures. And bureaucrats would have been criminally liable if the court found he "arbitrarily or capriciously" withheld desired information. In short; the act would have some teeth.

Attorney General William Saxbe also recently moved to put shrouds around government information. He in effect has reversed a 15-month old decision by his predecessor, Elliot Richardson, which gave authorized scholars access to investigatory files more than 15 years old. A scholar writing a book on the Alger Hiss case obtained FBI files that had numerous deletions, apparently made because of the scholar's request. Mr. Saxbe backed up the FBI on this, thereby violating the spirit if not the letter of Mr. Richardson's policy.

For weeks now, we have been hearing about the "lessons of Watergate," and we will undoubtedly hear more as moralists of every type look for Watergate lessons like shamans examining entrails for signs. But there is one lesson that must be obvious to all: Secrecy creates the environment for a Watergate, a Vietnam, a Bay of Pigs. The power of a bureaucrat or Administration official to cover his mistakes with a classification stamp is inherently anti-democratic. President Ford could not see that. Congress should override his veto of the Freedom of Information bill when it returns in November.

[From the Chicago Daily News, Oct. 24, 1974]

PUSHING SECRECY TOO FAR

One of Congress' first actions when it reconvenes should be to override President Ford's veto of legislation amending the Freedom of Information Act. An override shouldn't be difficult in this case: The House passed the bill 349 to 2, and the Senate approved it by voice vote without a roll-call.

The amendments were designed to make the Freedom of Information Act work. The reason it hasn't worked properly is that government departments and agencies have never allowed it to work. Since its passage in 1966, over bureaucratic opposition, the welders of the "classified" stamps have blocked access to public records at every turn. Congress worked long and hard to devise amendments that would overcome these barriers, only to encounter the Ford veto.

There are some government documents and records, obviously, that ought to be held close to the vest. When it comes to foreign policy and national security in particular, a certain amount of secrecy over a period of time is doubtless in the best interests of the nation. But the law allows for such exceptions. It also recognizes that trade secrets filed with the government deserve protection, and such things as individual personnel files and medical records ought not to be laid out for everyone to see.

Many kinds of records that should be public property, however, are being hidden without cause or reason, and it was this super-secrecy that the bill sought to overcome. It is disappointing to find President Ford, who has pledged a candid and open Administration, going along with the crowd that prefers to squirrel away the government records where no one can see them.

His principal objection, apparently, was to a provision that would allow courts to determine whether a "secret" or "top secret" classification was justified. The courts already have this power when the documents pertain to criminal trials, however, and the Supreme Court held last year that Congress could broaden that authority to cover other cases if it chose to do so.

The fact that Congress did so choose, and that President Ford chose to use a veto on a bill passed so overwhelmingly, creates a needless confrontation at a time when the legislative and executive branches should be striving to work in harmony. But since the President has posed the challenge, it is up to Congress to reply. Its response should be another overwhelming vote to pierce the veil of secrecy. The events of the past provide ample reason for doing so.

[From the Washington Post, Nov. 20, 1974]

A REGRETTABLE VETO

President Ford's assurances of openness in government were dealt a serious blow by his decision Thursday night to veto the amendments to the Freedom of Information Act. Those amendments, intended to make it easier for citizens and the press to learn what is going on within government, could have played an important role in bringing about that promised openness. Congress was willing; the amendments passed both houses by substantial margins. But Mr. Ford chose instead to accept the counsel of the bureaucracy that these changes in the law somehow menaced the operation of government.

The section that caused the President to bring down the weight of his veto power provides that documents that are stamped "secret" must be proved to contain valid secrets if a citizen or a reporter seeks to inspect them. An orderly mechanism was provided for seeing this purpose through. The legislation required that, when a dispute arose over such a document, a federal district court judge would inspect the document in private and determine whether it was in the public interest for the document to be released.

There were other provisions of the act, all of them of paramount importance in the effort to make the government more accountable to those it seeks to serve. The new legislation would have reduced the number of days within which an agency would be required to say whether it intended to provide the public with a previously withheld document. The FBI and other investigative agencies would no longer have been able to withhold material unless they could justify doing so on the grounds that a current investigation or a defendant's rights would be compromised. And, perhaps most important of all from the bureaucrat's vantage-point, if an official withheld a document and the court decided the document should not have been withheld, the official might be required by the Civil Service Commission to give an account of his actions.

All of these provisions were in the spirit of the kind of relationship between government and the public that Mr. Ford assured the Congress he wanted when he made his first appearance before a joint session only days after taking office. Now he has vetoed a piece of legislation that sought to overhaul a well-intentioned law that has languished ineffectively for nearly a decade. In so doing, the President has put it up to both houses of Congress to muster the votes to make the Freedom of Information Act a more effective servant of the public's right to know.

[From the Sacramento Bee, Oct. 30, 1974]

FREEDOM OF INFORMATION

President Gerald Ford missed an opportunity to strike a blow for openness in government by vetoing a bill which would open up the public files and documents pertinent to government actions.

Congress approved a number of amendments to the Freedom of Information Act which would have made it much easier for the citizens and representatives of the media to find out what the government is doing, both good and bad.

The Freedom of Information Act, although it embodies a sound idea, is too cumbersome to be effective. There are major gaps in the law through which agencies are able to justify unnecessary delays, to place unreasonable obstacles in the way of public access and to withhold information which should be released to the public.

For example, the Tennessee Valley Authority came up with an innovative wrinkle under the act. It charged a citizen \$6.75 an hour for every hour a clerk had to spend checking the files for data the citizen requested.

The TVA levied the \$6.75-an-hour charge against reporter James Branscome of the Mountain Eagle, a weekly in Letcher County, Ky., a paper which could ill afford to pay the tariff for information about the TVA operation.

In addition to doing away with any such practice as charging for government agency information, the new amendments would have required agencies to keep an index of the documents they generate so citizens, for the first time, would have some sensible way of keeping track of what the government agency is doing.

A government agency then would have 30 days to respond to a suit claiming that valid information had been denied a citizen or a journalist.

Government officials who withheld information the court believed they should have provided could be held to answer for their actions before the U.S. Civil Service Commission.

Confidential sources and investigative information involving current prosecutions would be protected, but judges, not executive officials, would decide the legitimacy of the security claim.

Congress expressed its clear intent that citizens should have relatively easy access to government information.

The President was wrong in vetoing the bill. It is hoped Congress will override the veto in the name of the people's freedom to know more about their government.

Mr. KENNEDY. Mr. President, I yield 5 minutes to the Senator from Maine.

Mr. MUSKIE. Mr. President, first, I express my appreciation to the distinguished Senator from Massachusetts for taking the leadership with respect to this issue and this piece of legislation. I wish to express the satisfaction I have had in working with him in advancing this measure and now defending it and urging the override of the President's veto.

Mr. President, the vote before us this afternoon is, in my opinion, one of the most important we will consider during this postelection session.

Throughout the campaign period this fall flowed an increasingly visible undercurrent of voter frustration with government and politics as usual. Among many signals transmitted by the voting public on November 5 was that government has become too big, too unresponsive, and too closed to the people it is supposed to serve.

Candidates across the Nation were confronted with demands for openness and candor to a degree unparalleled in recent years. To many observers, these demands reflect the voters' cynical belief that most of the public's business is conducted far from the public's eye.

If this reading is correct—and I believe it is—then one of the best ways to deal with such cynicism is to open up the business of government to greater public scrutiny. The legislation before us now—the

amendments to the Freedom of Information Act of 1966—is intended to do just that.

During joint hearings on the Freedom of Information Act held last year by Senators Ervin and Kennedy and myself, it became evident that loopholes in the original 1966 act were interfering substantially with the public's right to know.

The cost of challenging Government secrecy claims in court remained too great for most citizens to bear.

Red tape and delay generated in response to a request for information tested both the patience and endurance of the citizen making the request.

And, as demonstrated in the case of Environmental Protection Agency against Patsy Mink, there was no mechanism for challenging the propriety of classifications under the national defense and foreign policy exemptions of the 1966 act. Thus, the mere rubberstamping of a document as "secret" could forever immunize it from disclosure.

The legislation before us today is designed to close up the loopholes which have led to such abuse of both the spirit and the letter of the law. It will enable courts to award costs and attorneys' fees to plaintiffs who successfully contest agency withholding of information. It will require agencies to respond promptly to requests for access to information, and thereby help bar the stalling tactics which too many agencies have used to frustrate requests for information. And most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classification by an impartial outside party.

These amendments are not just a hasty, patchwork effort. On the contrary, they represent many months of careful study by three subcommittees in the Senate, and the Subcommittee on Foreign Operations and Government Information in the House. And they were sent to the President with the overwhelming support of both Houses of Congress.

Unfortunately, the same President who began his administration with a promise of openness, sided with the secret-makers on the first big test of that promise.

The President claims to have several problems with the legislation we sent to him. But his major problem goes to the heart of what these amendments are all about.

When the Freedom of Information Act amendments were first considered by the Senate, I offered a change which would authorize the courts to conduct in camera a review of documents classified by the Government to determine if the public interest would be better served by keeping the information in question secret or making it available to the public.

My amendment was a response to the increased reliance by former administrations to use national security to shield errors in judgment or controversial decisions.

It was a response as well to the mounting evidence, more recently confirmed in tapes of Presidential conversations, that national security reasons were deliberately used to block investigations of White House involvement in Watergate.

That amendment was incorporated in the legislation sent to the President for his signature. And it is primarily that amendment which caused the President to veto the legislation.

The President does not seem to object to the concept of judicial review of classified documents. The changes he proposed in returning the bill to Congress adopted the same mechanism of *in camera* review.

What the President does object to is the standard to be used in reviewing such documents. And on this point his proposals would deal another setback to the public's right to know.

The legislation passed by Congress would call for a determination by the judge reviewing the documents in question that the documents were properly classified, in accordance with rules and guidelines for classification set out by the executive branch itself.

The judge would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.

The President's counterproposal on this point would make it even more difficult to extract information of questionable classification from the executive branch. Under his proposal, the court could only enjoin an agency from withholding agency records after finding the agency had no reasonable basis whatsoever for classifying them in the first place. Thus, in spite of the record of abuse, we are being asked once again to assume that the Government is right, on the basis of a very vague standard indeed, and to accept that the stamp of secrecy is challengeable only in the most blatant cases of misuse.

The conflict on this particular point boils down to one basic concern—trust in the judicial system to handle highly sensitive material. The administration seems to feel that only the agency dealing with specific information is capable of passing judgment on the legitimacy of classification, except in cases where that judgment has been found to be grossly inappropriate.

The bill passed by Congress recognizes that special weight should be given agency judgments where highly sensitive material is concerned.

But that bill also expresses confidence in the Federal judiciary to decide whether the greater public interest rests with public disclosure or continued protection.

I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy.

As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we construct the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

A final point that needs to be made about the President's opposition to this legislation concerns his claim that the bill is unconstitutional.

On Tuesday I placed in the Record an opinion I solicited from Prof. Philip Kurland on this question. I would like to quote from Professor Kurland's letter again, because he has so succinctly and finally laid the President's claim to rest.

I would repeat that the issue between Congress and the President here is not whether there is or should be a privilege for military and state secrets. Both are in agreement that there should be such a privilege. Nor is the issue between the President and the Congress the question whether the federal courts should have the power of in camera inspection in order to determine whether the materials that are classified should retain their privilege. Both are in agreement that in camera inspection is appropriate. The controversy is solely over the question of the standard to be applied by the courts in making determinations of availability. Congress says that the materials in question must in fact have been properly classified in accordance with the executive's own standards for classification. The President wants the secrecy maintained if the court finds a "reasonable," if erroneous, basis for the classification. . . . I do not see how it is possible to say that the Presidential position is constitutional, but the congressional position unconstitutional.

The President's charge that this bill is unconstitutional is a serious one to make. I hope that my colleagues will not be swayed by it, for I believe it to be without foundation.

In closing, I want to underscore my feeling that this legislation represents a unique opportunity to bring the people of this country closer to the facts and figures on which governmental decisions are based.

We must not delay any further the people's opportunity to know more about their Government. For too long that opportunity has been eroded by not enough candor and too much secrecy.

The people are saying that they want to know more. I hope that by our action today, we will give them that chance.

The PRESIDING OFFICER (Mr. Biden). Who yields time?

Mr. HART. If I may have 2 minutes, Mr. President.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. HART. Mr. President, I rise under a very limited request to suggest that we be aware that the position of the administration with respect to the treatment of disclosure of investigatory files has shifted. Initially, and through a very long conference, they insisted that the safeguards were inadequate to protect against the identification of an informant. Language was incorporated in the conference report to insure against that possibility. Now the objection with respect to the investigative files is that there is an administrative burden too great to be imposed.

Mr. President, I suggest that the burden is substantially less than we would be led to believe by the President's message, but I conclude on the point, Mr. President, that the price of some administrative inconvenience is not too much to pay to increase public confidence in and the accountability of government. That is precisely the issue that confronts us.

Mr. President, in September, when President Ford made his forthright assurances of openness in Government, I welcomed them as another sign that a fresh wind was blowing through the White House. I did not expect that 2 months later, I would be asking my colleagues to override his veto of the Freedom of Information Act amendments.

The veto was even more of a surprise because of the major efforts to accommodate the President's views which were made by the conferees from the House and Senate in the conference.

One of the reasons given by the President for his veto is that the investigatory files amendment which I offered would hamper criminal

law enforcement agencies in their efforts to protect confidential files. We made major changes in the conference to accommodate this concern.

My amendment to the Freedom of Information Act permits the disclosure of investigatory files only after elaborate safeguards are met—that is, that disclosure will not—

(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 of physical safety of law enforcement personnel.

After lengthy negotiations during the conference on the bill, the Justice Department apparently agreed that these safeguards are adequate. The major change in conference was the provision which permits law enforcement agencies to withhold "confidential information furnished only by a confidential source". In other words, the agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informer's identity; all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt. In fact, this protection was introduced by the conferees in response to the specific request of the President in a letter to Senator Kennedy during the conference. All of the conferees endorsed the Hart amendment as modified.

Now the administration has shifted its ground and argues that compliance with the amendment will be too burdensome. Specifically the President's message singles out investigatory files for exemption from the amendment's command that "any reasonably segregable portion of a record shall be provided—after deletion of the portions which are exempt." The Presidential substitute allows the agency to classify a file as a unit without close analysis, alleging that the time limits and staff resources are inadequate for such intensive analysis. This would allow an agency to withhold all the records in a file if any portion of it runs afoul of the safeguards above. It is precisely this opportunity to exempt whole files which gives an agency incentive to commingle various information into one enormous investigatory file and then claim it is too difficult to sift through and effectively classify all of that information.

This "contamination technique" has been widely used by agencies to thwart access to publicly valuable information in their files. If investigatory files are unique in terms of length and complexity, an agency's logistical difficulty in conducting a thorough analysis would strongly influence a court to extend the time for agency analysis, as is authorized by the bill. Therefore, a procedure is already available to provide for accurate and thorough analysis.

It is important that this country have a strong freedom of information law that will make it possible for the public to learn of such activities—and to learn of them as quickly as possible.

Finally, we should remember that these amendments were necessary because the agencies have not made a good faith effort to comply

with the act. The President is asking that the agencies be given more discretion, not less, to undermine the act.

The American Civil Liberties Union which has studied the FBI's response to requests for historical information from scholars over the last 2 years. The ACLU concludes that the FBI's historical records policy has been a dismal failure. In case after case, significant historical research has been curtailed by administrative restrictions which often seem arbitrary and unnecessary and heavy costs of time and money have been imposed on the persons requesting access. One example will suffice:

Prof. Sander Gilman, chairman of the Department of German Literature at Cornell University, is preparing a biography of the German playwright and poet, Bertolt Brecht. On December 14, 1973, the FBI responded to Gilman's request for access to Brecht materials by informing him that it had "approximately 1,000 pages" in its files on Brecht, and stating initially that if Gilman would "submit letters from Brecht's heirs granting their approval" to his research, the FBI would provide him with the materials at a "processing" cost of \$160.

On January 16, 1974, Professor Gilman sent the Bureau a deposit and a letter to him from Brecht's only son, dated a week earlier, stating that the son had "no objection to your use of FBI files on my father." Two months later the FBI provided Gilman with 30 heavily deleted pages from its Brecht files as the "final disposition" of his request. It refused to produce the bulk of the files on the ground that Gilman had not provided the Bureau with written authorization from the heirs of each of the hundreds of persons—many of them public figures, such as Thomas Mann—whose names appear in the files. Included within the 30 pages—3 percent of the entire file, for which Gilman paid \$40, were 8-10 magazine and newspaper clippings on Brecht's well-publicized travels in the United States.

The President's objection to the Hart amendment, as was the objection to the time limits is one of degree. In light of the fact that "[t]he FOIA was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest," *Wellford v. Hardin*, 444 F. 2d 21, 24 (1971) disclosure of severable portions of investigatory documents does not appear to create an unreasonable burden.

In conclusion, the agencies will not be overburdened for the following reasons:

First. The agencies will be able to charge search and copying fees—up to \$5 an hour, 10 cents per page—which will, in most cases be more than enough to discourage frivolous requests;

Second. The Hart amendment has six pigeonholes into which the agencies can place information that they do not want to release. It is reasonable to expect that they will find plenty of scope in these excuses for nondisclosure to keep them from being overburdened by public requests for access to their files;

Third. The fact that the agencies can withhold information furnished by a confidential source relieves it of the burden of showing that disclosure would actually reveal the identity of a confidential source;

Fourth. The clauses providing for "segregation of records" and "search fees" are ambiguous and doubtlessly will be subject to litigation. If the requests prove unnecessarily burdensome, I suspect that the

agencies will find a sympathetic ear in the courts when the time comes for interpreting those sections.

If the agencies can show after 6 months or so that the cost threshold is inadequate and that the benefits from disclosure are outweighed by their cost, I would support supplemental appropriations for the additional staff and if necessary an amendment to the act to permit the agency more discretion in assessing fees for extraordinary requests.

Finally, we must keep our sense of proportion in considering the President's objections to the Freedom of Information Act amendments. No one suggests that our citizens' right to know about their Government can be protected without some cost. It is my conviction that, in the aftermath of Watergate and the recent disclosures about the FBI's counter-intelligence activities, the price of some administrative inconvenience is not too much to pay to increase public confidence in—and the accountability of—Government.

This conviction has been bolstered by recent disclosures that the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. As the Washington Post noted,

The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS.

The tax laws were not intended to be used for political harassment. The interesting point about these disclosures is that they were made possible by the utilization of the Freedom of Information Act.

Second, the Justice Department recently released a report on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act.

Mr. President, I urge that the Senate override the veto.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President. I yield myself 4 minutes.

Mr. President, I supported the freedom of information bill as it was reported out of the Senate Judiciary Committee. It was—and is—my belief that amendments to the Freedom of Information Act are necessary to remove the obstacles to full and faithful compliance with the mandate of the act to grant citizens the fullest access to records of Federal agencies that the right of privacy and effective Government will permit.

The bill was amended on the floor, however, in a way that could open confidential files to any person who requested them at the expense of our Nation's interest in foreign relations and defense and every individual's interest in law enforcement, the right of privacy and of personal security. Because of these amendments, the President was compelled to veto this bill.

I. DEFENSE AND FOREIGN RELATIONS INFORMATION

The first objectionable feature of the bill concerns the review of classified documents. It is important to stress just what is and what is not the issue here. The issue is not whether a judge should be authorized to review classified documents in camera. As reported by

a unanimous Judiciary Committee, the bill contained a provision which enabled the courts to inspect classified documents and review the justification for their classification. And the President, in his veto message, stated that he was prepared to accept such a provision.

No, the issue is not whether a court should be able to question an agency's decision to affix a classification stamp to a document. Instead, the issue is whether this judicial scrutiny should be unchecked. It is one thing to empower a court to review a document to determine whether the executive's decision to classify was arbitrary or clearly unreasonable. It is patently different to authorize a court to determine in the first instance whether a document should be classified or released to the public. The courts have the facilities and expertise to review executive determinations but they do not have the facilities or expertise to make executive determinations. That is the sole province of the executive branch.

The vetoed bill does not check judicial authority. There are no standards, such as guarding against the arbitrary and capricious, or requiring a reasonable basis, to guide the judge's decision. The judge can disclose a document even where he finds the classification to be reasonable if he also finds that the plaintiff's case for disclosure is equally reasonable. This is not the general rule in cases of court review of any regulatory body or executive agency.

It is clear that the President has a "constitutionally based" power to withhold information the disclosure of which could impair the President's conduct of our foreign relations or maintenance of our national defense. As Justice Stewart observed in *New York Times v. United States*, 403 U.S. 713, 729-30 (1971):

It is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and defense.

In *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, (1948), the Supreme Court stated that the:

President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.

Acting in these capacities, the Supreme Court added:

The President has available intelligence services whose reports are not and ought not to be published to the world.

Just this past summer, in a unanimous decision in the *United States v. Nixon* case, 94 S.Ct. 3090, 3108 (1974), the Supreme Court expressly recognized that the President has a "constitutionally based" power to withhold information the disclosure of which could impair the effective discharge of a President's responsibility. As the Court stated:

As to these areas of Art. II duties (military or diplomatic secrets) the courts have traditionally shown the utmost defence to presidential responsibilities . . . Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

Another recent court decision, *United States v. Marchetti*, 466 F.2d 1309 (4 Cir. 1972) is particularly noteworthy. The Court summarized the law in this area as follows:

Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the *President's constitutional responsibilities for the security of the Nation* as the Chief Executive and as Commander in Chief of our Armed forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure *may reasonably be thought to be inconsistent with the national interest*. . . (Emphasis supplied.) 466 F.2d at 1315.

It is clear then that the Constitution vests in the Chief Executive the authority to maintain our national defense and to conduct our foreign relations. It is also clear that in order to discharge these responsibilities effectively, the President must take measures to insure that information the disclosure of which would jeopardize the maintenance of our national or the conduct of our foreign relations is not disclosed to all the world.

From these two points, it should also be clear that an attempt to empower a judge to determine, on his own, whether this same type of information should be disclosed to the public infringes on the constitutional power of the President to maintain our national defense and conduct our foreign relations. To authorize a court to make its own decision whether a document should be classified is to empower a court to substitute its decision for that of the agency and, in certain cases, the President.

Attempts to grant courts unfettered powers of judicial scrutiny of classified documents have been criticized in several recent law reviews. The 1974 Duke Law Journal, in an article on "Developments Under the Freedom of Information Act—1973," states that the amendment of the Senator from Maine [Senator Muskie] unduly infringes upon the privilege of the Executive to protect national secrets:

In this regard, Senator Muskie recently proposed an amendment to the FOIA which would broaden the scope of de novo judicial review. Pursuant to the proposed amendment a court would be empowered to question the Executive's claim of secrecy by examining the classified records *in camera* in order to determine whether "disclosure would be harmful to the national defense or foreign policy of the United States." This proposal, however, extends judicial authority too far into the political decision-making process, a field not appropriately within the province of the courts. *A more satisfactory legislative solution would be a judicial procedure which would not unduly restrict the Executive's prerogative to determine what should remain secret in the national interest but which would simultaneously provide a limited judicial check on arbitrary and capricious executive determinations.* An acceptable compromise of these competing interests might be a procedure whereby the agency asserting the privilege would separately classify each document and portions thereof and prepare a detailed itemization and index of this classification scheme for the court. *Thus, the court could adequately ascertain whether the claim of privilege was based upon a reasoned determination rather than an arbitrary classification without subjecting the material to in camera scrutiny. Such a procedure would prevent indiscriminate and arbitrary classification yet not unduly infringe upon the privilege of the Executive to protect national secrets.* (Emphasis supplied.) 74 Duke L.J. 258-259.

The Columbia Law Review's June 1974 issue, in a comprehensive study entitled "The Freedom of Information Act: A Seven Year Assessment," says:

To advocate some form of judicial scrutiny is not to say that power should be unchecked. That a court should assume the burden of declassifying documents seems altogether improper. Judgments as to the independent classification of genuinely secret information should be left to the executive. Little can be said, however, for exempting from disclosure non-classified information solely because of its physical nexus with a classified document. To assign to the judiciary the function of

winning the state secret from the spuriously classified document does violence neither to the language of the Act as an integrated statute, nor to the declaration of policy implicit in the first exemption. Even conceding that excising interspersed but non-secret from secret matter necessarily implies the exercise of some substantive judgment, this does not amount to a de facto power of declassification. *Only materials that would not have been independently classified as secret should be deleted and disclosed on the court's initiative. In close cases, the court, cognizant of the "delicate character of the responsibility of the President in the conduct of foreign affairs," should defer to the executive determination of secrecy.* (Emphasis supplied.) 74 Col. L. Rev. 935.

A "Developments in the Law—Note on National Security" by the Harvard Law Review reaches the same conclusion. In discussing the role of the courts in reviewing classification decisions, it states that—

There are limits to the scope of review that the courts are competent to exercise.

And concludes that—

A court would have difficulty determining when the public interest in disclosure was sufficient to require the Government to divulge information notwithstanding a substantial national security interest in secrecy. 85 Harvard Law Review 1130, 1225-26 (1972).

Mr. President, every practitioner in administrative law knows that judicial review of agency decisions is not unlimited. The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. This enrolled bill would establish a different type of review, however. It would empower a court to substitute its own decision for that of the agency. This is not review of agency decisions but the making of the decision itself.

I simply cannot understand why a different standard should be applied to agency decisions to classify certain documents.

By conferring on the courts unchecked powers to declassify documents, the enrolled bill is not only unwise but apparently also unconstitutional.

II. LAW ENFORCEMENT INVESTIGATORY INFORMATION

The second issue relates to the criminal and civil files of law enforcement agencies. The confidentiality of countless law enforcement files containing information of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law enforcement but the individual's right to privacy assurance of personal security, and to be secure in the knowledge that information he furnishes to a law enforcement agency will not be disclosed to anyone who requests it.

The enrolled bill requires the FBI and other law enforcement agencies to respond to any person's request for investigative information by sifting through pages and pages of files within strict limits. If the agency believes that information must be withheld from the public, it must prove to a court line-by-line that disclosure would disclose the identity of a source or confidential information furnished by him, would impair the investigation or would constitute an invasion of personal privacy.

Mr. President, it is extremely difficult if not impossible to prove that information, if disclosed, would invade a person's privacy or would impair the investigation. The magnitude of such a task and the standards of harm that are defined in the amendment create serious doubt as to whether such a provision is workable aside from its

questionable wisdom. Where the rights of privacy and personal security are at stake, measures should not be adopted that even tend indirectly to undermine these fundamental rights.

Mr. President, the issue here does not involve a denial or rejection of "freedom of information." This concept has the active support of most, if not all of us.

The real issue relates to the provisions for determining how the right to know can be exercised without impairing the effective operation of our Government and also infringing the rights of privacy and security.

Mr. President, as I stated at the outset, I believe that amendments to the Freedom of Information Act are necessary. Freedom of information is basic to the democratic process. It is elementary that the right of the citizen to be informed about the actions of his Government must remain viable if a government of the people is to exist in practice as well as theory.

Yet, it is also elementary that the welfare of our Nation and that of its citizens may require that same information in the possession of the Government be held in the strictest confidence. The right to know must be balanced against the right of the individual to privacy. Likewise the right to know must be balanced against the interest of our Nation to conduct successful foreign relations and to maintain our military secrets in confidence.

I cannot support the enrolled bill because it emphasizes the right to know to the detriment of the right of privacy and security and the interests of us all in a responsive government. These interests must be accommodated. One cannot be elevated above the others because all of these interests are so important.

The enrolled bill does not balance and protect all of these interests. Therefore, I urge my colleagues to vote to sustain the veto of the President. And, in turn, I urge my colleagues to reenact the bill with the amendments proposed by the President so that we will have legislation that balance and protects all of the interests while insuring the fullest responsible disclosure of Government records. Such a bill is S. 4172, introduced by the Senator from Pennsylvania (Mr. Scott) and now pending.

Its provisions will improve the present statute on making Government held information available, without violating the Constitution, and yet in a fashion that will not result in interrupting orderly and effective conduct of the Nation's business. It will protect the privacy and personal security of those who cooperate with the State and Justice Departments by furnishing necessary, vitally needed information. It will enable law enforcement to proceed without impairment in that it will instill in informants the necessary confidence that they will not be endangered by disclosure. S. 4172 should be enacted.

The veto should be sustained.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. I yield 4 minutes to the Senator from Ohio.

Mr. TAFT. Mr. President, I appreciate the Senator's yielding, and I appreciate also the, I think, good sense and reasonableness of his approach in his remarks.

Mr. President, I intend to vote to sustain the veto of the President. In casting this vote, I want to make it clear that I am not less committed to the right of the public to know the actions of their Govern-

ment than any other advocate of democratic government. In this regard, I voted for final passage of the bill during Senate floor consideration although I urged my colleagues to approve it without amendment in accordance with the Judiciary Committee's recommendations.

Freedom of information is the hallmark of a democratic society. It is elementary that the people cannot govern themselves—that this cannot be a Government of the people—if the people cannot know the actions of those in whom they trust to discharge the functions of Government.

But, Mr. President, the right to know, like any other right, cannot be exercised at the expense of other rights that are also fundamental. Some information in the possession of the Government must be held in the strictest confidence. For example, the individual's right of privacy requires that certain information collected by the Government in either census reports or law enforcement investigations must be protected from disclosure. Information bearing on our Nation's endeavors to pursue peace through negotiations with foreign nations must also be held in confidence if the discussions are to be frank and complete. And, of course, our military secrets must be safeguarded.

In this respect, the President objects to, and I voted against, the floor amendment offered by Senator Muskie on May 30, 1974, which granted a court the authority to disclose a classified document even where there is a reasonable basis for the classification. Most courts are not knowledgeable in sensitive foreign policy and national defense considerations that must be weighed in determining whether material deserves, or indeed, requires classification.

I am sure those of us in the Senate who take a part in the naming and selection of those who are to serve in judicial capacities in the courts around the country do not select those men for their knowledge of military matters and national security, or even foreign affairs. We choose them for their legal expertise to judge, in accordance with standards established by law, as to just what the application of the law ought to be to situations; but not to give judgment themselves, to make the decisions, in areas properly reserved by the Constitution to the other branches of the Government.

Notwithstanding this fact, the bill, as passed, calls for a *de novo* weighing of all these factors by the court which creates confusion and vagueness and, in my view, will not serve the interests of clear legislation or assist in the process of making available sensitive classified material.

I preferred the Judiciary Committee's approach to this problem which compelled a court to determine if there is a reasonable basis for the agency classification. If there is a reasonable basis, then the document would not be disclosed. Certainly the standard "reasonable basis" is not vague, it having been applied in our judicial system for centuries. This standard and procedure correctly accord foreign policy and national defense considerations special recognition and provides the executive branch with sufficient flexibility in dealing with these sensitive matters.

Mr. President, we must recognize the competing interests in disclosure and confidentiality. While a judge should be able to review classified documents to determine whether there is a reasonable basis for the classification, he should not be empowered to second-guess

foreign policy and national defense experts. While a law enforcement agency should not be authorized to hide all types of information, it should be given the tools to protect information the disclosure of which could likely invade a person's privacy, or impair the investigation.

I believe that the competing interests in disclosure and confidentiality are accommodated only if the enrolled bill is amended with the changes proposed by the President.

The Senate and the House of Representatives should have no trouble in doing that. It is, therefore, my hope that the veto of the enrolled bill is sustained so that we can reenact this legislation with necessary amendments.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Massachusetts controls 13 minutes.

Mr. KENNEDY. I yield myself 3 minutes.

I ask unanimous consent that Dorothy Parker of Senator Fong's staff be accorded the privilege of the floor during the consideration of this matter.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, the Senator from Michigan has correctly stated the situation which occurred with respect to his amendment to this legislation which was adopted on the floor. His amendment initially protected against the disclosure of the identity of an informer. We decided in conference, however, as a result of a specific request from the President, to change that to protect confidential sources, which broadened it and provided a wider degree of protection.

Then we also provided that there be no requirement to reveal not only the identity of a confidential source, but also any information obtained from him in a criminal investigation. The only source information that would be available would be that compiled in civil investigations. The arguments made about this particular issue today sounded like arguments directed more toward the initial amendment of the distinguished Senator from Michigan rather than actually to the resulting language that emerged from the conference.

I might add parenthetically, Mr. President, that this was actually language suggested by the distinguished Senator from Nebraska in behalf of the administration. So it really could not be all that bad.

On the second question, Mr. President, which the Senator from Ohio mentioned, and which has been discussed here with respect to the examination in camera of certain information, the Senator from Maine, I think, has provided a rather complete response in his statement which makes the record complete. But it is important to note that today judges are examining extremely sensitive information and carrying out that judicial review responsibility very well. We can think of recent cases—the *Pentagon Papers* case, the *Ellsberg* case, the *Watergate* case, the *Keith* case where the key issue involved national security wiretaps, the *Knopf* case involving CIA material in a book written by a former CIA official—where courts have met these responsibilities, and have been extremely sensitive to the whole question of national defense and national security.

I mention at this point here what the Supreme Court said in the *Keith* case. The Court said:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

This is important:

If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Mr. President, on both of these matters I want the record to be extremely clear that, in our Administrative Practice Subcommittee, the full Judiciary Committee, and on the Senate floor, they were considered in great detail. They were the principal matters discussed in the course of the conference.

We have been extremely sensitive to these objections raised by the administration and, it seems to me, the bill we are considering is a reasonable accommodation of the views of the administration. However, it also carries forward the central thrust of the legislation passed by the Senate. I would hope those arguments which have been made in opposition to those provisions would be rejected.

If I may, I would like to yield 3 minutes to the Senator from Tennessee and then to the Senator from North Carolina.

Mr. BAKER. Mr. President, I thank the distinguished senior Senator from Massachusetts for yielding.

Mr. President, events of the past 3 years have dealt harshly with the concept of "secrecy" in Government. We have witnessed two national tragedies—Watergate and the Vietnam war—which might not have occurred, and surely would have suffered an earlier demise had not the President and his advisers been able to mask their actions in secrecy.

This experience, coupled with my belief in the axiom that "sunshine is the most effective disinfectant," prompted my support for H.R. 12471, the Freedom of Information Act Amendments of 1974. I regret that President Ford returned this legislation to the Congress without his approval, and I shall vote to override his veto. While I believe that the President's action was taken in good faith, I particularly disagree with his proposal that judicial review of classified documents should uphold the classification if there is a reasonable basis to support it.

During my tenure as a member of the Senate Select Committee on Presidential Campaign Activities, I reviewed literally hundreds of Watergate-related documents that had been classified "secret" or "top secret" or the like. It is my opinion that at least 95 percent of these documents should not have been classified in the first place and that the Nation's security and foreign policy would not be damaged in any way by public disclosure of these documents. Yet, despite several formal requests by the Senate Watergate Committee, the Central Intelligence Agency, in particular, has declassified these documents and evinces no intent of so doing.

In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating; and I believe that this

trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recommended by the President. De novo judicial determination based on in camera inspection of classified documents—as provided by the Freedom of Information Act amendments passed by the Congress—insures confidentiality for genuine military, intelligence, and foreign policy information while allowing citizens, scholars, and perhaps even Congress access to information which should be in the public domain.

In balancing the minimal risks that a Federal judge might disclose legitimate national security information against the potential for mischief and criminal activity under the cloak of secrecy, I must conclude that a fully informed citizenry provides the most secure protection for democracy.

Consequently, I urge that the veto of H.R. 12471 be overridden.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield 3 minutes to the Senator from North Carolina.

Mr. ERVIN. Mr. President, the executive agencies of the U.S. Government remind me of a young lawyer in Charlotte, N.C. Years ago he brought suit for damages against Western Union Telegraph Co. Mr. C. W. Tillotson, a very eminent lawyer, represented the telegraph company, and he filed a motion to require the plaintiff to make his complaint more specific.

The judge who had to pass on the motion happened to see this young lawyer and suggested to him that he go ahead and make his complaint more specific in the respects that had been asked for. The young lawyer told the judge he would not do it.

He said:

If Mr. Tillotson is going to want me to tell him what this lawsuit is all about he is just a damn fool.

Every time the Congress of the American people or the American press seek information from the executive branch of Government they have an equivalent reply in most cases from the executive branch of the Government.

For some reason that begs understanding, the executive branch of the Government thinks that the American people ought not to know what the Government is doing.

I have been a believer in the right of the people to know what the truth is about the activities of their Government. For that reason I supported the original Freedom of Information Act of 1966. We had a good bill when we started out. But, as a result of the limitations and exemptions that were inserted in the bill and, as a result of the reluctance of the executive branch of the Government to observe that part of the bill which survived, the existing law is totally ineffective for the purpose that was sought to be accomplished.

Now, the distinguished Senator from Massachusetts just stated what I think is the truth about this matter. Every one of the objections which were set forth by the President in his veto message was considered at length by the Senate committee during the original hearings on the bill. They were considered minutely and carefully by the conference committee. Every one of those legislators who, after all, are the people who are supposed to enact our laws, came up with, a majority of them came up with, the conclusions that

these objections did not merit the defeat of the bill or the alteration of the bill.

I ask unanimous consent that a copy of the letter written on October 31, 1974, by the distinguished Senator from Maryland (Mr. Mathias), the distinguished Senator from New Jersey (Mr. Case), the distinguished Senator from New York (Mr. Javits), the distinguished Senator from Tennessee (Mr. Baker), the distinguished Senator from Massachusetts (Mr. Kennedy), the distinguished Senator from Maine (Mr. Muskie), the distinguished Senator from Michigan (Mr. Hart), and myself be inserted in the Record at this point.

There being no objection, the letter was ordered to be printed in the Record, as follows:

WASHINGTON, D.C., *October 31, 1974.*

DEAR COLLEAGUE: We are enlisting your support to override President Ford's veto of the Freedom of Information Act Amendments (H.R. 12471) when the Congress returns from the current recess. We believe that this veto is unjustified and urge that the legislation be enacted as previously approved by Congress.

The 1966 Freedom of Information Act has worked neither efficiently nor effectively. There are loopholes in the statute. Agencies have engaged in delaying and obstructionist tactics in responding to requests for government information. The Freedom of Information Act Amendments will facilitate public access to information, while preserving confidentiality where appropriate.

The President has proposed numerous specific changes to this legislation. Similar proposals were made by government agencies time and again over the past year and a half. These proposals were considered, they were debated, and in the end they were rejected during the legislative process.

The President has suggested that the Freedom of Information Act Amendments pose a threat to our national security because they do not sufficiently restrict federal court review of executive classification decisions. As an alternative, the President has proposed that courts be allowed to require disclosure of classified documents only if the agency had no reasonable basis whatsoever to classify them. We do not believe a secrecy stamp should be that determinative.

We believe that the approach taken in the Amendments is the correct one. Federal courts should have the authority to review agency classification of documents and make their findings on the weight of the evidence.

The Executive writes the classification rules, since documents are classified under an Executive order, not a statute. A federal judge should be empowered to review classification decisions as an objective umpire, and he should determine whether Executive branch officials have complied with their own rules. This is consistent with administrative due process and the tradition of checks and balances. We are confident that the legislation poses no threat to this nation's security interests.

The President has also decried the possibility of an administrative burden placed on law enforcement and other agencies by the new amendments, although we are pleased to note that he did *not* object to the opening of some new investigatory materials to the public. We believe, however, that the additional delays, charges, and exclusions requested by the President do more than alleviate administrative burden—they would effectively bar access to some records by the press, the nonaffluent, and the scholar.

Freedom of Information is too precious a right to be sacrificed to false economy. Like due process, it may carry some cost; but that is a cost to be borne by all Americans who would keep our government open and accountable and responsible.

Government agencies universally opposed original enactment of the Freedom of Information Act in 1966, and they likewise opposed enactment of amendments to the Act this year. As a practical matter, with our heavy workload for the remainder of this session and continuing agency hostility to any strengthening of the Information Act, failure to override the President's veto next month will result in postponement of any improvements to the Act for a substantial period of time.

We have too recently seen the insidious effects of government secrecy run rampant. Enactment of H.R. 12471 can do much to open the public's business to public scrutiny, while providing appropriate safeguards for materials that should

remain secret. We therefore urge you to join us when Congress returns in voting to enact the Freedom of Information Act Amendments over the President's veto.

Sincerely,
 CHARLES MCC. MATHIAS, JR., CLIFFORD P. CASE, JACOB K. JAVITS,
 HOWARD H. BAKER, JR., EDWARD M. KENNEDY, EDMUND S. MUSKIE,
 PHILIP A. HART, SAM J. ERVIN, JR.

Mr. ERVIN. Mr. President, I ask unanimous consent that an editorial from the Washington Post dated November 20, 1974; and the speech I made on the bill be printed in the Record. I thank the Senator from Massachusetts.

There being no objection, the editorial and speech were ordered to be printed in the Record, as follows:

FEDERAL FILES: FREEDOM OF INFORMATION

Just before the election recess, President Ford used his power of veto and sent back to the Congress a piece of very important legislation, the 1974 amendments to the Freedom of Information Act. Those amendments were important because they strengthened a law that was fine in principle and purpose but poor in practical terms. The Freedom of Information Act had been enacted in 1966 in the hope of making it possible for the press and the public to obtain documents from within government to which they are entitled. Because of cumbersome provisions of the act, however, obtaining such information proved very difficult.

This year, after long hearings, much haggling between House and Senate and two resounding votes, a series of amendments was ready for presidential signature. They shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to keep information secret that should be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, sadly, Mr. Ford yielded to the arguments of the bureaucracy and vetoed the legislation.

Since then, a number of journalists' and citizens' groups have criticized that action by the President and urged Congress to override the veto. Today in the House and tomorrow in the Senate, those votes are scheduled to take place. We would urge a strong vote in support of the legislation, particularly in light of two recent disclosures made possible by the Freedom of Information Act.

Recently, a Ralph Nader-supported group on tax reform turned up the fact the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS. As we have had occasion to say in the past, the tax laws were not intended to be used for political harassment. The interesting point about these latest disclosures is that they were made possible by the utilization of the Freedom of Information Act.

In the same vein, the Justice Department released a report earlier this week on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act. Attorney General William Saxbe felt compelled, on the basis of what the Justice Department had been forced to release about the program, to order a study of what the FBI had done. Mr. Saxbe found aspects of the program abhorrent. But FBI director Clarence M. Kelley actually defended the practices of his predecessor, J. Edgar Hoover. This is a good example of how important it is that this country have a strong Freedom of Information law that will make it possible for the public to learn of such activities—and such attitudes on the part of officials in sensitive and powerful jobs—and to learn of them as quickly as possible.

The Freedom of Information Act is not a law to make the task of journalists easier or the profits of news organizations greater. It is, in other words, not special interest legislation in the sense that the term is ordinarily used. It is special interest legislation in that it is intended to assist the very special interest of the American people in being better informed about the processes and practices of

their government. This is a point President Ford's advisers missed badly at the time of the veto. One of them is alleged to have said that if the President vetoed the bill, "who gives a damn besides The Washington Post and the New York Times?" The truth of the matter is that this legislation goes to the heart of what a free society is about. When agencies of government such as the FBI and IRS can engage in the kind of activity just revealed, it is serious business. That's why we should all give a damn—especially those who are to cast their votes today and tomorrow.

SPEECH BY SENATOR ERVIN

Mr. President, I rise in support of this amendment. It seems to me that we ought not to have artificial weight given to agency action, which the bill in its present form certainly would do.

It has always seemed to me that all judicial questions should be determined de novo by a court when the court is reviewing agency action. One of the things which has been most astounding to me during the time I have served in the Senate is the reluctance of the executive departments and agencies to let the American people know how their Government is operating. I think the American people are entitled to know how those who are entrusted with great governmental power conduct themselves.

Several years ago the Subcommittee on Constitutional Rights, of which I have the privilege of being chairman, conducted quite an extensive investigation of the use of military intelligence to spy on civilians who, in most instances, were merely exercising their rights under the first amendment peaceably to assemble and to petition the Government for redress of grievances. At that time, as chairman of that subcommittee, I was informed by the Secretary of Defense, when the committee asked that one of the commanders of military intelligence appear before the committee to testify that the Department of Defense had the prerogative of selecting the witnesses who were to testify before the subcommittee with respect to the activities of the Department of Defense and the Department of the Army.

On another occasion I was informed by the chief counsel of the Department of Defense that evidence which was quite relevant to the committee's inquiry, and which had been sought by the committee, was evidence which, in his judgment, neither the committee nor the American people were entitled to have or to know anything about.

And so the Freedom of Information Act, the pending bill, is designed to make more secure the right of the American people to know what their Government is doing and to preclude those who seek to keep the American people in ignorance from being able to attain their heart's desire.

I strongly support the amendment offered by the distinguished Senator from Maine, of which I have the privilege of being a cosponsor, because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

MR. MUSKIE. Mr. President I yield to the Senator from North Carolina.

THE PRESIDING OFFICER. The Senator from North Carolina is recognized.

MR. ERVIN. Mr. President, the question involved here would be whether a court could determine this is a matter which does affect national security. The question is whether the agency is wrong in claiming that it does.

The court ought not to be required to find anything except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge. We ought not to leave that decision to be made by the CIA or any other branch of the Government.

The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong.

With all due respect to my friend, the Senator from Nebraska, is it not ridiculous to say that to find out what the truth is, one has to show whether the agency reached the truth in a reasonable manner?

Why not let the judge determine that question, because national security is information that affects national defense and our dealings with foreign countries? That is all it amounts to.

If a judge does not have enough sense to make that kind of judgment and determine the matter, he ought not to be a judge, and he ought not to inquire whether or not the man reached the wrong decision in an unreasonable or reasonable manner.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

Mr. President, will the Senator respond to a question on that subject? He and I have discussed this matter preliminarily to coming on the floor.

If a decision is made by a court, either ordering a document disclosed or ordering it withheld, is that judgment or order on the part of the district court judge appealable to the circuit court?

Mr. ERVIN. I should think so.

Mr. HRUSKA. What would be the ground of appeal?

Mr. ERVIN. The ground ought to be not whether a man has reached a wrong decision reasonably or unreasonably. It would be to be whether he had reached a wrong decision.

Mr. HRUSKA. I did not hear the Senator.

Mr. ERVIN. The question involved ought to be whether an agency reached a correct or incorrect decision when it classified a matter as affecting national security. It ought not to be based on the question whether the agency acted reasonably or unreasonably in reaching the wrong decision. That is the point that the bill provides, in effect. In other words, a court ought to be searching for the truth, not searching for the reason for the question as to whether someone reasonably did not adhere to the truth in classifying the document as affecting national security.

Mr. HRUSKA. The bill presently provides that a judge should not disclose a classified document if he finds a reasonable basis for the classification. What would the Senator from North Carolina say in response to the following question: Should a judge be able to go ahead and order the disclosure of a document even if he finds a reasonable basis for the classification?

Mr. ERVIN. I think he ought to require the document to be disclosed. I do not think that a judge should have to inquire as to whether a man acted reasonably or unreasonably, or whether an agency or department did the wrong thing and acted reasonably or unreasonably.

The question ought to be whether classifying the document as affecting national security was a correct or an incorrect decision. Just because a person acted in a reasonable manner in coming to a wrong conclusion ought not to require that the wrongful conclusion be sustained.

Mr. HRUSKA. Mr. President, I am grateful to the Senator for his confirmation that such a decision would be appealable.

However, on the second part of his answer, I cannot get out of my mind the language of the Supreme Court. This is the particular language that the Court has used: Decisions about foreign policy are decisions "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." *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948).

That is not their field; that is not their policy.

Mr. ERVIN. Pardon me. A court is composed of human beings. Sometimes they reach an unreasonable conclusion, and the question would be on a determination as to whether the conclusion of the agency was reasonable or unreasonable.

The PRESIDING OFFICER. The Senator's 3 minutes have expired.

Mr. HRUSKA. Mr. President, I yield 3 minutes to the Senator from South Carolina.

Mr. THURMOND. Mr. President, the Freedom of Information Act, H.R. 12471, was vetoed by President Ford on October 17, 1974. I rise in support of the President's veto decision and ask that my colleagues join me in this effort.

My decision to support the President on this veto is based upon several key objections which the President expressed regarding this legislation.

If this bill is allowed to become law, classified documents relating to our national defense and foreign relations would be subjected to an in camera judicial review.

In his veto message, the President stated that he was willing to accept the provision which would enable courts to inspect classified documents and review the justification for their classification.

However, the issue is not whether a judge should be authorized to review in camera classified documents relating to the national defense and foreign relations. Instead, the issue is whether a standard should be established to guide the judge in making a decision as to whether a document is properly classified. In its present form, there are no guidelines for a judge to determine if a document is classified in a proper manner.

Mr. President, a judge should be authorized to disclose a classified document if he discovered that there was no reasonable basis for the classification. It should not be within the power of a judge to reveal a classified document where there is a reasonable basis for the classification.

Another objectionable area of H.R. 12471 deals with the compulsory disclosure of the confidential investigatory files of the Federal Bureau of Investigation and other law enforcement agencies.

Under this bill, Mr. President, these investigatory files would be exempt from disclosure only if the Government could prove that the release would cause harm to certain public or private interests. The President objected to this portion of H.R. 12471, since it would be almost impossible for the Government to establish in every instance that harm would result from a release of information.

Instead, the President suggested that investigatory records of the Federal Bureau of Investigation and other law enforcement agencies should be exempt from the act if there is a "substantial possibility" of harm to any public or private interest.

This is an area in which the rights of privacy and personal security are hanging in the balance, and no measures should be enacted to erode these basic and fundamental rights.

Due to these objections which have been raised, I agree with the President's decision to veto this bill, and I call upon my colleagues in the Senate to vote to sustain this veto.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield 4 minutes to the Senator from California.

Mr. CRANSTON. Mr. President, I thank the Senator for yielding and for the great work in committee that has led to this very important legislation which is before us.

I support the Freedom of Information Act amendments because I believe in the freest possible flow of information to the people about what their Government is doing, and why. The people must have access to the truth if they are to govern themselves intelligently and to prevent people in power from abusing the power.

Under the amendments in the vetoed bill, our courts, not our bureaucrats, will have the final say as to what information can legitimately be kept secret without violating the basic right of a democratic people to know what is going on in their Government.

What are some of the objections raised?

First. That a judge is not sufficiently knowledgeable to determine whether a document should be kept secret or not.

I maintain that a judge is at least as competent as some Pfc or some low echelon civilian bureaucrat who classified the document in the first place.

Presently, and this is incredible, presently in tens of thousands of cases, there is often no review by anyone higher of a classification made by a Pfc or a very low echelon bureaucrat, and these classifications remain in effect for a minimum of 10 years.

I also maintain that the Pfc and that bureaucrat will do a better job, and a more honest and thoughtful job, of classifying documents in the future if they know their decision may be reviewed by an independent judiciary.

Second. Some people object to giving so much discretion to a single judge.

There is little reasonable ground for fear.

If the judge ruled against the Government in a particular case and the Government felt strongly that the decision to disclose was unwise, the Government can, of course, appeal. Thus in actual practice, many of the top minds of our country—at the various appellate levels of our courts—would in fact be passing on the decision to disclose.

If we can not trust their wisdom and good judgment, whose can we trust?

Third. Some people say the time limits imposed by the amendments are too brief, that agencies need more time to determine whether a document being sought should be made public.

I say that reasonable speed is of the essence where public information is concerned. Speed of disclosure is the enemy of the coverup. Delay is its ally.

Concern over too much speed is hardly a compelling matter when you consider that under present procedures, for example, it took 13 months—yes, 13 months—before the Tax Reform Research Group was able to get released to the public earlier this week 41 documents showing how the Internal Revenue Service's special services staff investigated dissident groups.

Fourth. Finally, some people fear that increased emphasis on freedom of information, on the people's right to know, may harm the national interest in some instances.

I, myself, believe the national interest demands more emphasis on openness in government and less emphasis on government secrecy.

Nothing is more important in a democratic society—nothing is more vital to the strength of a democratic society—than for a free people to be told by its government what that government is doing. And why.

Of course, we must have proper safeguards to protect our legitimate secrets. Our amendments provide such safeguards.

But we have too many governmental secrets; too many governmental decisions are being made behind closed doors by people with closed minds.

Our amendments provide a sensible, workable solution to the problem of how to protect legitimate secrets in an open society.

Turning to the courts as a disinterested third party to resolve disputes between individuals or between individuals and the government is in keeping with centuries of American tradition.

The courts have served us well. I have full confidence in their continued competence, integrity, and patriotism.

I strongly urge that we vote to override the President's injudicious veto of this legislation.

The PRESIDING OFFICER. The Senator from Nebraska has 13 minutes remaining under his control.

Mr. HRUSKA. Mr. President, at this time I have no further requests for time. There is one other possibility. I would be willing to call for a brief quorum call on equal time, if that is agreeable with the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts has used all of his time on the bill. There are 13 minutes remaining.

Mr. HRUSKA. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. HRUSKA. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. Mr. President, I yield 4 minutes to the Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, I thank the able Senator for yielding.

When H.R. 12471, the Freedom of Information Act amendments, was passed by the Senate on May 16, 1974, I voted against the bill because I was concerned that passage of the bill would severely hamper law enforcement agencies in the gathering of information from confidential sources in the course of a criminal investigation.

The Senate-passed version of the bill contained an amendment which would have required disclosure of information from a law enforcement agency unless certain information was specifically exempted by the act. What particularly disturbed me was that while the identity of an informer would be protected, the confidential information which he had given the agency would not have been protected from disclosure. Another matter that disturbed me was the use of the word "informer", since that could be construed to mean that only the identity of a paid "informer" was to be protected and not the identity of an unpaid confidential source. I was deeply concerned that without such protection, law enforcement agencies would be faced with a "drying-up" of their sources of information and their criminal investigative work would be seriously impaired.

The bill in the form now presented to the Senate has been significantly changed by the conference on these critical issues. The language of section 552(b)(7) has been changed from protecting from disclosure the identity of an "informer" to protecting the identity of a "confidential source" to assure that the identity of a person other than a paid informer may be protected. The language has also been broadened substantially to protect from disclosure all of the information furnished by a confidential source to a criminal law enforcement agency if the information was compiled in the course of a criminal investigation. Thus, not only is the identity of a confidential source protected but also protected from disclosure is all the information furnished by that source to a law enforcement agency in the course of a criminal investigation.

There are two other substantive changes in the bill now before the Senate as compared with the bill originally passed by the Senate. First, the bill now provides an exemption from disclosure of investigative records which would "endanger the life or physical safety of law en-

forcement personnel." The bill as originally passed by the Senate contained no such exemption.

Second, the original bill included an exemption from disclosure for investigatory records which constituted a "clearly unwarranted invasion of personal privacy." The bill as it is now before the Senate strikes the word "clearly" and exempts from disclosure investigatory records which constitute an "unwarranted invasion of personal privacy." Thus, the agency could withhold investigatory records which would constitute an unwarranted invasion or privacy rather than be forced to show that the material was a "clearly" unwarranted invasion of privacy.

The conference changes from the language of the original bill satisfy my objections to the bill, as they have overcome the substantive objections I had to the bill in its original form, and I shall now support the bill and vote to override the Presidential veto.

I again thank the Senator for yielding.

MR. BAYH. Mr. President, the American system is built on the principle of the openness of public debate and the accountability of the Government to the people. The greatest danger to both these fundamental principles lies in excessive Government secrecy. As the power and size of the executive branch has grown in recent years, so has its ability to cloak its actions which broadly affect the American people and to conceal those who are responsible for them.

It was 16 years ago that we in the Congress first recognized the dangers of bureaucratic secrecy when we enacted a one sentence amendment to a 1789 "housekeeping" law which gave Federal agencies the authority to regulate their business. It read:

This section does not authorize withholding information from the public or limiting the availability of records to the public.

It quickly became clear, however, that this rather broad language was not sufficient. Therefore in 1966, after more than a decade of hearings, investigations, and studies, we enacted much more comprehensive legislation which we termed the "Freedom of Information Act." But the bureaucracy was not to be so easily unveiled. There were many loopholes which legions of bureaucratic lawyers, with some help from the courts, managed to enlarge into gaping and blanket exemptions. For example, take the exemption contained in the 1966 act for "Law Enforcement Activities." This exemption came to be interpreted as including such things as meat inspection reports, reports concerning safety in factories, correspondence between the National Highway Traffic Safety Administration and the automobile manufacturers concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds.

That is not to say, Mr. President, that the 1966 act did not accomplish some significant breakthroughs. Recently, for example a Freedom of Information Act suit uncovered the fact that the Nixon White House had instigated Internal Revenue Service investigations of social action groups on the left and in the black community. Included among these "radical" groups was the Urban League. In the same vein, the Justice Department earlier this week released a report on the counterintelligence operations of the FBI. The initial aspects of this police state-type of operation were revealed by a Freedom of Information Act lawsuit. But the loopholes remain.

Congress then responded this year with a bill to provide for some 17 amendments to the 1966 law. Lengthy and full hearings were held in both Houses. All of the competing interests were heard. Once the legislation reached the Senate-House conference committee, of which I was a member, significant concessions were made to the administration's objections. Yet almost inexplicably President Ford heeded the advice of the self-interested bureaucracy, who had likewise opposed the first legislation in 1966, and he vetoed the bill. In doing so, he dealt another crushing blow to his self-professed image of openness and candor in Government.

Let me examine, briefly, the stated reasons for the President's veto. They are basically two. First, that the bill would have unconstitutionally compromised our military or intelligence secrets and diplomatic relations by allowing a U.S. district court to review classified documents. Second, that the bill would have placed unrealistic burdens on agencies by requiring them to respond within a finite period of time to requests for information. To me it is abundantly clear, after carefully examining all of the arguments, that these concerns are completely misplaced and without merit.

The first exemption to the present Freedom of Information Act states that the act does not apply to matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." That section has been interpreted by the Supreme Court to mean that Congress granted to the Executive sole discretion to classify documents—*Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). The Court went on to say that because of this statutory construction the courts could not review the decision of an executive branch employee to classify nor could the court even examine the document in camera. However, the court also indicated that there were no constitutional barriers to full court review, and that Congress had the power to change the law if it saw fit to do so. The proposed amendments before us today provide for full court review of classification decisions made pursuant to Executive order. The executive branch still would have the power to make the rules and decision governing classification. This bill merely makes it clear that the courts may determine whether those rules are being followed.

The President wants documents that are claimed to fall within the national security exemption treated differently than documents that are claimed to fall within the other exemptions. He wants a court to ignore whether or not the classification decision was right or wrong and only determine whether the agency official acted reasonably or unreasonably. Under this approach a situation could arise where a judge determines that a document is not properly classified and should be public, but that the Secretary of State acted reasonably in classifying the document and therefore it remains secret. In other words, for a document to be released a judge must find that the Secretary of State acted unreasonably. There is no constitutional basis to support this result, and it is contrary to the spirit of the Freedom of Information Act.

Second, President Ford objects to the finite time limits provided for by the bill and seeks to have them relaxed, especially as they apply to law enforcement agencies. The time limits would allow 10 working days, 2 weeks, for an initial response and 20 working days,

4 weeks, to respond to administrative appeals. In addition an agency can extend the time for up to 10 working days, 2 weeks. This adds up to 2 months time in which an agency has to respond to a request for information. The President calls this "simply unrealistic." Two months is more than adequate. To allow more time would be to allow agencies to continue their current practice of using delay to discourage requests for information. Moreover, the bill permits a court in exceptional circumstances to delay its review of a case until an agency has had sufficient time to review its records. In other words, after the 2 months of administrative deadlines have lapsed and after a complaint has been filed with the court, the court still has the discretion to grant the agency more time if exceptional circumstances warrant. These provisions more than adequately satisfy the President's concern for flexibility.

In short, Mr. President, a close examination of the administration's objections to this bill reveal their insubstantiality. If we have learned anything from the political events of the past 2 years, it should be that openness and accountability in Government are crucial to the preservation of our democracy. Yesterday the other body acted overwhelmingly to reassert this principle by overriding this ill-advised veto. I urge my colleagues to do likewise.

Mr. METCALF. Mr. President, the leaders of the free and responsible press have joined the drive to make the freedom of information law a more workable tool to dig out Government information, not because it means money in their pockets but because they truly believe in the ideals of a democratic society. They know that democracy can survive only if the public has access to the facts of government. Stories about Government problems do not sell newspapers, do not influence the public to watch television or listen to radios. The public would rather not listen to or read about the bad news which most Government stories report.

Those dedicated newsmen fighting for the people's right to know are not fighting for their own special interest. This fact is emphasized by looking at the organizations and individuals supporting the drive to override President Ford's veto of the amendments which would make the freedom of information law a more effective tool. The representatives of the business side of the news industry—the American Newspaper Publishers Association—do not want us to override President Ford's veto of the freedom of information law amendments. The representatives of the news side of the information business—the American Society of Newspaper Editors—have gone all-out to urge overriding of President Ford's veto. The ASNE is interested in the people's right to know, not the publishers' desire to make a profit.

This point is emphasized in an editorial from the Denver Post. William Hornby, executive editor of the newspaper, also serves as chairman of the freedom of information committee of ASNE. He and other leaders of the information industry have rallied the members of their profession to fight for the right of the people to know, not the right of the press to publish. I urge you to consider carefully the cogent points made in the recent editorial in Bill Hornby's newspaper.

Mr. President, I ask unanimous consent to have the editorial printed in the Record.

There being no objection, the editorial was ordered to be printed in the Record, as follows:

[From the Denver Post, Nov. 7, 1974]

CONGRESS MUST OVERRIDE VETO OF INFORMATION ACT CHANGES

When Congress reconvenes after the election recess, it ought to act promptly—and decisively—to override President Ford's veto of essential amendments to the Freedom of Information Act.

The amendments, embodied in the bill H.R. 12471, are designed to improve the seven-year-old FOI law by removing bureaucratic obstacles in the way of freer public access to governmental documents.

Mr. Ford's veto of H.R. 12471 is in direct contradiction of his avowal of an "open administration." Further, his demands for more concessions from Congress on FOI amendments raise additional questions about the credibility of his openness pledge.

Congress has gone more than halfway to meet administration objections to the original FOI changes considered on Capitol Hill.

The House-Senate conference committee bill that emerged was a genuine compromise between congressional representatives and Justice Department experts.

Mr. Ford got four out of the five changes he recommended to the committee. Yet not only did Mr. Ford veto the final bill, but he added a new demand to his original proposals.

In his veto message, President Ford contended for the first time that lengthy investigatory records should not be disclosed on the grounds that law enforcement agencies do not have enough competent officers to study the records. He also restated his earlier demand that Congress should not give the courts as much power as the bill provides to decide on whether documents should be withheld for reasons of national security.

Mr. Ford's veto also prevented other improvements in the FOI law ranging from the setting of reasonable time limits for federal agencies to answer requests for public records to requiring agencies to file annual reports on compliance of the law.

The amendments to strengthen the FOI law represent a true consensus of Congress: H.R. 12471 passed the House with only two dissenting votes and there was no opposition in the Senate.

If Mr. Ford will not follow through on his open administration pledge, then Congress ought to do it for him by overriding his veto.

Mr. MONDALE. Mr. President, over a century ago, one of the greatest leaders our Nation ever produced, Abraham Lincoln, expressed his faith in the American people. Lincoln said:

I am a firm believer in the people, if given the truth, they can be depended upon to meet any national crisis. The great point is to bring them the real facts.

Eight years ago, the Congress passed and President Lyndon Johnson signed the Freedom of Information Act, which was intended to aid the people in their search for the truth. The act was a recognition of the sad fact that all too often our Government's desire to cover up the truth from public view took precedence over the need to bring this truth to the people. The Freedom of Information Act held out great promise for the Nation's media and for every American citizen to gain the information they needed from the Federal Government, information which is often vital to their livelihood, their welfare, and even their freedoms. The act sought to place into law one more concrete manifestation of our society's respect for the truth and our willingness, if need be, to sacrifice convenience in order to uncover the facts.

Sadly, the years since 1966 have not produced the increase in Government responsiveness which we had hoped would follow enactment of the Freedom of Information Act. Indeed, secrecy has become even more of a hallmark of Government actions in recent years than ever before in our history. And for the first time in 200 years, a President was forced to resign because he refused to give the Nation

the facts we deserved about Government wrongdoing at the highest level.

Every day, at lower levels of Government, Federal agencies have regrettably undertaken coverups which have also undermined the confidence of the American people in their Government. While the substantive provisions of the Freedom of Information Act have stood the test of time, the agencies whose job it is to comply with requests for information under the act have demonstrated their ingenuity in using the procedural provisions of the act to frustrate the legislation's intent. Former Attorney General Elliot Richardson, testifying before the Senate Administrative Practice and Procedure Subcommittee, noted that—

The problem in affording the public more access to official information is not statutory but administrative . . . The real need is not to revise the act extensively but to improve compliance.

The Freedom of Information Act amendments of 1974 are an attempt to improve compliance with the act, which is needed to make it a better vehicle for learning the truth. Under the outstanding leadership of the distinguished Senator from Massachusetts (Mr. Kennedy), the Congress has made every attempt to fashion legislation which will remove the procedural loopholes through which Federal agencies avoided compliance in the past, while at the same time affording adequate protection for vital governmental interests in sensitive or national security information.

I believe that the Congress has done this job well, and I was, therefore, distressed and disappointed that President Ford saw fit to veto this bill. Only 3 months ago, President Ford came into office on the heels of the most secretive and repressive administration in our history. His pledge was to open up Government and make it more responsive to the people. And yet the President, while espousing the rhetoric of openness has chosen to implement the policy of secrecy, through his veto of this legislation. His principal objections—to those sections of the bill dealing with in camera inspection of classified documents and the disclosure of agency investigative files—are, I believe, without justification. In fact, the Congress has made every attempt to overcome any legitimate objections based on national security or law enforcement grounds, and has accepted many modifications in language designed to accomplish these ends. The legislation on which we will shortly be voting is a balanced compromise, which safeguards the legitimate interests of the Government while expanding the ability of citizens to obtain the information they need to maintain a vital and free society.

I am hopeful that the Senate will override this most unfortunate veto, and in so doing will reaffirm our commitment to openness in government. The American people are tired of the politics of secrecy. They are demanding a politics of honesty and openness. And enactment of the Freedom of Information Act amendments of 1974 will be an important step toward restoring the faith of a free people in their Government.

Mr. President, I ask unanimous consent that an excellent editorial from the Minneapolis Tribune, outlining some of the principal issues involved in this vote to override, be inserted in the Record at the conclusion of my remarks.

There being no objection, the editorial was ordered to be printed in the Record, as follows:

[From the Minneapolis Tribune, Oct. 21, 1974]

MR. FORD AND THE "RIGHT TO KNOW"

In 1966, when the first Freedom of Information Act was passed, Gerald Ford, then a congressman, voted in favor, along with 306 other House members, despite the opposition of many federal agencies. Passage put Lyndon Johnson on the spot, but he took the heat and signed the bill.

Now President Ford is on a similar spot. Early this month Congress passed a bill to close major loopholes in the 1966 "right-to-know" act and make it a sharper tool for citizens to dig out government secrets. As in 1966, the bill was opposed by virtually all government agencies, but had the support of many House Republicans, including Minnesota Reps. Quie and Franzel (Nelsen and Zwach did not vote). On Thursday, Mr. Ford vetoed the bill as "unconstitutional and unworkable."

The bill's key provision empowers federal courts to go behind a government secrecy stamp and examine contested material *in camera* to see if it has been appropriately classified. The bill exempted nine categories of material ranging from secret national-security information to trade secrets and law-enforcement investigatory records.

Despite the exemptions—and despite the fact that federal judges already have the right to review classified information in criminal cases—Mr. Ford objected. The provision, his veto message said, would mean that courts could make what amounted to "the initial classification decision in sensitive and complex areas where they have no expertise." It could adversely affect intelligence secrets and diplomatic relations. "Confidentiality would not be maintained if many millions of pages of FBI and other investigatory law-enforcement files" were not protected.

The veto has met with strong congressional criticism. Sen. Kennedy, one of the bill's major backers, called it "a distressing new example of the Watergate mentality that still pervades the White House." Rep. Moss, an author of the 1966 act, said there is "no validity to the fears expressed by the president . . . He is buying the old line of the intelligence and defense community that all information they have is sacrosanct."

Coming from a president who has promised "open" government, the veto surprised those who had expected him to sign, especially since Congress had already incorporated in the bill modifications he suggested last summer. But, according to reports from Washington, Mr. Ford finally bent to the wishes of the National Security Council, which led the federal agencies' opposition. Mr. Ford says he will submit new proposals next session, but it is unlikely that they will do as much for the public's "right to know" as the vetoed bill.

There is a good chance Congress will override the veto. It has the votes. We hope it uses them.

Mr. HUGH SCOTT. Mr. President, just prior to the recess, President Ford vetoed the Freedom of Information Act amendments. In his veto message, the President cited several objections, including adverse impact on military or intelligence secrets and diplomatic relations, loss of confidentiality in law enforcement matters, and inflexibility with regard to procedures associated with the release of information to the public.

I am sympathetic with the President's objections. I agree with him the "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." I agree with him that it would be very difficult for the Government to prove to a court that disclosure of detailed law enforcement investigatory files would be harmful. And I agree with him that "additional latitude" must be provided Government agencies during the information release period.

However, in spite of my sympathy with the purpose of the veto, I am convinced that I must vote to override. The bill proposed 17 specific amendments to the Freedom of Information Act; 14 of these

pick up the slack that has developed since 1966 to facilitate public access to information. The balance of the bill tilts in a responsible direction, and the good provisions should not be discarded because there are a few bad provisions.

In fairness to the President, and if the bill becomes law over his objections, Congress has an obligation not to lose sight of his objections in the interest of national welfare. Therefore, I have submitted a new bill, which is drafted to reflect the changes proposed by the President. If, after a trial period, the law proves defective as the President insisted that it would, Congress must respond quickly and in a responsible way.

I have been in Congress a long time. I have seen Presidents of both political parties misuse secrecy stamps. On balance, too much information is withheld from public scrutiny, and the trend must be reversed. The President and the Congress have a duty to protect the public from unwarranted secrecy and to protect the Nation from losing its ability to protect itself.

Mr. RIBICOFF. Mr. President, on October 17, President Ford vetoed the Freedom of Information Act Amendments which were overwhelmingly approved in both Houses of Congress. Yesterday, by a vote of 371 to 31, the House of Representatives reaffirmed that mandate.

In his veto message, Mr. Ford's conviction was that the bill is unconstitutional and unworkable.

The President's objections to the bill seem to be three: First, that our military secrets and foreign relations could be endangered. Second, that a person's right to privacy would be threatened by provisions of the bill requiring disclosure of FBI files and investigatory law enforcement files. Third, that the 10-day deadline imposed upon Government agencies to reply to requests for documents and the 20 days afforded for determinations appeal are unrealistic.

A closer examination will show these fears are unfounded. The President contends that the amendments will jeopardize our national security interests. The President said that he objected to forcing the courts to make initial classification decisions "in sensitive and complex areas where they have no particular expertise." The FOIAA does not require the courts to render initial classification decisions. The act allows the courts to inspect in camera classified records and review the classification to determine if the material sought is "in fact properly classified."

The bill empowers the courts to declassify such records if they determine that an agency acted arbitrarily. The bill places faith in the ability of the judiciary to promote both the national interest and the public's right to information, while also encouraging the Federal courts in making de novo determinations to "accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record."

Presently, the executive branch alone retains the power to declassify documents. It appears that Mr. Ford regards such in camera inspection of classified documents as a usurpation of his constitutional authority to be final arbiter.

The Supreme Court, however, has suggested in the case of EPA against Mink that Congress has the constitutional power to grant in camera authority to the courts when questions arise concerning

the classification of documents. In the Mink case, the Court held that the judiciary lacks the power to review classified documents. However, the majority opinion suggested that Congress could legislate this power to grant such authority to the courts. Mr. Justice Stewart, in a concurring opinion in the Mink case, noted that under the Freedom of Information Act, a court has no power to disclose information "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." Mr. Stewart continues:

It is Congress, not the Court, that . . . has ordained unquestioning deference to the Executive's use of the "secret" stamp . . . Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

The House-Senate conferees have clarified the intent of Congress for in camera examination of contested records in FOI cases. The vetoed bill, in fact, answers the present weaknesses of the FOIA, as evidenced in the Mink case, Congress and the courts have voiced the belief that the President's sole power to classify documents is not absolute.

A second objective offered by the President is that FBI files and other law enforcement agency files would be open to inspection on demand. Both the FOIA and existing statutes provide adequate guidelines to insure that an individual's right to privacy will not be endangered. The FOIA's exempt from the rule of mandatory disclosure the files of law enforcement and investigatory agencies if their production interferes with enforcement proceedings, deprives a person of his right to a fair trial, constitutes an unwarranted invasion of privacy, endangers law enforcement personnel or discloses the identity of a confidential source. It also safeguards information involving current prosecutions.

The President's third objection is that it sets an unrealistic time limit for an agency to reply to a request for information. The time limit prohibits an agency's use of delaying tactics. Just this week, the Tax Reform Research Group listed 99 organizations which were IRS targets for harassment. This information was obtained under the FOA 13 months after it was first requested. There is no excuse for such unnecessary bureaucratic delays when abuses such as this are occurring in our government.

I believe the President's veto of the Freedom of Information Act Amendments is unfortunate. Unfortunate at a time when confidence in our Government has dramatically declined and the principles of openness and honesty are urgently needed. I will vote to override this veto.

MR. CLARK. Mr. President, the Senate is about to vote on one of the most important issues we have considered all year: the Freedom of Information Act amendments. This bill corrects some of the deficiencies in the current law to insure that the public and the news media have access to the information the public is entitled to know. For example, it cuts down the length of time a citizen will have to wait for the Government to release a requested document. It also eliminates some of the more questionable restrictions on what information is available to the public. Finally, it rightfully provides for penalties against the people who withhold requested information which should be in the public domain.

As we consider this legislation, I am reminded of a remarkable definition of democracy which I once read. It originated within an agency of the U.S. Government and went as follows:

Democracy: A government of the masses. Authority derived through mass meeting or any other form of direct expression. Results in mobocracy. Attitude toward property is communistic . . . negating property rights. Attitude toward law is that the will of the majority shall regulate, whether it is based on deliberation or governed by passion, prejudice, and impulse, without restraint or regard to consequences. Result is demagogism, license, agitation, discontent, anarchy.

The definition is from a U.S. Army Training Manual No. 20005-25 in use from 1928-32. The manual was published 38 years before the Freedom of Information Act became law.

But it is interesting to note that the manual was withdrawn almost immediately after a newspaper story on the manual because of the public furor, and it is just this kind of public accountability that is the central purpose of the Freedom of Information Act.

Mr. President, the strength of a democracy is derived directly from the ability of the entire populace to make its own judgments about the Government's policy decisions and the leaders selected to make and implement them. If those judgments are to be sound, it is essential that people have access to the information it takes to evaluate Government performance. Openness, candor, and access to information are not luxuries; they are vital to the democratic process.

Mr. President, the recognition of this essential principle led to the initial passage of the Freedom of Information Act. For too long the Government had been publishing—and acting upon—questionable documents, as in that Army Training Manual I referred to earlier. For too long, Government has classified and reclassified reams of information, much of it needlessly and succeeded in hiding embarrassing information from the public. For far too long, Government agencies have been impervious to the needs and requests of the people they supposedly are serving, and Congress passed the original Freedom of Information Act in an effort to solve those problems.

Since its passage in 1966, many of these unnecessary barriers to gaining information have been eliminated. The act has played a vital role in protecting some fundamental rights. For example, it was the Freedom of Information Act which recently led to the disclosure of the Internal Revenue Service investigation of political and social groups in the country in direct violation of their constitutional rights. By the same token, the Freedom of Information also has been cited as the primary vehicle for revealing the improper counter-intelligence operations of the FBI. Finally, the act opened the door for every American citizen to a wide range of information that the public is entitled to receive.

The act was not perfect. It did not completely eliminate all of the barriers which had been erected over a period of decades. For example, agencies often were reluctant to provide indexes of relevant information so the public could ascertain what was available, and they were reluctant to establish reasonable procedures to help identify and obtain pertinent records. Many Federal agencies engaged in delaying tactics in response to legitimate requests for information by the public, placing an unfair financial burden on the individuals requesting the information as well as an unnecessary burden on the courts to resolve the dispute. In addition, the Watergate scandal revealed numerous

instances of the misuse of the law's various exemptions—such as the national security exemption—and it highlighted the need for an independent review of such exemptions to prevent agencies from making unilateral and arbitrary classification to violate the intent of the law.

With these deficiencies in mind, Congress has attempted to improve the law. On March 14, the House approved the 1974 amendments by a resounding vote of 382 to 8. The Senate followed shortly thereafter and voted overwhelmingly in favor of the new amendments, 64 to 17. Given that congressional mandate, as well as President Ford's repeated assertions of his commitment to openness and candor, many people were stunned by the President's veto of this legislation. While the President's public position is that the new amendments are unconstitutional, it is clear that such a position is untenable in light of the facts, and that he has bowed to the wishes of the bureaucracy at the expense of the public. The constitutional issue is no issue at all. As the eminent law professor, Philip Kurland of the University of Chicago, recently observed in a letter to Senator Muskie:

Although President Ford states that the provision to which he takes exception is unconstitutional, not surprisingly, he refers neither to provision of the Constitution nor to any judicial decision on which such a conclusion could rest. It is not surprising, because there is neither constitutional provision nor Supreme Court decision to support his position.

My considered opinion is that the issues between the Congress and the President in this regard are really issues of policy and not at all issues of constitutionality. To me, it is clear that the bill does not offend the Constitution in any way.

Mr. President, we needed the Freedom of Information Act back in 1928 when the Army Training Manual was first printed. It became even more imperative as more and more information became harder and harder to get as the bureaucracy grew. Certainly now, after the abuses of the past administration and the misuse of so many agencies at the expense of the public, it has become essential to the very future of democracy that we guarantee every citizen maximum access to information.

I urge my colleagues to follow the action of the House yesterday and override this dangerous veto.

Mr. DOLE. Mr. President, I would like to take this opportunity to express my concern that the President's veto of the Freedom of Information Act should be upheld.

I have consistently supported the intent of the Freedom of Information Act and have worked to achieve passage of the bill. However, amendments were added in the Senate which are objectionable. I voted against the amendment concerning investigatory records when it came before the Senate and had hoped that this amendment would be dropped in the joint Conference Committee. It was not, and because of the serious harm it could cause to the crime fighting agencies in this country, I am compelled to uphold the President's veto.

REASONABLE CHANGES

I have read the President's veto message carefully and feel that his obligations and suggested changes are reasonable. This is why I have cosponsored the substitute Freedom of Information Act introduced by the senior Senator from Pennsylvania (Mr. Hugh Scott).

The changes suggested by the President are relatively minor and would not derogate from the benefits provided by the act. I support the substitute bill which contains these amendments.

Considering that crime is rising in this country, it is important that we should not jeopardize the ability of the FBI and other crime fighting organizations to control crime. The substitute bill would prevent a derogation of the FBI's ability to combat crime while not restricting the basic improvements in the freedom of information provided under the bill.

Similar questions have been raised about the detrimental impact this measure could have on our national security. Freedom of information is a basic right in this country; however, national defense does clearly require some security precautions. National security remains a vital national requirement in the tense and adversary-oriented environment existing in the world. The changes suggested by the President in this respect would not decrease the basic improvements in freedom of information under this act but would prevent jeopardizing our national defense.

Mr. President, for these reasons, I believe the President's veto should be upheld and that the substitute bill which would include all the basic provisions and improvements in the freedom of information contained in this act should be passed, and I urge the Senate to adopt this substitute measure.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. HELMS). Without objection, it is so ordered.

Under the previous order, the hour of 2 p.m. having arrived, the Senate will now proceed to vote on overriding the President's veto of H.R. 12471. The question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

The yeas and nays are required under the Constitution, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. Fulbright), the Senator from South Dakota (Mr. McGovern), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that the Senator from Minnesota (Mr. Humphrey) is absent on official business.

I further announce that, if present and voting, the Senator from Minnesota (Mr. Humphrey) and the Senator from South Dakota (Mr. McGovern) would each vote "yea".

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett) is necessarily absent.

I also announce that the Senator from New York (Mr. Buckley) and the Senator from Maryland (Mr. Mathias) are absent on official business.

I further announce that the Senator from Oregon (Mr. Hatfield) is absent due to illness in the family.

I further announce that, if present and voting, the Senator from Oregon (Mr. Hatfield) and the Senator from Maryland (Mr. Mathias) would each vote "yea".

The yeas and nays resulted—yeas 65, nays 27, as follows:

[No. 494 Leg.]

YEAS—65

Abourezk	Fong	Muskie
Allen	Gravel	Nelson
Baker	Hart	Packwood
Bayh	Hartke	Pastore
Beall	Haskell	Pearson
Bentsen	Hathaway	Pell
Bible	Huddleston	Percy
Biden	Hughes	Proxmire
Brock	Inouye	Randolph
Brooke	Jackson	Ribicoff
Burdick	Javits	Roth
Byrd, Harry F., Jr.	Johnston	Schweiker
Byrd, Robert C.	Kennedy	Scott, Hugh
Cannon	Magnuson	Stafford
Case	Mansfield	Stevens
Chiles	McGee	Stevenson
Church	McIntyre	Symington
Clark	Metcalf	Tunney
Cranston	Metzenbaum	Weicker
Domenici	Mondale	Williams
Eagleton	Montoya	Young
Ervin	Moss	

NAYS—27

Aiken	Fannin	McClellan
Bartlett	Goldwater	McClure
Bellmon	Griffin	Nunn
Cook	Gurney	Scott, William L.
Cotton	Hansen	Stennis
Curtis	Helms	Taft
Dole	Hollings	Talmadge
Dominick	Hruska	Thurmond
Eastland	Long	Tower

NOT VOTING—8

Bennett	Hatfield	McGovern
Buckley	Humphrey	Sparkman
Fulbright	Mathias	

The **PRESIDING OFFICER**. On this vote the yeas are 65 and the nays, 27. Two-thirds of the Senators present and voting having voted in the affirmative, the bill, on reconsideration, is passed, the objections of the President of the United States to the contrary notwithstanding

APPENDIXES

APPENDIX 1—VETOING H.R. 12471, TO AMEND FREEDOM
INFORMATION ACT, A MESSAGE FROM THE PRESI-
DENT OF THE UNITED STATES

VETOING H.R. 12471, AMEND FREEDOM
OF INFORMATION ACT

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

VETOING

H.R. 12471, AN ACT TO AMEND SECTION 552 OF TITLE 5,
UNITED STATES CODE, KNOWN AS THE FREEDOM OF
INFORMATION ACT



NOVEMBER 18, 1974.—Message and accompanying act ordered to be
printed as a House document

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1974

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.*

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 dupli-

cation. 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 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 pur-

poses, 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.

CARL ALBERT,
Speaker of the House of Representatives.

JAMES O. EASTLAND,
President of the Senate pro tempore.

I certify that this Act originated in the House of Representatives.

W. PAT JENNINGS,
Clerk.
By W. RAYMOND COLLEY.

APPENDIX 2—TEXTS AND LEGISLATIVE HISTORY REFERENCES OF: (I) P.L. 89-487, FREEDOM OF INFORMATION ACT OF 1966 AMENDING SECTION 3 OF THE ADMINISTRATIVE PROCEDURE ACT; AND (II) P.L. 90-23, TO CODIFY THE PROVISIONS OF P.L. 89-487

I. (P.L. 89-487)

- A. Text of Freedom of Information Act (before codification), 80 Stat. 250 (P.L. 89-487, 89th Congress, S. 1160, July 4, 1966).
- B. Committee reports on S. 1160 (89th Congress):
 - 1. S. Rept. No. 813, 89th Cong., 1st Sess., Committee on the Judiciary, October 4, 1965.
 - 2. H. Rept. No. 1497, 89th Cong., 2d Sess., Committee on Government Operations, May 9, 1966.
- C. Congressional Record References on S. 1160 (89th Congress):
 - 1. Considered and passed Senate, October 13, 1965, 111 Cong. Rec. 26820.
 - 2. Considered and passed House, June 20, 1966, 112 Cong. Rec. 13007.
- D. Hearings:
 - 1. Senate Committee on the Judiciary, Hearings on S. 1666, October 28, 29, 30, and 31, 1963 (88th Congress).
 - 2. Senate Committee on the Judiciary, Hearings on S. 1663, July 21, 22, and 23, 1964 (88th Congress).
 - 3. Senate Committee on the Judiciary, Hearings on S. 1160, May 12, 13, 14, and 21, 1965 (89th Congress).
 - 4. House Committee on Government Operations, Hearings on H.R. 5012, March 30 and 31; April 1, 2, and 5, 1965, and Appendix (89th Congress).
- E. Senate Action—88th Congress:
 - 1. S. Rept. No. 1219, 88th Congress, 2d Sess. (S. 1666).
 - 2. Considered and passed Senate, July 28, 1964, 110 Cong. Rec. 17086.
 - 3. On motion to reconsider, July 31, 1964, 110 Cong. Rec. 17666.

II. (P.L. 90-23)

- A. Text of Freedom of Information Act (codification), 5 U.S.C. 552 (P.L. 90-23, 90th Congress, H.R. 5357, June 1967).
- B. Committee Reports on H.R. 5357 (90th Congress):
 - 1. H. Rept. No. 125, 90th Cong., 1st Sess., Committee on the Judiciary, March 14, 1967.
 - 2. S. Rept. No. 248, 90th Cong., 1st Sess., Committee on the Judiciary, May 17, 1967.
- C. Congressional Record References on H.R. 5357 (90th Congress):
 - 1. Considered and passed House, April 3, 1967, 113 Cong. Rec. 8109.
 - 2. Considered and passed Senate, amended, May 19, 1967, 113 Cong. Rec. 13253.
 - 3. House agreed to Senate amendments, May 25, 1967, 113 Cong. Rec. 14056.

TEXT OF PUBLIC LAW 89-487

An Act

80 STAT. 250

To amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

Public information, availability.
5 USC 1002.

"SEC. 3. Every agency shall make available to the public the following information:

"(a) PUBLICATION IN THE FEDERAL REGISTER.—Every 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 officers from whom, and the methods whereby, the public may secure information, make submissions 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) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all 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 any member of the public, unless such 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: *Provided*, That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either

made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

"(c) **AGENCY RECORDS.**—Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon 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, make such records promptly available to any person. Upon 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 shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall 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.

"(d) **AGENCY PROCEEDINGS.**—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

"(e) **EXEMPTIONS.**—The provisions of this section shall not be applicable to matters that are (1) specifically required by 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 any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party 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 private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

"(f) **LIMITATION OF EXEMPTIONS.**—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

"(g) **PRIVATE PARTY.**—As used in this section, 'private party' means any party other than an agency.

"(h) **EFFECTIVE DATE.**—This amendment shall become effective one year following the date of the enactment of this Act."

Approved July 4, 1966.



Public Law 90-23
90th Congress, H. R. 5357
June 5, 1967

An Act

81 STAT. 54

To amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 552 of title 5, United States Code, is amended to read:

Public information.
80 Stat. 383.

“§ 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—

Publication in Federal Register.

“(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.

Exception.

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

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 a current index providing identifying information for the public

81 STAT. 55

Conditions.

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.

Exceptions.

“(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, 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 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.

“(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.

Nonapplicability.

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

“(1) specifically required by 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.”

Congressional reservation.

June 5, 1967

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81 STAT. 56

SEC. 2. The analysis of chapter 5 of title 5, United States Code, is amended by striking out: 80 Stat. 380.

"552. Publication of information, rules, opinions, orders, and public records." and inserting in place thereof:

"562. Public information; agency rules, opinions, orders, records, and proceedings."

SEC. 3. The Act of July 4, 1966 (Public Law 89-487, 80 Stat. 250), is repealed. Repeal.

SEC. 4. This Act shall be effective July 4, 1967, or on the date of enactment, whichever is later. Effective date.

Approved June 5, 1967.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 125 (Comm. on the Judiciary).
 SENATE REPORT No. 248 (Comm. on the Judiciary).
 CONGRESSIONAL RECORD, Vol. 113 (1967):

- Apr. 3: Considered and passed House.
- May 19: Considered and passed Senate, amended.
- May 25: House agreed to Senate amendments.

APPENDIX 3—PUBLIC LAW 93-502, AN ACT TO AMEND SECTION 552 OF TITLE 5, UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT; TEXT OF 1974 AMENDMENTS



Public Law 93-502
93rd Congress, H. R. 12471
November 21, 1974

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."

Public information.
Indexes, publication and distribution.

Publication in Federal Register.

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

Records, availability to public.

"(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:

Document search and duplication fees, regulations.

"(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."

88 STAT. 1561
88 STAT. 1562

"(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."

Withheld agency records, court examination.

"(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."

Complaints, response by defendant.

"(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.

Attorney fees
and costs.

"(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.

CSC proceeding
against officer
or employee.

"(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.

Noncompliance,
penalty.

"(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."

Administrative
deadlines.

(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.

88 STAT. 1562

88 STAT. 1563

"(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—

"Unusual cir-
cumstances."

"(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

November 21, 1974

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"(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."

Time extension
for agency
review.

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

National defense
and foreign poli-
cy, exemption.

"(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:

Investigatory
records for law
enforcement pur-
poses, exemption.

"(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;"

88 STAT. 1563
88 STAT. 1564

(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."

Segregable por-
tions of
records.

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

Reports to
Speaker of the
House and
President of
the Senate.

"(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—

Contents.

"(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;

Ante, p. 1562.

"(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.

Annual report.

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.

Ante, p. 1561.

"Agency."
5 USC 551.

"(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."

Effective
date.
5 USC 552
note.

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

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

88 STAT. 1564
88 STAT. 1565

IN THE HOUSE OF REPRESENTATIVES, U.S.,

November 20, 1974.

The House of Representatives having proceeded to reconsider the bill (H.R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS

Clerk.

By W. Raymond Colley

November 21, 1974

- 5 -

Pub. Law 93-502 88 STAT. 1565

I certify that this Act originated in the House of Representatives.

W. PAT JENNINGS

Clerk.

By W. Raymond Colley

IN THE SENATE OF THE UNITED STATES,

November 21, 1974.

The Senate having proceeded to reconsider the bill (H. R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO

Secretary.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-876 (Comm. on Government Operations)
and No. 93-1380 (Comm. of Conference).
SENATE REPORTS: No. 93-854 accompanying S. 2543 (Comm. on the
Judiciary) and No. 93-1200 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 120 (1974):
Mar. 14, considered and passed House.
May 30, considered and passed Senate, amended in lieu of
S. 2543.
Oct. 1, Senate agreed to conference report.
Oct. 7, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 42:
Oct. 17, vetoed; Presidential message.
CONGRESSIONAL RECORD, Vol. 120 (1974):
Nov. 20, House overrode veto.
Nov. 21, Senate overrode veto.

APPENDIX 4—FULL TEXT OF THE FREEDOM OF INFORMATION ACT, AS AMENDED IN 1974 BY PUBLIC LAW 93-502

THE FREEDOM OF INFORMATION ACT AS AMENDED IN 1974 BY PUBLIC LAW 93-502

§ 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 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. 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, 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.

(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 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.

(5) 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.

(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.

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

(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;

(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 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;

(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.

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.

(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 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.

APPENDIX 5

ATTORNEY GENERAL'S MEMORANDUM

ON THE

1974 AMENDMENTS

TO THE

FREEDOM OF INFORMATION ACT



UNITED STATES DEPARTMENT OF JUSTICE

FEBRUARY 1975

ATTORNEY GENERAL'S MEMORANDUM
ON THE
1974 AMENDMENTS
TO THE
FREEDOM OF INFORMATION ACT

A MEMORANDUM FOR THE EXECUTIVE DEPARTMENTS AND AGENCIES CONCERNING THE AMENDMENTS TO THE FREEDOM OF INFORMATION ACT (5 U.S.C. 552, SOMETIMES REFERRED TO AS SECTION 3 OR THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT) EFFECTED BY P.L. 93-502, ENACTED NOVEMBER 21, 1974, AND EFFECTIVE FEBRUARY 19, 1975

Citations: This Memorandum may be cited as "A.G.'s 1974 FOI Amdts. Mem." The June 1967 Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act is cited herein as "A.G.'s 1967 FOI Mem." (For the form of citation of legislative reports on the 1974 Amendments as used herein, see Appendix III-A, below.)

UNITED STATES DEPARTMENT OF JUSTICE

EDWARD H. LEVI, *Attorney General*

February 1975

FOREWORD

When the Freedom of Information Act was enacted in 1967, Attorney General Clark issued a memorandum on its application and interpretation for the guidance of all Federal departments and agencies. The 1974 Amendments to the Act represent a less fundamental change from existing practice than did the Act itself; yet in several respects they pose legal and administrative problems of great complexity. For that reason, and because of the high public importance of the program which the Amendments affect, I have thought it appropriate to meet their enactment with guidelines similar to the 1967 memorandum.

Despite the short time available, an extensive consultative process has been followed in the preparation of these guidelines, including the solicitation of advice from those concerned with Freedom of Information matters in many agencies of the Government, and from the professional staffs of the congressional committees responsible for the Amendments. The guidance does not purport to be exhaustive, and I invite further comments from the agencies, and from the public, which may assist in achieving effective administration of the Act.

The President has asked me, in issuing these guidelines, to emphasize on his behalf that it is not only the duty but the mission of every agency to make these Amendments effective in achieving the important purposes for which they were designed. The Department of Justice will continue to regard the encouragement of sound and effective implementation of the Freedom of Information Act as one of its most important responsibilities.



EDWARD H. LEVI,
Attorney General,
February 1975.

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PART I. AMENDMENTS PERTAINING TO THE SCOPE AND APPLICATION OF THE EXEMPTIONS

I-A. CHANGES IN EXEMPTION 1 (CLASSIFIED NATIONAL DEFENSE AND FOREIGN POLICY RECORDS) AND THE PROVISION CONCERNING *IN CAMERA* INSPECTIONS

The 1974 Amendments modify the national defense and foreign policy exemption of the Act, 5 U.S.C. 552(b) (1), and add an express provision concerning *in camera* judicial inspection of records sought to be withheld under any exemption, including exemption 1. The change in exemption 1 primarily affects the procedures and standards applicable to an agency's processing of requests for classified records. The provision concerning *in camera* judicial inspection affects the manner in which a court may treat classified records which an agency seeks to withhold.

AMENDMENT OF EXEMPTION 1

Exemption 1 of the 1966 Act authorized the withholding of information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." As amended, exemption 1 will permit the withholding of matters that are "(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." The previous language established a standard which essentially was met whenever a record was marked "Top Secret," "Secret," or "Confidential" pursuant to authority in an Executive order such as No. 10501 or its successor, No. 11652. The more detailed standard of the amended exemption limits its applicability to information which, as noted in the Conference Report, "is 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in such Executive order." (Conf. Rept. p. 12.)

Consequently, a Freedom of Information request which encompasses classified records will require, at both the initial and appellate stages, an administrative determination that the records warrant continued classification under the criteria of Executive Order 11652 or any subsequent Executive order governing the protection of national security information. This determination must be based upon

substantive classification review of the records, regardless of their age. The records should also be reviewed for conformity with the procedural requirements of the Order, and any irregularities should be corrected.

When it is not possible to make the necessary determination within the time limits established by 1974 Amendments, because of the volume, the complexity, or the inaccessibility of the records encompassed by the request, it will frequently be desirable to negotiate a time arrangement for processing the request mutually acceptable to the requester and the agency. (See Appendix III-B for discussion of time limits.) If in such circumstances a requester is unwilling to enter into an arrangement of this nature, an agency will be compelled to rely upon the original classification marking until classification review can be accomplished. Such review must proceed as rapidly as possible.

The primary substantive criteria presently incorporated by the amended exemption appear to be section 1, 4(C) and 5(A), (B), (C), (D), and (E) of Executive Order 11652. The remaining provisions of the Executive Order constitute the procedural criteria. The mandatory review provisions of the Order are not directly affected by the amendment to exemption 1 and should continue to be applied when a member of the public specifically requests classification review under those provisions. However, absent such specific request, the provisions of the Freedom of Information Act, rather than the mandatory review provisions of the Executive Order, will govern the processing of the request.

Under Executive Order 11652, information originally classified by an agency ordinarily can be declassified only by the same agency. There is nothing in the amendments or their legislative history which displays any intent that this disposition be reversed—resulting in a requirement that HEW, for example, make the decision as to whether a document classified by the State Department is “properly” classified. To the contrary, the legislative history recognizes the primacy in this area of those agencies “responsible” for national defense and foreign policy matters. (Conf. Rept. p. 12.) In order to reserve the decision to the classifying agency, it is necessary to consider documentary material contained in one agency’s files which has been classified by another agency as being an “agency record” of the latter rather than the former. This seems a permissible construction, since the phrase is nowhere defined and it is unrealistic to regard classified documentary material as “belonging” to one agency for the purposes here relevant when primary control over dissemination of its contents, even within the Government, rests with another agency. Thus, when records requested from one agency contain documentary material classified by another agency it would appear appropriate to refer those portions of the request to the originating agency for determination (as to all matters) under the Act. When such referral is made,

EXEMPTION ONE

the agency to which the request was directed retains its obligation to comply with the Act as to those portions of the request which have not been referred; and the agency receiving the referral has that obligation with respect to the remainder. For purposes of the time limits of the Act, it is consistent with the foregoing analysis to consider the date of receipt of referred portions of a request to be the date on which they are received by the agency to which they are referred (or the date on which they would have been so received, with the exercise of due diligence by the referring agency). Every effort should be made, however, to comply with the limits computed from the date of receipt by the referring agency; and referred requests should be accorded priority.

When requested records contain information classified by the agency receiving the request, but as to which one or more other agencies have a subject matter interest, the agency receiving the request must process and act upon it without referral. Any interagency consultation required by the Executive Order or otherwise desired must be completed within the time limits established by the Act.¹ Agencies consulted in such circumstances must provide guidance to the primary agency as rapidly as possible in view of the time constraints.

IN CAMERA INSPECTION WITH RESPECT TO EXEMPTION 1

The terms of the amended Act authorize a court to examine classified records *in camera* to determine the propriety of the withholding under the new substantive standards of the exemption. The Conference Report makes clear, however, that "*in camera* examination need not be automatic" and that before a 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." (Conf. Rept. p. 9.) The Conference Report also emphasizes congressional recognition that:

"[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects 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." (p. 12)

A recent Court of Appeals decision—not involving a Freedom of Information Act request, but taking account of the amendment of exemption 1 and the new provision for *in camera* inspection—comports with this legislative view. It affirms the need for judicial re-

¹ The Amendments do, however, provide that such consultations may constitute "unusual circumstances" for which the time limits may be extended for a maximum of 10 working days.

straint in the field of national security information and the appropriateness of judicial deference to classification decisions made and reviewed administratively in accordance with the provisions of Executive Order 11652, particularly decisions reflecting the expertise and independent judgment of the interagency review body established under that Order.²

In his veto of the 1974 Amendments, accompanied by suggestions for acceptable revisions, the President had expressed concern that the Amendments posed serious problems, including a problem of constitutional dimensions, to the extent that they authorized a court to overturn an Executive classification decision which had a reasonable basis. To avoid this difficulty, the President proposed:

“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.” Veto Message, 10 Weekly Compilation of Presidential Documents 1318 (1974).

The language of the bill was not changed, but Congressman Moorhead, House manager of the bill and a conferee for the House, after quoting this portion of the President's veto message, stated: “[I]n the procedural handling of such cases under the Freedom of Information Act, this is exactly the way the courts would conduct their proceedings.” (120 Cong. Rec. H 10865 (November 20, 1974).)

In *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), the Supreme Court acknowledged the power of Congress to alter the Court's holding of unreviewability of classification decisions. It expressly recognized, however, that this power was subject “to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.” 410 U.S. at 83. The Amendments, in other words, do not affect the responsibility of the President to protect certain Executive branch information to the extent that such responsibility is conferred upon him by the Constitution; and they do not enlarge the power of the courts insofar as that Presidential function is concerned.

I-B. CHANGES IN EXEMPTION 7 (INVESTIGATORY LAW ENFORCEMENT RECORDS)

INTRODUCTION

The 1974 Amendments to the Freedom of Information Act substantially altered the exemption concerning investigatory material com-

² *Alfred A. Knopf, Inc. v. Colby*, No. 74-1478 (4th Cir. Feb. 7, 1975).

EXEMPTION SEVEN

5

piled for law enforcement purposes. Prior to the amendments, the Act permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."³ The 1974 Amendments substitute the term "records" for "files," and prescribe that the withholding of such records be based upon one or more of six specified types of harm. The revised exemption now reads:

"(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;"

There follows a discussion of the phrase "investigatory records compiled for law enforcement purposes," the six bases for withholding investigatory material, and the implementation of the amended provision.

THE MEANING OF "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES"

A series of court decisions had construed the prior provision as exempting any material contained in a file properly designated as an investigatory file compiled for law enforcement purposes.⁴ The primary purpose of Senator Hart's amendment to revise exemption 7⁵ was to overturn the result of those decisions and to require consideration of the particular document and the need to withhold it. (See, e.g., 120 Cong. Rec. S 9329-30 (May 30, 1974).)

Because of the change from "files" to "records" and the provision concerning reasonably segregable portions of records (see Part I-C,

³ The exception clause, which was dropped by the 1974 Amendments, applied, for example, to requests under the Jencks Act, 18 U.S.C. 3500. While a subject of occasional confusion in the early days of the Act, this clause merely meant that the exemption was not intended to repeal or foreclose discovery rights of litigants such as those under the Jencks Act. See A.G.'s 1967 FOI Mem. at 38. It can be assumed that the reason the clause was dropped was merely to avoid encumbering the more complex amended exemption with a clause which was unnecessary; its omission thus does not change the law.

⁴ See, e.g., *Weisberg v. U.S. Department of Justice*, 489 F. 2d 1195 (D.C. Cir., 1973), cert. denied, 416 U.S. 993 (1974).

⁵ Neither the bill passed by the House nor the bill reported by the Senate Judiciary Committee contained any amendment of exemption 7. Senator Hart's amendment was adopted during the Senate debate, and it was revised during the House-Senate conference.

below), the particular documents must ordinarily be examined.⁶ The threshold questions are whether the requested material is "investigatory" and whether it was "compiled for law enforcement purposes." These terms were not defined in the original Act and are not defined in the Act as amended.

"Investigatory records" are those which reflect or result from investigative efforts. The latter may include not merely activities in which agencies take the initiative, but also the receipt of complaints or other communications indicating possible violations of the law, where such receipt is part of an overall program to prevent, detect or counteract such violations, or leads to such an effort in the particular case.

Under the original Act, "law enforcement" was construed administratively and by the courts as applying to the enforcement of law not only through criminal prosecutions, but also through civil and regulatory proceedings, so that investigations by agencies with no criminal law enforcement responsibilities were included. The legislative history of the 1974 Amendments indicates that no change in this basic concept was contemplated. (See, e.g., Conf. Rept. p. 13.)

"Law enforcement" includes not merely the detection and punishment of law violation, but also its prevention. Thus, lawful national security intelligence investigations are covered by the exemption,⁷ as are background security investigations and personnel investigations of applicants for Government jobs under Executive Order 10450. (Cf. Conf. Rept. p. 13.) On the other hand, not every type of governmental information-gathering qualifies. Records of more general information-gathering activities (e.g., reporting forms submitted by a regulated industry or by recipients of Federal grants) developed in order to monitor, generally or in particular cases, the effectiveness of existing programs and to determine whether changes may be appropriate, should not be considered "compiled for law enforcement purposes" except where the purpose for which the records are held and used by the agency becomes substantially violation-oriented, i.e., becomes re-focused on preventing, discovering or applying sanctions against noncompliance with federal statutes or regulations. Records generated for such purposes as determining the need for new regulations or preparing statistical reports are not "for law enforcement purposes."

THE SIX BASES FOR INVOKING EXEMPTION 7

Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is

⁶ It might be possible to make the necessary exemption 7 determination without such individual examination when, for example, an entire file is known to contain standardized forms all portions of which meet the exemption requirements. Such a situation is obviously likely to be rare, at least with respect to presently existing files.

⁷ See 5 U.S.C. 552(b) (7) (D).

whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. If not, the material must be released despite its character as an investigatory record compiled for law enforcement purposes, and (generally speaking) even when the requester is currently involved in civil or criminal proceedings with the Government. (Of course exemptions other than exemption 7 may be applicable, or restrictions upon disclosure other than those expressly set forth in the Freedom of Information Act—for example, the prohibition against disclosing the transcript of grand jury proceedings, Rule 6 of the Federal Rules of Criminal Procedure.)

The six bases for nondisclosure set forth in 5 U.S.C. 552(b) (7) (A)–(F) may be explained as follows:

(A) INTERFERENCE WITH ENFORCEMENT

Under clause 552(b) (7) (A), nondisclosure is justified to the extent that production of the records would “interfere with enforcement proceedings.” This clause is derived, without change, from Senator Hart’s amendment.

The term “enforcement proceedings” is not defined, but it seems clear that its scope corresponds generally to that of “law enforcement purposes,” covering criminal, civil and administrative proceedings. Moreover, in explaining this clause of his amendment, Senator Hart made clear he considered proceedings to be “interfered with” when investigations preliminary to them are interfered with. He used the term “enforcement procedures” as synonymous with “enforcement proceedings” to describe the over-all coverage of the clause. (120 Cong. Rec. S 9330 (May 30, 1974).) Thus, records of a pending investigation of an applicant for a Government job would be withholdable under clause (A) to the extent that their production would interfere with the investigation.

Normally, clause (A) will apply only to investigatory records relating to law enforcement efforts which are still active or in prospect—sometimes administratively characterized as records in an “open” investigatory file. But this will not always be the case. There may be situations (e.g., a large conspiracy) where, because of the close relationship between the subject of a closed file and the subject of an open file, release of material from the former would interfere with the active proceeding. Also, material within a closed file of one agency may bear directly upon active proceedings of another agency, Federal or State.

The meaning of “interfere” depends upon the particular facts. (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) One example of interference when litigation is pending or in prospect is harm to the

Government's case through the premature release of information not possessed by known or potential adverse parties. *Ibid.* Regarding investigations, interference would be created by a release which might alert the subject to the existence of the investigation, or which would "in any other way" threaten the ability to conduct the investigation. (120 Cong. Rec. S 9337 (May 30, 1974) (letter of Senator Hart).) The legislative history indicates that, while the 7th exemption as it previously stood was to be narrowed by changing "files" to "records" and specifying six bases for asserting the exemption, these new bases themselves were to be construed in a flexible manner. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This applies to clause (A) and may properly be considered in determining the meaning of "interfere."

(B) DEPRIVATION OF RIGHT TO FAIR TRIAL OR ADJUDICATION

Clause (B) permits withholding to the extent that production would "deprive a person of a right to a fair trial or an impartial adjudication." This provision also came, without change, from Senator Hart's amendment; no specific explanation of it is contained in the legislative history.

A fundamental difference between clause (A) and clause (B) is that, while the former is intended primarily to protect governmental functions, clause (B) protects the rights of private persons. "Person" is defined in the Administrative Procedure Act (APA), of which the Freedom of Information Act is a part, to include corporations and other organizations as well as individuals. (5 U.S.C. 551(2).) The term "trial" is undefined, but would normally be thought to apply to judicial proceedings, both civil and criminal, in Federal and State courts. "Adjudication" is defined in the APA to mean the procedure by which Federal agencies formulate decisions in all matters except rulemaking (including ratemaking). (5 U.S.C. 551(7); see also 5 U.S.C. 551(4), (6), (9), and (12).) It is unlikely, however, that this definition was intended to apply here, since there is no apparent reason why Federal ratemaking or, for that matter, the most important state administrative proceedings should have been thought undeserving of any protection in contrast to informal and relatively inconsequential determinations that may qualify as Federal "adjudication" technically speaking (e.g., approval or denial of an application for a small grant for a cultural demonstration trip.) It will be seen elsewhere as well that the drafting of these Amendments apparently does not presume the APA definition of "adjudication". (See Part II-B, pp. 19-20 below.) It would seem best to interpret the word in this clause to refer to structured, relatively formal, quasi-judicial administrative determinations in both State and Federal agencies, in which

the decision is rendered upon a consideration of statutorily or administratively defined standards.

Clause (B) would typically be applicable when requested material would cause prejudicial publicity in advance of a criminal trial, or a civil case tried to a jury. The provision is obviously aimed at more than just inflammation of jurors, however, since juries do not sit in administrative proceedings. In some circumstances, the release of damaging and unevaluated information may threaten to distort administrative judgment in pending cases, or release may confer an unfair advantage upon one party to an adversary proceeding.

(C) INVASION OF PRIVACY

Clause (C) exempts law enforcement investigatory records to the extent that their production would "constitute an unwarranted invasion of personal privacy." The comparable provision in Senator Hart's amendment referred to "clearly unwarranted" invasions, but "clearly" was deleted by the Conference Committee.

Except for the omission of "clearly," the language of clause (C) is the same as that contained in the original Act for the sixth exemption, the exemption for personnel, medical and similar files. Thus, in determining the meaning of clause (C), it is appropriate to consider the body of court decisions regarding the latter—bearing in mind, of course, that the deletion of "clearly" renders the Government's burden somewhat lighter under the new provisions. (See, e.g., 120 Cong. Rec. H 10003 (Oct. 7, 1974) (letter of chairman of conferees).) In applying clause (C), it will also be necessary to take account of the Privacy Act of 1974, Public Law 93-579, which takes effect in September 1975.

The phrase "personal privacy" pertains to the privacy interests of individuals. Unlike clause (B), clause (C) does not seem applicable to corporations or other entities. The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any [other] person mentioned in the requested file." (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) In appropriate situations, clause (C) also protects relatives or descendants of such persons.

While neither the legislative history nor the terms of the Act and the 1974 Amendments comprehensively specify what information about an individual may be deemed to involve a privacy interest, cases under the sixth exemption have recognized, for example, that a person's home address can qualify. It is thus clear that the privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which

he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family.

When the facts indicate an invasion of privacy under clause (C), but there is substantial uncertainty whether such invasion is "unwarranted," a balancing process may be in order, in which the agency would consider whether the individual's rights are outweighed by the public's interest in having the material available. (Cf. *Getman v. NLRB*, 450 F. 2d 670 (D.C. Cir., 1971), and *Wine Hobby U.S.A., Inc. v. United States Bureau of Alcohol, Tobacco and Firearms*, 502 F. 2d 133 (3d Cir., 1974) (sixth exemption cases).)

The Conference Report states (p. 13) that "disclosure of information about a person to that person does not constitute an invasion of his privacy." It must be noted, however, that records concerning one individual may contain information affecting the privacy interests of others. Of course, when information otherwise exempt under clause (C) is sought by a requester claiming to be the subject of the information, the agency may require appropriate verification of identity.

(D) DISCLOSURE OF CONFIDENTIAL SOURCES OR INFORMATION PROVIDED BY SUCH SOURCES

Clause (D), which was substantially broadened by the Conference Committee, exempts material the production of which would:

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.

The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatory record, civil or criminal. (Conf. Rept. p. 13.) The term "confidential source" refers not only to paid informants but to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Ibid.* In most circumstances, it would be proper to withhold the name, address and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown.

The second part of clause (D) deals with information provided by a confidential source. Generally speaking, with respect to civil

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matters, such information may not be treated as exempt on the basis of clause (D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations conducted by a "criminal law enforcement authority" and lawful national security intelligence investigations conducted by any agency, any confidential information furnished only by a confidential source is, by that fact alone, exempt. (See, e.g., 120 Cong. Rec. S19812 (Nov. 21, 1974) (Senator Hart).)

According to the Conference Report (p. 13), "criminal law enforcement authority" is to be narrowly construed and includes the FBI and "similar investigative authorities." It would appear, then, that "criminal law enforcement authority" is limited to agencies—or agency components—whose primary function is the prevention or investigation of violations of criminal statutes (including the Uniform Code of Military Justice), or the apprehension of alleged criminals. There may be situations in which a criminal law enforcement authority, e.g., the FBI or a State authority obtains confidential information from a confidential source in the course of a criminal investigation and then provides a copy to another Federal agency. In the event that a Freedom of Information Act request is directed to the latter agency, non-disclosure based on the second part of clause (D) is proper, regardless of whether the requested agency is itself a "criminal law enforcement authority." What determines the issue is the character of the agency that "compiled" the record.

With respect to that portion of the second part of clause (D) dealing with national security intelligence investigations, the Conference Report states (p. 13) that it applies not only to such investigations conducted by criminal law enforcement authorities but to those conducted by other agencies as well. According to the report, "national security" is to be strictly construed and refers to "military security, national defense, or foreign policy"; and "intelligence" is intended to apply to "positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by [authorized] governmental units * * *." *Ibid.*

A further qualification contained in this second part of clause (D) is that the confidential information must have been furnished "only by the confidential source." In administering the Act, it is proper to consider this requirement as having been met if, after reasonable review of the records, there is no reason to believe that identical information was received from another source.

(E) DISCLOSURE OF TECHNIQUES AND PROCEDURES

Clause (E), derived without change from Senator Hart's amendment, exempts records to the extent that release would "disclose investigative techniques and procedures."

The legislative history indicates that this exemption does not apply to routine techniques or procedures which are generally known outside the Government. (See, e.g., Conf. Rept. p. 12.) For example, the exemption does not protect the disclosure of such procedures as ballistics tests and fingerprinting, though it would shield new developments or refinements in those procedures. (Of course, the *results* of such generally known procedures may be exempt on another ground.) Administrative staff manuals and instructions, covered by 5 U.S.C. 552(a) (2), are not generally protected by this clause (Conf. Rept. p. 13), although the exempt status of material otherwise covered by clause (E) is not affected by its inclusion in such a manual or instruction.

(F) ENDANGERING LAW ENFORCEMENT PERSONNEL

Clause (F), which was added by the Conference Committee, exempts material whose disclosure would "endanger the life or physical safety of law enforcement personnel." (See, e.g., 120 Cong. Rec. H 10003-04 (Oct. 7, 1974) (letter of chairmen of conferees).) The legislative record contains little discussion of this provision.

Clause (F) might apply, for example, to information which would reveal the identity of undercover agents, State or Federal, working on such matters as narcotics, organized crime, terrorism, or espionage. It is unclear whether the phrase "law enforcement personnel" means that the endangered individual must be technically an "employee" of a law enforcement organization; arguably it does not. It is clear, however, that the language of clause (F) cannot be stretched to protect the safety of the families of law enforcement personnel or the safety of other persons. Nonetheless, it is safe to proceed on the assumption that Congress did not intend to require the release of any investigatory records which would pose a threat to the life or physical safety of any person; perhaps clause (A) (interference with law enforcement) would be liberally construed to cover a request which involves such a threat.

IMPLEMENTATION OF EXEMPTION 7

The prior discussion deals with the grounds for nondisclosure that are specified in amended section 552(b) (7). Application of these grounds by agency personnel within the available time limits will often present great difficulty, especially when the request pertains to a large file. One means by which the agency might seek to assist its personnel—and the public—is the development of guidelines regarding the manner of applying the exemption 7 clauses to standard categories of investigatory records in its files.

The general policy underlying the seventh exemption is maximum public access to requested records, consistent with the legitimate in-

terests of law enforcement agencies and affected persons. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) A central issue which must be faced in every case is the type of showing needed to establish that disclosure "would" lead to one of the consequences enumerated in clauses (A) through (F). The President and some opponents of the bill voiced concern that "would" connoted a degree of certainty which in most cases it would be impossible to establish. (See Weekly Compilation of Presidential Documents 1318 (1974); 120 Cong. Rec. S 19814 (Nov. 21, 1974) (Senator Hruska); 120 Cong. Rec. S 19818 (Nov. 21, 1974) (Senator Thurmond).) The bill's proponents, including the sponsor of the amendment, did not accept the interpretation that would result in such a strict standard. (See, e.g., 120 Cong. Rec. H 10865 (Nov. 20, 1974) (Congressman Moorhead); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This legislative history suggests that denial can be based upon a reasonable possibility, in view of the circumstances, that one of the six enumerated consequences would result from disclosure.

A practical problem which can be predicted is that agency personnel will sometimes be uncertain whether they have sufficient information to make the necessary determination as to the likelihood of one of the six consequences justifying nondisclosure. This raises the question whether it is necessary to go beyond the records themselves and in effect to conduct an independent investigation to determine, for example, what privacy or confidentiality interests are involved. This question cannot be answered in the abstract, for its resolution will depend substantially upon the particular circumstances. Since the six clauses in the exemption are to be interpreted in a flexible manner, see p. 8 above, it should usually be sufficient to rely upon conclusions which—taking due account of such factors as the age of the records and the character of law violation involved—can reasonably be drawn from the records themselves.

It is clear that implementation of the amended exemption 7 will frequently involve a substantial administrative burden. It was not, however, the intent or the expectation of the Congress that this burden would be excessive. (See, e.g., 120 Cong. Rec. S 19808 (Nov. 21, 1974) (Senator Kennedy); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) If, therefore, a law enforcement agency (the category of agencies principally affected) regularly finds that its application of these provisions involves an effort so substantial as to interfere with its necessary law enforcement functions, it should carefully re-examine the manner in which it is interpreting or applying them. Needless to say, burden is no excuse for intentionally disregarding or slighting the requirements of the law, and, where necessary, additional resources should be sought or provided to achieve full compliance.

I-C. THE PROVISION ON THE AVAILABILITY OF "REASONABLY SEGREGABLE" PORTIONS OF A RECORD CONTAINING EXEMPT MATTER

The 1974 Amendments added at the end of section 552(b) 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 [i.e., exempt under one of the nine exemptions listed in subsection (b)]."

This new sentence should be read in conjunction with the new *in camera* review provision of section 552(a)(4)(B) which states:

"In such a case [i.e., where a requester under the Act sues to enjoin an agency from withholding agency records] 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." (Emphasis supplied.)

The legislative history of these two related provisions indicates that Congress intended to codify a deletion principle, already applied in numerous instances by courts and agencies, so as to prevent the withholding of entire records or files merely because portions of them are exempt, and to require the release of nonexempt portions. (H. Rept. No. 92-1419 on Administration of the Freedom of Information Act, pp. 55, 72 (92d Cong., 2d Sess. 1972); H. Rept. p. 7; S. Rept. pp. 17, 31, 32; 120 Cong. Rec. S. 9313 (May 30, 1974) (Senator Kennedy); and see, e.g., *Bristol Myers Co. v. FTC*, 424 F. 2d 935, 939 (D.C. Cir. 1970); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970).)

In order to apply the concept of "reasonably segregable,"⁸ agency personnel should begin by identifying for deletion all portions of the requested document which are to be withheld in order to protect the interest covered by the exemption or exemptions involved. The remaining material (assuming it constitutes information that is responsive to the request) must be released if it is at all intelligible—unintelligibility indicating, of course, that it is not "reasonably" segregable from the balance. There is language in the legislative history of the "reasonably segregable" provision which indicates that even unintelligible

⁸ The concept of "reasonably segregable" should not be confused with the concept of "inextricably intertwined", developed chiefly in connection with the 5th exemption. The latter concept is applied in determining what matter is exempt; the former is applied to compel the release of certain matter already determined to be nonexempt. See, e.g., *Montrose Chemical Corp. v. Train*, 491 F. 2d 63 (D.C. Cir. 1974). Thus, "inextricably intertwined" material is *exempt* material, whereas it is only *nonexempt* material that may or may not be "reasonably segregable."

matter remaining after the deletion process must be released. (See S. Rept. pp. 31-32.) It does not seem that this sentence, contained in a report on the bill in its earlier stages, should outweigh the plain language of the provision. Conjunctions, prepositions, articles and adverbs are almost always technically "segregable" without disclosing material which must be protected. Unless the qualification "reasonably" means that such unintelligible excerpts need not be provided, it seems meaningless. Of course, doubts about the intelligibility or responsiveness of remaining nonexempt material should be resolved in favor of release to the requester.

PART II. AMENDMENTS PERTAINING TO ADMINISTRATION AND OTHER MATTERS

Note. Part II chiefly discusses subjects referred to but not explored in the Attorney General's Dec. 11, 1974 "Preliminary Guidance" Memorandum on the 1974 Amendments. In general, subjects which were there discussed in detail are not further discussed here. The Dec. 11th Memorandum is attached hereto as Appendix III-B.

II-A. FEES—WAIVER OR REDUCTION BY AGENCIES

The amended Act provides, at the end of the subparagraph requiring an agency to promulgate a uniform schedule of search and duplication fees (5 U.S.C. 552(a)(4)(A)), that:

"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."

Where an agency perceives a substantial question whether release of requested information can be considered as "primarily benefiting the general public," it should consider exercising its discretion under this provision. What is required is the application of good faith in determining whether public payment should be made for essentially public benefits. In its consideration of the matter, the agency need not employ any particular formalized procedure, and may draw upon both special expertise and general knowledge concerning such matters as the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, the likelihood that tangible public good will be realized, and other factors which may be pertinent to the appropriateness of public payment. Deliberate, irrational discrimination between one case and the next is of course improper; but neither is it necessary to develop a system of rigid guidelines or inflexible case precedents.

There is no doubt that waiver or reduction of fees is discretionary. The statute provides that it "shall" be done only "*where the agency determines that waiver or reduction * * * is in the public interest because furnishing the information can be considered as primarily benefiting the general public.*" (Emphasis supplied.) The most authoritative expression of legislative history on the point, the Conference Report, refers to the provision as establishing a "discretionary public-interest waiver authority." (Conf. Rept. p. 8.)

II-B. PUBLICATION OF INDEXES OF "(a)(2)" MATERIALS

THE PUBLICATION REQUIREMENT

Prior to the 1974 Amendments, subsection (a)(2) of the Act required each agency to "make available for public inspection and copying" the agency's so-called (a)(2) materials, that is, certain final opinions and orders, certain statements of policy and interpretation, and certain administrative staff manuals and instructions to staff. Subsection (a)(2) also required each agency to "maintain and make available for public inspection and copying a current index providing identifying information for the public" as to such of the agency's (a)(2) materials as were issued, adopted, or promulgated after July 4, 1967. The 1974 Amendments add to this scheme the following:

"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."

The requirement to "publish" merely means to reproduce a *quantity* of the indexes. There are several ways in which such reproduction can be achieved. The Conference Report states that publication by commercial firms will suffice, so long as the indexes thus produced "are made readily available for public use." (Conf. Rept. p. 7.⁹) The House Report indicates that an index in "brochure form available for distribution would be an appropriate way to meet this [publication] requirement." (H. Rept. p. 5.) The Senate Report states that "photocopy reproduction" of indexes will constitute adequate publication if there is insufficient interest in an agency's indexes to justify printing. (S. Rept. p. 8.¹⁰)

⁹ The Senate Report cautions that where agencies rely on such a commercial service, they will be expected "to maintain the commercial service at the agency offices or reading rooms." (S. Rept. p. 9.)

¹⁰ The Senate Report continues: "The cost, if any, of such photocopied indexes should, however, reflect not the actual cost of reproduction but the equivalent per-item cost were the indexes printed in quantity." (S. Rept. p. 8.)

In addition to publication, the new Amendments require agencies to "distribute (by sale or otherwise) copies of each index or supplements thereto." There is no specific indication in the legislative history as to what the word "distribute" means, but since it is followed by the phrase "(by sale or otherwise)," it evidently does not contemplate an active delivery program, but rather the publicized availability of copies on demand. The necessary publicizing of availability can be provided by the Office of the Federal Register, which currently plans to print a list of published indexes at quarterly intervals.

The amendment dispenses with the publication requirement where the agency publishes a finding in the Federal Register that publication of the index would be "unnecessary and impracticable." Publication is "unnecessary" when there is insufficient interest in an agency's indexes to justify mass routine publication. (S. Rept. p. 8.) "Impracticable" is evidently the same as "impractical." (S. Rept. p. 8.) This condition might be met, for example, if the materials to be indexed are so rapidly increasing that any publication with reasonable frequency would still be substantially incomplete. Although these two requirements ("unnecessary and impracticable") are cumulative rather than alternative (see S. Rept. p. 8), they obviously are both highly relative concepts and must be considered in connection with one another. "Practicability" cannot be appraised in the abstract; it reflects a relationship between the actual effort involved and the utility of the product achieved—one important element of that utility being the *need* for the product.

It should be noted that the "unnecessary and impracticable" provision is to be applied on an index-by-index basis, so that an agency may fail to publish an index of one category of its (a) (2) documents while publishing indexes of all of the remainder. When an agency makes a determination that this provision is applicable, an order to that effect must be published in the Federal Register. In such cases, despite the absence of publication, the agency must of course continue to maintain the index, make it available for public inspection, and "provide copies * * * on request at a cost not to exceed the direct cost of duplication."¹¹

THE INDEXING REQUIREMENT

The indexing requirement, which immediately precedes the publication requirement, reads as follows:

"Each agency shall 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."

¹¹ But see footnote 10 above.

The provision is virtually identical to the public index requirement found in subsection (a) (2) of the Freedom of Information Act as passed in 1966. Since, however, some uncertainty had arisen over what constitutes an adequate (a) (2) index under those provisions, the subject merits consideration here.

While the language of the Act does not define or describe an acceptable index, its intent may reasonably be inferred from its characterization of the contemplated index as one "providing identifying information for the public." The only articulated test for an index contained in the legislative history of the 1974 Amendments is that it be "in a usable and concise form". (H. Rept. p. 5.) The 1965 Senate Report stated that the index requirement was designed to "afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." (S. Rept. 813, 89th Cong., 1st Sess. p. 7.) On the other hand, the 1964 Senate Report set forth as a criterion "that any competent practitioner who exercises diligence may familiarize himself with materials through use of the index." (S. Rept. 1219, 88th Cong., 2d Sess. p. 6.) This suggests that an agency need not convert an index relating to specialized (a) (2) material into such a form that it can be used by the average layman without staff assistance. A reasonable reading of the Act and its history would indicate that the index requirement will be met by any classification system which will substantially enable a member of the public, with specialized assistance where the nature of the subject matter so requires, to isolate desired materials from the mass of agency documents covered by the index.

Both the 1965 Senate and 1966 House reports (S. Rept. 813, 89th Cong., 1st Sess. p. 7; H. Rept. 1497, 89th Cong., 2d Sess. p. 8) cite the sophisticated index-digest system of the Interstate Commerce Commission as a system which satisfies the index requirement. The Senate Report on the 1974 Amendments refers to the equally detailed index of the Federal Communications Commission as an index "already in compliance with this requirement." (S. Rept. p. 8.) Obviously, however, the elaborateness of the index must depend upon the volume and complexity of the materials involved. Any systematic device which helps people identify documents, whether it be a multivolume index-digest or a simple tabulation of subject headings (and of the materials contained under each heading) should fulfill the index requirement; it may be organized by subject headings, by a numbering system, by names of parties, or by any other useful classification device.

THE NATURE OF THE MATERIALS TO WHICH THE INDEXING AND PUBLICATION REQUIREMENTS APPLY

The indexing and publication requirements under discussion apply to materials described in subsection (a) (2) of the Act (so-called "(a) (2) materials") which are as follows:

"(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."

The primary purpose of subsection (a) (2) was to compel disclosure of what has been called "secret law", or as the 1966 House Report put it, agency materials which have "the force and effect of law in most cases." (H. Rept. 1497, 89th Cong., 2d Sess. p. 7.) Generally speaking, (a) (2) materials consist of those documents which contain what the agency has treated as authoritative indications of its position on legal or policy questions. It should be noted that some recent court decisions point towards a considerable broadening of the class of documents which meet these criteria. (See, e.g., *Tax Analysts and Advocates v. I.R.S.*, 362 F. Supp. 1298 (D.D.C. 1973), aff'd without discussion of the (a) (2) issues, No. 73-1978 (D.C. Cir., Aug. 19, 1974).)

An agency is not required to make available for public inspection and copying (a) (2) materials which fall within one of the exemptions found in subsection (b); by its terms that subsection applies to the entire "section", i.e., the entire Freedom of Information Act. For the same reason, agencies are not required to maintain or to publish an index of exempt (a) (2) materials. However, the legislative history of the 1974 Amendments indicates that agencies cannot fail to disclose or index (a) (2) documents merely because some *portions* of the documents may be exempt. (S. Rept. p. 32.) Rather than withholding such documents, agencies must delete the exempt portions and then index and make available for public inspection any reasonably segregable remainder.

The balance of this discussion deals with the three subcategories of (a) (2) materials.

(a)(2)(A) final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases

Both the adjective "final" in this provision, and the qualifying phrase "made in the adjudication of cases" should be read to apply to both "opinions" and "orders." The terms "order" and "adjudica-

tion" are defined in § 551(6) and (7) of the Administrative Procedure Act (APA), of which the Freedom of Information Act is a part. If these definitions were unqualifiedly applied to the present provision, they could be read as including within (a) (2) (A) materials many items which could not reasonably have been intended (for example, Park Police traffic tickets, and the millions of ministerial IRS grants of refunds of withheld taxes each year), and there would have to be excluded important matters which must have been meant to be covered (for example, opinions and decisions issued in ratemaking proceedings). These § 551 definitions were, of course, chiefly designed to support the main goals of the original APA, particularly to establish the applicability of certain procedural requirements to certain types of proceedings (5 U.S.C. 554), rather than to delineate with precision the distinction between (a) (2) and (a) (3) records, a distinction which did not exist when the definitions were enacted. Thus, fidelity to the obvious intent of both the original and subsequent draftsmen can be achieved by regarding the phrase "adjudication of cases" to be something different from the word "adjudication" elsewhere within the APA. The latter term, defined in § 551(7), is linked by § 551(6) with "matters" rather than "cases." A similar analysis applies to the word "orders" in (a) (2) (A), when modified by the phrase "made in the adjudication of cases." There is thus something less than a perfect equation between (a) (2) (A) and the earlier definitions. Hence, a permissible construction of the provision, and one in accord with its history and purpose, would read it as applying to structured, relatively formal proceedings, in which the agency is functioning in a quasi-judicial capacity, and in which its decision is rendered upon a consideration of statutorily or administratively defined standards.

The (a) (2) (A) requirement of finality is met when the opinion or order is "final" as to the agency, that is, when the agency makes a conclusive determination of a matter. The fact that the agency's determination may be subject to review by another body does not destroy this characteristic.

The courts have indicated that advice and legal conclusions of agency legal staffs are not "orders" or "opinions" within the Freedom of Information Act unless they are incorporated into the final order and administrative decision of the agency or are specifically referred to as the sole basis for its decision. (See *International Paper v. F.P.C.*, 438 F. 2d 1349, 1358-9 (2d Cir. 1971); cf. *American Mail Line Ltd. v. Gulick*, 411 F. 2d 696 (D.C. Cir. 1969).)

(a)(2)(B) statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register

“Statements of policy” are statements which articulate a settled course of action which will be pursued in a class of matters entrusted to agency discretion. “Interpretations” are explanations or clarifying applications of laws, regulations, or statements of policy. Numerous expressions by agency personnel may fall within the breadth of these terms, but only expressions which are “adopted by the agency” fall within (a) (2) (B). This qualification can only be met by statements and interpretations issued by the head of the agency, or by a responsible official who has been empowered by the agency to make authoritative issuance. There are innumerable instances in which agency personnel at various levels are authorized to respond to citizen inquiries and requests for assistance, or to perform ministerial functions which require statements of pre-existing policy or interpretations. But such authority does not necessarily imply authority to adopt policy or interpretations on behalf of the agency—and the issue of adoption for purposes of (a) (2) (B) is not the same as the issue of whether the agency may be bound with respect to a particular individual by reason of employee information or advice.

Whether legal memoranda containing interpretations and recommendations of agency counsel fall within (a) (2) (B) depends primarily on whether they have been adopted by the agency. Such memoranda are usually advisory unless some positive adoptive action is taken. Moreover, internal legal advice, opinions, and recommendations—as long as they occupy only that status and have not been “adopted”—as ordinarily intra-agency or inter-agency memoranda within exemption 5.

Although the 1966 House Report stated that agencies must make available under (a) (2) (B) only those materials cited or relied upon by the agency as precedent (H. Rept. 1497, 89th Cong., 2d Sess. p. 7), there is judicial authority indicating that whether the agency regards the material as precedential or non-precedential may not be controlling. (See, e.g. *Tax Analysts and Advocates v. I.R.S.*, 362 F. Supp. 1298, 1303 (D.D.C. 1973), aff'd on other issues, No. 73-1978 (D.C. Cir., Aug. 19, 1974).)

(a)(2)(C) administrative staff manuals and instructions to staff that affect a member of the public.

In this provision the adjective “administrative” and the clause “that affect a member of the public” apply to both “manuals” and “instructions”. Thus, (a) (2) (C) generally does not include materials which deal with proprietary agency matters. For a brief discussion of the clause “that affect a member of the public” see A.G.’s 1967 FOI Mem. at p. 17.

The 1965 Senate Report explained that the word “administrative” was added to the language of subsection (a) (2) (C) to *limit* the avail-

ability of staff manuals and agency instructions "to those which pertain to administrative matters rather than to law enforcement matters." (S. Rept. 813, 89th Cong., 1st Sess. p. 2.) The purpose of this limitation was of course to prevent disclosure of information or techniques which if known in advance would render effective Government action more difficult. Accordingly, despite the legislative history as quoted above, the limitation has been held not to protect all law enforcement material but only that whose disclosure would significantly impede detection or prosecution of law violators. (See, e.g., *Hawkes v. I.R.S.*, 467 F.2d 787 (6th Cir. 1972).) Interpretation of the legislative history in this fashion should permit the word "administrative" to exclude manuals and instructions which do not deal with "law enforcement" in the strict sense of being violation-related; but which deal with the performance of functions that would automatically be rendered ineffective by general awareness of agency techniques or procedures. An example would be staff instructions pertaining to negotiating techniques in concluding procurement contracts or international agreements. The courts have understandably been wary of extension of this limitation. In order to preserve the possibility of its use in non-violation-related situations, agencies must scrupulously avoid invoking it except in situations such as those described, when the very function to be performed presumes secrecy as to the manner of its performance.

II-C. REQUIREMENT THAT A REQUEST "REASONABLY DESCRIBE" THE RECORDS TO WHICH ACCESS IS SOUGHT

Prior to the 1974 Amendments, subsection (a)(3) of the Act required each agency to make documents available "on request for identifiable records made in accordance with published rules." The 1974 Amendments revised this to require that the request be one which "reasonably describes such records," rather than one which is for "identifiable records."

As the legislative history points out, this change serves basically to clarify rather than alter the law as it has been understood by several courts and many agencies. See S. Rept. p. 10. The House Report describes the amendment as

"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." H. Rept. pp. 5-6.

The last point deserves some emphasis: It is not enough that the request provide enough data to locate the record; it must enable it to be located in a manner which does not involve an unreasonable amount of effort. This point also finds support in the Senate Report, which cites with approval the decision in *Irons v. Schuyler* giving judicial expression to the same principle.¹²

When an agency receives a request which does not "reasonably describe" the records sought, it should notify the requester of the defect. In addition it is recommended that, when practicable, the agency offer assistance in reformulation of the request to comply with the Act.

II-D. DISCIPLINING OF PERSONNEL RESPONSIBLE FOR ARBITRARY AND CAPRICIOUS WITHHOLDING

Among the changes in the Act effected by the 1974 Amendments is the addition of the following provision concerning disciplining of agency personnel, 5 U.S.C. 552(a) (4) (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."

Congress did not expect this provision to be invoked often, but only "in unusual circumstances." (120 Cong. Rec. H 10002 (Oct. 7, 1974) (Congressman Moorhead); see also 120 Cong. Rec. H 10006 (Oct. 7, 1974) (Congressman Erlenborn).) The provision originated in the Senate bill, under which the court was required to take action if it found that the employee's withholding of records was "without reasonable basis in law." The Conference Committee changed this to "arbitrarily and capriciously." (See Conf. Rept. p. 10.) It is thus

¹² 465 F. 2d 608 (D.C. Cir. 1972). The *Irons* case involved a request for "all unpublished manuscript decisions of the Patent Office." That description alone was enough to enable the documents to be identified—but only by searching through well over 3,500,000 files built up over more than a century. The court held that the request was not one for identifiable records within the meaning of the Act.

clear that, to justify commencement of Civil Service Commission proceedings, much more is required than a judicial determination that an agency has erred in its interpretation of the Act.

The procedures to be followed by the Civil Service Commission were discussed by Congressman Moorhead (120 Cong. Rec. H 10001-02). He stated that they might include a hearing, and would be in accord "with regular civil service procedures." The employee's rights would include "the right to appeal any adverse finding by the Commission." The statute directs the agency in question to "take the corrective action that the Commission recommends," and without further specification leaves the choice of such corrective action to the discretion of the Commission.

The court's findings under § 552(a)(4)(F) relate to "the officer or employee who was primarily responsible for the withholding." Within an agency, responsibility for withholding is coextensive with authority to deny. The agency should therefore fix such authority with absolute clarity in its regulations, both with respect to initial denials and appeals. (On this point, see pp. 13-15 of the December 11, 1974 Preliminary Guidance Memorandum, Appendix III-B, below.)

In addition to the special problems relating to the case of a request for records classified by another agency (see I-A. above), occasions will arise in which the protection of information contained in a record held by one agency is of primary concern to another agency. The 1974 Amendments explicitly recognize the existence of such situations by making special provision for agency consultation in such circumstances. (See 5 U.S.C. 552(a)(6)(B)(iii).) When a denial is made at the request of another agency, and out of regard for its primary interest or expertise, the person in the other agency who made the request to deny may be a "person responsible for the denial." (5 U.S.C. 552(a)(6)(C).) However, such a result might be proper only if he is advised by the withholding agency, before his final recommendation to deny is accepted, that he will be so designated in the denial letter, and is in fact so designated.

II-E. REDEFINITION OF "AGENCY"

Prior to the 1974 Amendments, the Freedom of Information Act contained no special definition of "agency", but relied upon the definition in 5 U.S.C. 551, applicable to the Administrative Procedure Act generally. Subsection (e) of the Freedom of Information Act as now amended provides:

"(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.”

There were certain differences between the definitions of “agency” in the House and Senate bills. The Conference Report (pp. 14–15) explains that the conferees followed the House bill, and throws considerable light on the meaning of “agency” in the amended Act, as follows:

“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.”

It seems clear from the legislative history that the new provision of the Act defining “agency” is intended chiefly to clarify and expand the class of organizational entities to be deemed “agencies” so that their records will be subject to the Act. In fact, however, the issue of what is an “agency” will be confronted only rarely in the context of whether particular records are covered, but will arise more often in determining whether the various requirements of the Act applicable to concededly covered “agency” records must be complied with by a lesser or greater organizational unit within the particular Governmental entity. (See, e.g., subsections (a) (1), (a) (2), (a) (3), (a) (4) (A), (a) (4) (B), (a) (4) (F), (a) (5), (a) (6) (A), (a) (6) (C), (b) (2), (b) (5), (b) (7) (D), and (d).) The amendment apparently did not intend to affect this aspect of the matter¹³ and it is left in the same uncertainty that existed under the previous law. 5 U.S.C. 551 specifies that an authority is an agency “whether or not it is within or subject to review by another agency.” *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), cited with approval in the excerpt from the Conference Report quoted above, states that agency status is “apparently” conferred on “any administrative unit with substantial

¹³ See the last sentence of the first paragraph quoted from the Conference Report.

independent authority in the exercise of specific functions." In other words, particularly in some of the larger Government departments, there may be "agencies" within "agencies."

Despite its theoretical perplexity, this issue has rarely been a source of substantial practical difficulties. The principle which has evolved is that it is for the over-unit—the higher-level "agency"—to determine which of its constituent parts will function independently for Freedom of Information Act purposes. It is sometimes permissible to make the determination differently for purposes of various provisions of the Act—for example, to publish and maintain an index at the over-unit level, while letting the appropriate subunits handle requests for their own records. Giving variable context to the term "agency" in this fashion often furthers the purposes of the Act—as, in the example just given, by speeding up responses to requests (handled at the lower organizational level) while making the index of documents available at a larger number of "agency" offices or reading rooms (those of the higher organizational unit). As long as the over-unit makes a good-faith disposition of this issue which does not needlessly impede the purposes of the Act, it seems unlikely that its decision will be reversed.

II-F. CONTENTS OF DENIAL LETTERS

Any denial under the amended Act must include:

- (a) The reasons for the denial, with appropriate references to the exemptions involved;
- (b) The name and title of the person or persons responsible for denying the request (presumably the official who signs the letter unless otherwise indicated); and
- (c) A statement to the requester complying with the Act, 5 U.S.C. 552(a)(6)(A), describing his administrative appeal rights.

A letter on administrative appeal that affirms a denial in whole or part must contain a statement to the requester complying with 5 U.S.C. 552(a)(6)(A) describing his judicial review rights. Of course it should also set forth the reasons for affirmance (which may be merely "the reasons stated in the denial" if that is the case) and the name and title of the person responsible for the affirmance.

Part III: APPENDICESIII-A: LEGISLATIVE HISTORY CHRONOLOGY AND CITATIONS

1. September 20, 1972 Moorhead Report (House Report No. 92-1419). This report summarized hearings on the "Administration of the Freedom of Information Act" held during 1972.
- * 2. March 5, 1974 House Report No. 93-876 on H.R. 12471. This report includes the text of the bill as it was passed by the House on March 14, 1974.
3. March 14, 1974 House Debate on H.R. 12471, 120 Cong. Rec. pp. H1787-H1803. (All references to page numbers in the Congressional Record are to the page numbering in the daily editions.)
- * 4. May 16, 1974 Senate Report No. 93-854 on S. 2543. This report includes the amendments to the Act which would have been made by S. 2543 as it was reported by the Senate Judiciary Committee.
5. May 30, 1974 Senate Debate on S. 2543, 120 Cong. Rec. pp. S9310-S9343. This debate includes the text of several floor amendments to S. 2543 which were adopted before that bill was inserted into H.R. 12471 as a substitute for the text of the latter bill and then passed as H.R. 12471.
6. August 20, 1974 President Ford's letter to conferees. Weekly Compilation of Presidential Documents, Vol. 10, No. 34.
- * 7. October 1, 1974 Conference Report (Senate Report No. 93-1200).
8. October 1, 1974 Senate passes conference version, 120 Cong. Rec. pp. S17971-S17972.

* These legislative reports on the 1974 Amendments to the Freedom of Information Act are cited in the foregoing memorandum as "H. Rept.", "S. Rept.", and "Conf. Rept.", respectively.

9. October 7, 1974 House passes conference version, 120 Cong. Rec. pp. H10001-H10009.
10. October 17, 1974 President Ford's Veto Message. Weekly Compilation of Presidential Documents, Vol. 10, No. 42.
11. November 20, 1974 House Override Debate, 120 Cong. Rec. H10864-H10874.
12. November 21, 1974 Senate Override Debate, 120 Cong. Rec. S19806-S19823.

III-B: ATTORNEY GENERAL'S DECEMBER 11, 1974 "PRELIMINARY GUIDANCE" MEMORANDUM



Office of the Attorney General
Washington, D. C. 20530

December 11, 1974

MEMORANDUM TO HEADS OF ALL
FEDERAL DEPARTMENTS AND AGENCIES

Re: Preliminary Guidance concerning the 1974 Freedom of Information Act Amendments, P.L. 93-502, enacted November 21, 1974.

Introduction

By action of the Senate on November 21st in overriding the President's veto of the enrolled bill H.R. 12471, several important amendments have been made to the Freedom of Information Act, 5 U.S.C. 552. Most of these will have some effect upon your agency.

The new amendments (hereinafter the "1974 Amendments") will become effective on February 19, 1975. It is essential that every agency take certain actions as soon as possible, as discussed below, in order to be in compliance with the 1974 Amendments when they become effective.

Outline of Discussion

1. Time Limits for Agency Determinations
2. Index Publication
3. Uniform Agency Fees
4. Procedures on Requests for Classified Records
5. Requirements for Annual Report
6. Assignment of Responsibility
7. Substantive Changes
8. Miscellaneous Matters
9. Further Actions

Attachments:

- A. Freedom of Information Act prior to 1974 Amendments.
- B. 1974 Amendments to the Act (P.L. 93-502).
- C. Freedom of Information Act as now amended.
- D. Summary of Principal Changes made by 1974 Amendments.

Discussion

The discussion below is in the nature of advice and assistance rather than a directive. While it is intended to apply generally to all federal agencies (except to the extent an agency may be subject to unique provisions of law, e.g., 39 U.S.C. 410, 412),^{*} some recommendations may not fit the circumstances of a particular agency.

1. Time Limits for Agency Determinations. Agencies must amend their regulations to conform to the provisions in the 1974 Amendments which prescribe administrative time limits for processing requests for access to their records. Basically, these provisions call for an initial determination to be made on any such request within 10 working days (usually two weeks) after its receipt. In case of an appeal from an initial denial, a determination on the appeal is to be made by the agency within 20 working days (four weeks) after receipt of the appeal. After any agency determination to comply in whole or part with a request for records, whether made initially or on appeal, the records shall be made available "promptly."

These time limit provisions apply to requests and to appeals that are received by agencies on or after Wednesday, February 19, 1975. Agency regulations under the Act should be revised to reflect these provisions and the revisions should be published in the Federal Register and distributed to all concerned agency personnel before that date. The discussion which follows is chiefly concerned with the impact of the time limits on requests which, for one reason or another, an agency finds difficult to process properly within such periods.

It is important to note that these time limits run from the date of "receipt." The experience of the Justice Department

^{*}/These provisions modify the application of the Freedom of Information Act to records of the Postal Service.

with voluntarily adopted time limits for acting on requests and appeals for our own records has indicated that much time can be lost in mail rooms and elsewhere in routing requests and appeals to those who must act upon them. Such delays can be sharply reduced by explicit and well-conceived instructions to requesters on how to address their requests and their appeals. It is strongly recommended that such instructions be set forth in agency regulations, as well as in any other pertinent agency information and guidance materials that may be prepared. While failure to comply with such reasonable regulations will not necessarily disqualify a request from entitlement to processing under the Act, it will probably defer the date of "receipt" from which the time limitations are computed, to take account of the amount of time reasonably required to forward the request to the specified office or employee. ^{1/} Such regulations designed to facilitate processing must not, of course, be used to protract or delay it.

Agencies should also consider the adoption of devices and the designing of procedures to speed processing of requests. It might be desirable, for example, to specify in agency regulations and guidance that FOIA requests be clearly identified by the requester as such on the envelope and in the letter. Similarly, agency personnel should be required to mark FOIA requests and appeals conspicuously so that they may be given expeditious treatment. Of course, the new time limits also mean that an efficient system of date-stamping for incoming matter is essential.

The 1974 Amendments contain two provisions for extension of the foregoing time limits. One authorizes administrative extensions by giving requesters written notices with prescribed contents in three types of "unusual circumstances" which are specified in the amendments. It is clear that such extensions cannot exceed ten working days in the aggregate, so that only one ten-day extension can be invoked by the agency, either at the initial or the appellate stage. Neither the language

^{1/} Where such delay has occurred, it would be desirable to provide for acknowledgment of effective receipt. Such acknowledgment should also be provided where delay is caused in the mails, or by any other means of which the requester is likely unaware.

of the statute, however, nor the legislative history specifically precludes the taking of more than one extension where the circumstances justify, so long as the ten-day maximum is not exceeded with respect to the entire request. Logic favors the latter interpretation, since the same circumstances which make a particular request difficult to process at the initial stage frequently complicate the appeal as well. Accordingly, we interpret the statute to permit more than one extension, either divided between the initial and appeal stages or within a single stage, so long as the total extended time does not exceed ten working days with respect to a particular request.

Agencies should carefully consider whether they should make some provisions in their regulations concerning (a) who controls the use of the 10-day extension and (b) its allocation to the initial stage, the appeal stage, or partly to one and partly to the other. Such provisions, of course, would only operate in the unusual circumstances specified in the statute. Subject to this condition it would appear permissible for agency regulations to provide for distribution of the ten days on a case-by-case basis, or by restricting any extension at the initial stage to five days absent special showing (so as to reserve five days for the appeal stage), or in some other manner. Agencies should also be prepared to instruct their staffs on the form, contents, and timeliness of extension notices in the light of the statutory requirements.

The second provision for time extension in the 1974 Amendments authorizes a court to allow an agency "additional time to complete its review of the records" if the government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request. In cases where an agency believes that this provision would probably lead to a judicial extension of its time if the agency were to be sued immediately, the agency may in the interest of avoiding unnecessary litigation and exploring fully the scope of a possible administrative grant of access, wish to suggest to the requester the possibility of agreeing

with the agency upon a specific extension of time. In preparing its regulations on time limits, an agency should consider (a) who within the agency should give attention to the considerations discussed in this paragraph, and (b) the extent to which communications or agreements with requesters under this paragraph should be recorded for such bearing as they may have on possible litigation.

The legal consequence provided in the 1974 Amendments for an agency's disregard of the prescribed administrative time limits (i.e., the 10 and 20 day limits and any up-to-10 days extension effected by notice to the requester) is that the requester may sue at once, without resort to further administrative remedies. The Act as amended expressly provides that the requester "shall be deemed to have exhausted his administrative remedies" in case the agency fails to comply with applicable time limits. THIS MEANS THAT IF THE 10-DAY TIME LIMIT FOR INITIAL DETERMINATIONS (TOGETHER WITH ANY PERMISSIBLE EXTENSION OF THIS LIMIT AS DISCUSSED ABOVE) IS NOT COMPLIED WITH, THE AGENCY MAY HAVE LOST THE 20 DAYS OR MORE THAT WOULD OTHERWISE HAVE BEEN AVAILABLE TO IT IN THE EVENT OF A TIMELY-ISSUED DENIAL AND AN APPEAL. Thus, every effort should be made to issue an initial determination -- even one with qualifications or conditions 2/ -- within the required time. Where it is necessary to find and examine the records before the legality or appropriateness of their release can be assessed, and where, after diligent effort, this has not been achieved within the required period, the requester may be advised in substance that the agency has determined at the present time to deny the request because the records have not yet been found and/or examined; that this determination will be reconsidered as soon as the search and/or examination is complete, which should be within days; but that the requester may, if he wishes, immediately file an administrative appeal.

In the event an agency fails to issue a timely determination and is sued, it should nevertheless continue to process

2/ The qualifications or conditions cannot be so extensive as to render the response meaningless because such a response would not constitute the required "determination".

the request. To the extent that the request is granted, the suit may become moot; to the extent the request is denied, the government will be able to prepare a defense on the merits.

If an initial denial in whole or part is issued by an agency after suit has been filed, and the requester administratively appeals, the agency should, unless otherwise instructed by its counsel or by the court, proceed to process the appeal. Moreover, agencies may wish to consider making provisions for the initiation of an appeal upon their own motions in such circumstances; otherwise, failing an appeal by the requester, the agency may be committed in litigation to a position it does not genuinely support. If suit is filed while an appeal is pending, whether or not the suit is premature, the agency should normally continue to process the appeal.

The time limit provisions of the 1974 Amendments appear to presuppose that agencies will have a basically two-step, rather than a single-step, procedure in their regulations, i.e., that they will provide for an initial determination whether to grant or deny access, followed by an administrative appeal. While there is nothing in the 1974 Amendments which expressly forbids an initial determination that is administratively final, it seems clear that the vast majority of agencies will continue to use some form of two-step procedure, not only because it permits the correction of errors and avoidance of unnecessary litigation but also because, under the 1974 Amendments, it makes available an additional 20 days for agency consideration of the request. Agencies contemplating changes in their regulations from a single-step to a two-step procedure, or changes to a different form of two-step procedure, should note that the 1974 Amendments contemplate an administrative "appeal". This means that the agency official charged with acting on appeals must be different from the official responsible for initial denials.

Some agency regulations now prescribe a period of time, such as 30 days, within which a requester must file an appeal, ordinarily running from the requester's receipt

of the denial letter. The 1974 Amendments contemplate that an initial determination to furnish records will be dispatched within the time limits discussed above, and that the records will be furnished either at the same time or "promptly" thereafter. At the time of the initial determination there may be some uncertainty on the part of the requester, or even on the part of the agency, as to the precise extent of the materials being made available and being denied. Accordingly, if an agency's regulations as revised contain a time limit for the filing of an appeal,^{3/} it is suggested that the period run from receipt of the initial determination (in cases of denials of an entire request), and from receipt of any records being made available pursuant to the initial determination (in cases of partial denials). Such a provision would relate only to the end, not to the beginning, of the period for the requester to file an appeal; it would in no way interfere with the right to file an appeal immediately after any initial determination involving any degree of denial. Such a provision should promote fairness, help reduce premature and unnecessary appeals, and minimize technical questions about the timeliness of appeals.

2. Index Publications. Under subsection (a)(2) of the Act prior to the 1974 Amendments, each agency has been required to "maintain and make available for public inspection and copying a current index providing identifying information for the public" as to the agency's so-called (a)(2) materials; i.e., certain final opinions and orders, statements of policy and interpretation, and administrative staff manuals and instructions. Under the 1974 Amendments, this index will be required to be published promptly at quarterly or more frequent intervals and distributed, unless the agency determines by order published in the Federal Register that such publication would be unnecessary and impractical, in which case copies of the index shall be provided on request at duplication

^{3/} The establishment of an explicit time limit is not mandatory. In its absence, a "reasonable time" would presumably be allowed. Such a disposition, however, increases uncertainty and hence litigation.

cost. Therefore, on or before February 19, 1975, or "promptly" thereafter, each agency must publish the required index, or must adopt and publish in the Federal Register an order containing the determination referred to above. As indicated in the Conference Report (Senate Report 93-1200 of October 1, 1974 at p. 7) commercial publication may satisfy the publication requirement if the agency makes the publication readily available for public use.

If an agency already publishes or plans to publish indexes to some of its (a)(2) materials in compliance with the above publication requirement, but determines that it is unnecessary and impractical to publish its indexes of the remainder, there is apparently no objection under the 1974 Amendments to using a combination of publication and the statutory alternative just described.

Recent court decisions have left some confusion as to what constitutes (a)(2) materials.^{4/} If an agency reasonably maintains that certain types of records are not covered, it may of course properly decline to publish them. In case of doubt, it may accompany its publication of the index or its Federal Register statement with the disclaimer that its action is being taken for the convenience of possible users of the materials, and does not constitute a determination that all of them are within subsection (a)(2) of the Act. As to what constitutes an acceptable index, consult the prior Justice Department guidance.^{5/}

3. Uniform Agency Fees for Search and Duplication. The 1974 Amendments make significant changes in the law pertaining to the fees which an agency may charge for services performed for requesters under the Act. Each agency must

^{4/}See, e.g., Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973), cert granted upon the government's petition and now pending; Tax Analysts and Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), affirmed _____ F. 2d _____ (1974). See also Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at pp. 20-22.

^{5/}Attorney General's Memorandum, supra, at pp. 20-22.

"promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency." This means that agencies should, in accordance with 5 U.S.C. 553, publish in the Federal Register a Notice of Proposed Rule Making before January 13, 1975, containing a proposed uniform schedule of fees to become effective on February 19th, 1975; and then, after consideration of public comment, publish the regulations themselves as they will become effective on February 19th.

Since by reason of these procedural requirements, the fee schedule regulations involve more "lead time" than the other regulation changes which the 1974 Amendments make necessary, it may be desirable to handle them separately, under an accelerated timetable. Of course provisions assigning functions and prescribing procedures for administration of the fee schedule need not be contained in the schedule itself, and may be reserved for inclusion in the other Freedom of Information regulations.

In providing for the administration of fee schedules, agencies may wish to consider whether and when they will furnish estimates of fees, and the circumstances in which they will request payment of estimated or incurred fees before the work is done or the materials transmitted. Since requesters will be financially liable for fees after the requested services have been performed, there is a need for some device to protect members of the public from unwittingly incurring obligations which far exceed their expectations. It is of course not possible simply to advise requesters of substantial costs and await their permission to proceed, since this process would consume much of the 10-day reply period. The problem might be met by including a provision in the agency's regulations to the effect that, unless the request specifically states that whatever cost is involved will be acceptable, or acceptable up to a specified limit that covers anticipated costs, a request that is expected to involve assessed fees in excess of \$ _____ will not be deemed to have been received until the requester is advised (promptly on physical receipt of the request)

of the anticipated cost and agrees to bear it. There is some question whether such a provision can be effective to toll the statutory time period, but in light of the need to protect the public against large unanticipated expenses, and in light also of the fact that the requester can avoid all delay by specifying in his request that all costs (or costs to a specified limit) will be accepted, our view is that such provisions are likely to be sustained.

A separate problem is the need in some cases for adequate assurance that the requester will pay the fees where they are substantial. Of course, if a substantial public good is accomplished by the request, the agency may under the 1974 Amendments simply waive the fees. But where that provision is not to be applied, means to assure payment should be considered. This might be achieved by a requirement in the regulation that when the anticipated fees exceed \$ _____, a deposit for a certain proportion of the amount must be made within _____ days of the agency's advising the requester.

The kinds of services for which fees may be charged under the 1974 Amendments are limited to search and duplication. Agencies may thus no longer seek reimbursement (a) for time spent in examining the requested records for the purpose of determining whether an exemption can and should be asserted, (b) for time spent in deleting exempt matter being withheld from records to be furnished, or (c) for time spent in monitoring a requester's inspection of agency records made available to him in this manner.

Search services are services of agency personnel -- clerical or, if necessary, of a higher salary level -- used in trying to find the records sought by the requester. They include time spent in examining records for the purpose of finding records which are within the scope of the request. They also include services to transport personnel to places of record storage, or records to the location of personnel for the purpose of search, if they can be shown to be reasonably necessary. The legislative history of the 1974 Amendments indicate that, when computerized record systems are involved, "the term 'search' would . . . not be limited to standard record-finding, and in these

situations charges would be permitted for services involving the use of computers needed to locate and extract the requested information." Senate Report No. 93-854, May 16, 1974, p. 12.

Search fees are assessable even when no records responsive to the request, or no records not exempt from disclosure, are found. It is recommended, however, that requesters be charged for unsuccessful or unproductive searches only where they have been given fair notice that this may occur. Such notice should be plainly set forth in an agency's regulations. Of course, where the cost of search is small its unproductiveness is persuasive ground for waiver.

Duplication includes costs associated with the paper and other supplies used to prepare duplicates made to comply with the request and the services of personnel used in such preparation.

Where an agency undertakes, either voluntarily or under some other statute, to perform for a requester services which are clearly not required under the Freedom of Information Act, -- e.g., the formal certification of records as true copies, attestation under the seal of the agency, creation of a new list, tabulation or compilation of information, translation of existing records into another language -- the question of fees should be resolved in the light of the federal user charge statute, 31 U.S.C. 483a, and any other applicable law. If for reasons of convenience an agency elects to include charges for such services in the fee schedule required to be promulgated by the 1974 Amendments, it should make clear the authority other than the Freedom of Information Act upon which such charges rest.

The amount of fees is ordinarily to be expressed as a rate per unit of service. The 1974 Amendments contain three general criteria: (a) the fees must provide for recovery of only the "direct costs" of search and duplication services, (b) they must be "reasonable standard" charges, and (c) they must be waived or reduced where the agency determines such action would be in the public interest because furnishing the information "can be considered as primarily benefiting the general public". The reference to

"direct costs" should be taken to mean that no agency overhead expense should be allocated to the services used in conducting a search. This would exclude such items as utilities, training expenses and management costs (except for management personnel directly involved in performing or supervising the particular search). If, for example, air freight or air express is used to transfer records at field offices to the office processing the request in order that the search can be completed and a determination made within applicable time limits, the air haul charge, but probably not the cost of ordering such transportation and processing payment, may be considered to be direct costs.

The requirement for "reasonable standard" charges should be taken to mean that the actual rates to be charged must be stated in dollars and cents or otherwise definitively indicated -- as, for example, by reference to publicly filed tariffs. It precludes special rates based upon negotiation, 6/ upon increases in federal personnel pay rates not reflected in an amended schedule, or upon other factors not incorporated in the schedule. There is, however, no requirement that the schedule contain only a single rate for personnel time. Legislative reference to the "direct costs" of search indicates that where there are sharp differences in the salaries of the personnel needed to conduct various types of searches which the agency may conduct, the schedule may set forth separate scales -- e.g., one for clerical time and one for supervisory or professional time. The applicable rates may be determined after considering the pay scales, converted to hourly rates, of the numbers and grades of the personnel who would be assigned to perform the required services. Recognizing that some mix of personnel may be involved, it would seem that reasonable approximations of costs will satisfy the legislative requirement for "reasonable" standard charges.

The remaining legislative factor in the amount of fees is the provision concerning waiver or reduction, noted above. Either the fee schedule or the other agency regulations under the Act as amended should clearly assign the function of determining, both in connection with initial actions and at the appeal stage, whether such waivers or reductions should be made and the amount of any such reduction.

6/ This does not preclude a negotiated settlement of a dispute over the fees for a particular request.

4. Procedures on Requests for Classified Records. Passing for the purposes of this memorandum any constitutional questions, requests for documents that raise questions under exemption 1, as amended, may often require more detailed administrative processing at both the initial and appeal stages than was required under the decision in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). Such processing will nonetheless be subject to the new statutory time limits. The scope of the problem which this presents is not entirely clear at this time. All agencies which generate or hold substantial amounts of classified documents should immediately begin considering a range of procedures for accommodating to the statutory changes. The Department of Justice solicits the views of affected agencies in this regard and anticipates issuing more detailed guidance for the processing of requests for classified documents under the 1974 Amendments prior to their effective date.

5. Requirements for Annual Report. The 1974 Amendments require each agency to file with the Congress a detailed Annual Report on March 1 of each year, covering administration of the Freedom of Information Act during the prior calendar year. With respect to the report due on March 1, 1975, some of the information called for in the Amendments will not be available, since the Amendments were not in effect during calendar 1974. Agencies should make as complete a Report as possible on the basis of the information at hand. It is not our view that the Congress intended agencies to conduct interviews or detailed historical research to develop information not recorded at the time. Agencies should begin at once to develop procedures for compiling the information which the Annual Reports must contain, and these should be in place no later than January 1, 1975 so that the Report for calendar 1975 will be complete. We recommend that these procedures be designed to accumulate, in addition to the other information required, data on the costs of administering the Act.

6. Assignment of Responsibility to Grant and Deny. Agency regulations should leave no uncertainty as to who has the responsibility for acting upon requests under the Act. Responsibility means the duty and the authority to act; an

assignment of either the duty or the authority normally carries with it the other, except as regulations may otherwise provide. When an agency employee or official receives a request which exceeds his authority to grant or deny, the requester should be referred to the official or unit which has authority under the agency's regulations. 7/

The employee or official who denies a request is referred to in several places in the 1974 Amendments. Any notification of denial of a request for records must "set forth the names and titles or positions of each person responsible for the denial of such request." §552(a)(6)(C). The required Annual Report must include "the names and titles or positions of each person responsible for the denial of records requested, . . . and the number of instances of participation for each." §552(d)(3). The so-called sanctions provision states that when a court makes a written finding as to possible arbitrary or capricious withholding by agency personnel, 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." §552(a)(4)(F).

The common element in these provisions is the characterization of an agency employee or official as the person "responsible" or "primarily responsible" for a denial. It is therefore incumbent upon an agency to fix such responsibility clearly in its regulations by confining authority to deny, both on initial determinations and on appeals, to specified officials or employees. In view of the time limits discussed above, it would appear impracticable to specify such officials or employees by name, thereby preventing action during their absence; specifications by organizational title should be so drawn as to include both regular incumbents and persons acting in their stead.

7/ As a matter of courtesy, if a request is misdirected the agency employee receiving it should himself route it to the proper official under the agency's regulations. The requester should be informed of this action and advised that the time of receipt for processing purposes will be deemed to run from the receipt by the proper official.

It is not necessary that the head of the agency be the official designated to determine all appeals. The reference to an "appeal to the head of the agency" in the provision concerning time limits for initial determinations must be read in conjunction with the three provisions concerning "responsible" officials referred to above, particularly the last two sentences of the sanctions provision. 8/ Coupled with the impracticability of running all appeals through Cabinet officers in certain departments, these provisions indicate that the head of an agency may, by regulation, delegate to another high official the function of acting on his behalf with respect to appeals.

Care should be taken to provide safeguards against confusion between the person who is authorized to deny access and the individuals or committees which assist him by providing information, furnishing legal or policy advice, recommending action, or implementing the decision. Care should also be taken to avoid the situation in which the official or employee whose signature appears on a notification of denial as ostensibly the responsible person is in fact acting on the orders of his superior. In such a case, the notification should identify the superior as the responsible person, with the subordinate signing "by direction" or with other appropriate indication of his role.

7. Substantive Changes. The 1974 Amendments include three provisions whose nature is "substantive", in the sense that they affect what records are subject to compulsory disclosure under the Act, rather than how requests for records shall be processed or litigated. These are a revision of the 1st exemption (pertaining to documents classified

8/ "The [Civil Service] 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." §552(a)(4)(F).

under an Executive Order for reasons of defense or foreign policy), a revision of the 7th exemption (investigatory law enforcement records), and a provision on the availability of "reasonably segregable" portions of records from which exempt matter has been deleted.

While these three substantive changes, like the rest of the 1974 Amendments, do not become effective until February 19, 1975, it would be parsimonious and ultimately unwise to act before that time as if they were not in prospect. Each agency should take these changes into account to the best of its ability even before they become effective, particularly in its processing of requests and appeals and in assisting in the conduct of litigation. The application of these revisions will be the subject of a subsequent Justice Department memorandum.

8. Miscellaneous Matters. The 1974 Amendments replace the requirement that a request be for "identifiable records" with the requirement that it be one which "reasonably describes such records". §552(a)(3)(A). Agency regulations which contain provisions that parallel the old "identifiable records" language should be revised accordingly. A broad categorical request may or may not meet the "reasonably describes" standard; an agency receiving such a request may communicate with the requester to clarify it.

The 1974 Amendments require that any adverse initial determination set forth the reasons therefor and a notice of the requester's appeal rights, and that any adverse determination on appeal give notice of the requester's rights of judicial review. §552(a)(6)(A). Agency regulations should be amended to reflect these new requirements.

In the event of suit under the Act, the government's time to answer is reduced from the 60 days generally available to the government in civil actions to 30 days "unless the court otherwise directs for good cause shown". §552(a)(4)(C). Upon termination of a suit under the Act in which the requester has "substantially prevailed", the court may assess "reasonable attorneys fees and other litigation costs reasonably incurred". §552(a)(4)(E). While neither

of these changes necessarily calls for a revision of agency regulations, each can have an impact on agency operations: If a judicial extension of the 30-day time period is to be sought, the agency is likely to be called upon to provide information as to the facts and circumstances believed to constitute "good cause"; and if attorney's fees are assessed, they will be normally charged to the agency whose withholding of records was at issue. Needless to say, the attorney's fee provision increases substantially the likelihood that an agency will be sued when it issues a denial having weak or doubtful justification.

Each agency should carefully examine the text of the 1974 Amendments to see if there are impacts upon its own regulations or operations which may not apply to other agencies and which are not discussed herein. It should also be noted that the Amendments include a redefinition of "agency" for purposes of the Act, set forth in the new §552(e), which extends the Act's coverage to some entities not considered agencies for purposes of other provisions of the Administrative Procedure Act.

As a general policy in cases where difficult problems are encountered as to such matters as the scope of the request, the time to process it, or the fees involved, agencies are encouraged to consider telephoning the requester to seek an informal accommodation, which should ordinarily be promptly confirmed in writing.

9. Further Action. The administrative and reporting requirements of the new Amendments, together with the relatively brief time limits imposed, demand the closest internal coordination of agency efforts, both in designing compliance with the 1974 revisions and in administering the Act after they become effective. To achieve this, agencies should consider establishing, perhaps on a temporary or ad hoc basis, an internal board or committee which would include talent at appropriate levels in the areas of law, public information, program operations, records management, budget and training.

The Justice Department will distribute before the effective date of the 1974 Amendments an interpretive and

advisory "Analysis", primarily addressed to the three "substantive" provisions referred to in item 7 above, but perhaps containing further guidance on procedural questions such as those discussed herein. Until that is issued, it would be appreciated if requests from agencies for advice and assistance concerning the Act be kept to a minimum. However, comments on this Preliminary Guidance memorandum are solicited, with a view to making desirable additions and changes.

Wm B Saybe

ATTORNEY GENERAL

Attachments

ATTACHMENT A -- Page 1 -- Freedom of Information Act Prior
to 1974 Amendments

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TITLE 5.—GOVERNMENT ORGANIZATION AND EMPLOYEES

§ 552

§ 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.

ATTACHMENT A -- Page 2 -- Freedom of Information Act Prior
to 1974 Amendments

(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 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, 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 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.

(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.

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

(1) specifically required by 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. (Pub. L. 89-554, Sept. 8, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54.)

ATTACHMENT B -- 1974 Amendments to the Freedom of
Information Act



Public Law 93-502
93rd Congress, H. R. 12471
November 21, 1974

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."

Public information.
Indexes, publication and distribution.

Publication in Federal Register.

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

Records, availability to public.

"(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:

Document search and duplication fees, regulations.

"(4) (5) 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."

88 STAT. 1561
88 STAT. 1562

"(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."

Withheld agency records, court examination.

"(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."

Complaints, response by defendant.

"(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.

Attorney fees
and costs.

"(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.

CSC proceeding
against officer
or employee.

"(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.

Noncompliance,
penalty.

"(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."

Administrative
deadlines.

(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.

88 STAT. 1562
88 STAT. 1563

"(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—

"Unusual cir-
cumstances."

"(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

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"(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."

Time extension
for agency
review.

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

National defense
and foreign poli-
cy, exemption.

"(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:

Investigatory
records for law
enforcement pur-
poses, exemption.

"(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;"

88 STAT. 1563
88 STAT. 1564

(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."

Segregable por-
tions of
records.

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

Reports to
Speaker of the
House and
President of
the Senate.

"(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—

Contents.

"(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;

Arte, p. 1562.

"(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.

Annual report.

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.

Arts, p. 1561.

"Agency,"
5 USC 551.

"(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."

Effective
date.
5 USC 552
note.

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

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

88 STAT. 1564
88 STAT. 1565

IN THE HOUSE OF REPRESENTATIVES, U.S.,

November 20, 1974.

The House of Representatives having proceeded to reconsider the bill (H.R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS

Clerk.

By W. Raymond Colley

November 21, 1974

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88 STAT. 1565

I certify that this Act originated in the House of Representatives.

W. PAT JENNINGS

Clerk.

By W. Raymond Colley

IN THE SENATE OF THE UNITED STATES,

November 21, 1974.

The Senate having proceeded to reconsider the bill (H. R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO

Secretary.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-876 (Comm. on Government Operations) and No. 93-1380 (Comm. of Conference).
 SENATE REPORTS: No. 93-854 accompanying S. 2543 (Comm. on the Judiciary) and No. 93-1200 (Comm. of Conference).
 CONGRESSIONAL RECORD, Vol. 120 (1974):
 Mar. 14, considered and passed House.
 May 30, considered and passed Senate, amended in lieu of S. 2543.
 Oct. 1, Senate agreed to conference report.
 Oct. 7, House agreed to conference report.
 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 42:
 Oct. 17, vetoed; Presidential message.
 CONGRESSIONAL RECORD, Vol. 120 (1974):
 Nov. 20, House overrode veto.
 Nov. 21, Senate overrode veto.

ATTACHMENT C -- Freedom of Information Act as Amended
in 1974 by Public Law 93-502
 (Amendments are underscored)

§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 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. 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, 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.

(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

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.

(5) 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.

(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.

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

(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;

(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 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;

(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.

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.

(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 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 subsection (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.

ATTACHMENT D -- Summary of Principal Changes in Freedom of
Information Act made by 1974 Amendments

<u>Changes</u>	<u>Place in Amended Act</u>
1. Publication or alternative re- quirement concerning <u>indexes</u> of (a)(2) materials	552(a)(2)
2. Administrative <u>time limits</u> and extensions, and contents of denial letters	552(a)(6)
3. Uniform agency <u>fees</u> for search and duplication	552(a)(4)(A)
4. <u>Disciplinary</u> proceedings for arbitrary or capricious denials	552(a)(4)(F)
5. <u>In camera</u> inspection by court of requested documents	552(a)(4)(B)
6. Shortened <u>time to answer</u> com- plaint in court	552(a)(4)(C)
7. <u>Attorney fees</u> award for re- questers who prevail	552(a)(4)(E)
8. Revision of exemption 1 for <u>defense and foreign policy</u> records classified under Executive Order	552(b)(1)
9. Revision of exemption 7 for <u>investigatory law enforcement</u> records	552(b)(7)
10. Availability of "reasonably segregable portion" of record	552(b) (at end of subsection)
11. Annual reports to Congress	552(d)

(In addition, the 1974 Amendments make a number of other changes in the Act which, for the purposes of most agencies, are believed to be generally less significant.)