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(prepared by
Rush)*

4 MEMORANDUM TO THE HEADS OF DEPARTMENTS AND AGENCIES

4 Administrative Procedure Act

1 (Public Law 404, 79th Cong., 2d Sess., approved
1 June 11, 1946)

4 As you know, section 3 of the Administrative Procedure Act becomes effective on September 11, 1946. I trust that the attached memorandum, which has been prepared in this Department and which has my full approval, will be of assistance to your agency in the preparation of materials for publication under that section.

4 *Panconne*
Attorney General

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DEPARTMENT OF JUSTICE
WASHINGTON 25, D. C.

4 SECTION 3 OF THE ADMINISTRATIVE PROCEDURE ACT
~~Handwritten signature~~

The Administrative Procedure Act (Public Law 404, 79th Congress, 2d Sess.) is applicable, at least in part, to every agency of the United States Government, other than Congress, the courts and the governments of the Territories, possessions, and the District of Columbia. It is the result of long congressional consideration of the administrative process and of the report and studies of the Attorney General's Committee on Administrative Procedure. Inasmuch as the Department of Justice worked closely with the Senate and House Committees on the Judiciary in the drafting of the act, it was decided to prepare and issue a manual which would make available to the various agencies the experience of the Department. The Department also proposes to act as a clearing house for legal interpretative problems with a view to facilitating uniform construction and application of the act. The Bureau of the Budget, as shown by its Bulletin No. 1945-46:27 of June 27, 1946, is prepared to give any assistance of an administrative nature.

The following material, comprising Part 1 of the manual, is an explanation of section 3.

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PART 1

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Section 3 - Public Information

The purpose of section 3 is to assist the public in dealing with administrative agencies by requiring the publication of administrative materials in precise and current form. Section 3 should be construed broadly in the light of this purpose so as to make such material most useful to the public. The public information requirements of section 3 do not supersede

the Federal Register Act. They are to be integrated with the existing program for publication of materials in the Federal Register and the Code of Federal Regulations. The Federal Register Regulations (1 CFR, Cum. Supp., Part 2) will continue to govern the manner in which documents are to be prepared prior to submission to the Division of the Federal Register. All material issued under section 3(a) of the act will be included in the Code of Federal Regulations and consequently should be prepared accordingly. The Division of the Federal Register is prepared to offer assistance in this respect. We understand that it is revising its regulations, and will make them available to all agencies as soon as possible.

13 Agencies Subject to Section 3

This section, unlike the other provisions of the act, is applicable to all agencies of the United States, excluding Congress, the courts, and the governments of the Territories, possessions, and the District of Columbia. Every agency, whether or not it has rule making or adjudicating functions, must comply with this section. Section 2(a), defining agencies, states specifically that even the exemption of the functions enumerated in the last sentence of that section does not extend to section 3. Accordingly, agencies performing temporary war functions must comply with this section.

13 Exceptions to Requirements of Section 3

4 Two exceptions have been made to section 3, namely:

4 "(1) Any function of the United States requiring secrecy in the public interest." This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law enforcement procedures the disclosure of which would reduce the utility of such procedures. It is not restricted, however, to investigatory functions.

The Comptroller of the Currency, for example, may have occasion to issue rules to national banks under such circumstances that the public interest precludes publicity.

It should be noted that the exception is made only "to the extent" that the function requires secrecy in the public interest. Such a determination must be made by the agency concerned. To the extent that the function does not require such secrecy, the publication requirements apply. Thus, the War Department obviously is not required to publish confidential matters of military organization and operation, but it would be required to publish the organization and procedure applicable to the ordinary civil functions of the Corps of Engineers.

"(2) Any matter relating solely to the internal management of an agency."

This exception is in line with the spirit of the public information requirements of section 3. If a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3. Thus, the agency's internal personnel and budget procedures need not be published. However, in case of doubt as to whether a matter is or is not one of internal management, it is suggested that the matter be published in the Federal Register, assuming it does not require secrecy in the public interest.

"Internal management of an agency" should not be construed as intra-agency only; it includes functions of internal Federal management, such as the budgetary functions of the Bureau of the Budget.

It should be understood that the following discussion of the requirements of section 3 is not applicable to the above underlined functions since they are expressly exempted from the section.

13 Effective Date - Prospective Operation

Section 3, which takes effect on September 11, 1946, is prospective in operation (Cong. Rec., May 24, 1946, p. 5755). It has no application

to materials issued prior to that date.

It is extremely important (in view of the last sentence of section 3(a), reading "No person shall in any manner be required to resort to organization or procedure not so published") that the agency's descriptions of its organization and procedure as of September 11, 1946, are in full conformity with the provisions of 3(a)(1) and 3(a)(2). For most agencies, this will mean the preparation of new material to be published in the Federal Register on or before September 11, 1946. Of course, to the extent that an agency's procedures and organization have been published heretofore (for example, formal rules of practice), it will not be necessary to republish them. Appropriate citations may be made to such previously published materials.

Under section 3(a)(3), publication in the Federal Register will be required of substantive rules (and statements of general policy and interpretations formulated and adopted by the agency for the guidance of the public) issued on and after September 11, 1946.

13 Separate Statement

The three classes of material--organizational, procedural and substantive rules--must be published in the Federal Register under separate and appropriate headings. Such separate statement, however, should not be carried to so logical an extreme as to inconvenience the public. For example, if an agency grants public benefits, it would be proper to include in the substantive rules relative to those benefits a statement as to the form to be used in applying for such benefits and the place of filing; however, the same procedural information must also be set forth or referred to in the separate statement of the agency's pro-

cedure. This may be accomplished by inserting in the procedural statement a notation to the effect that the procedure for obtaining public benefits may be found at a designated part of the substantive rules relative to such benefits.

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Description of Organization

Section 3(a)(1) requires that every agency shall separately state and currently publish in the Federal Register "(1) descriptions of its central and field organizations including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests." It is only delegations of the final authority of the agency which need be listed. In this connection, it should be noted that there is no requirement to list in the rules the names of specific individuals to whom power is delegated, unless such specific designation is otherwise required by law. However, the agency must list by title the offices or officers to whom delegations of final authority have been made, such as division head or regional director. Under this subsection, it may be advisable for agencies to state specifically the powers which may be exercised by persons serving in an "acting" capacity.

An agency's central organization should be described by listing its divisions and principal subdivisions and the functions of each. Field organizations should be described by listing the location of such offices, together with a statement of their functions. For example, if certain field offices have authority to issue interpretative or advisory opinions, this should be specified together with a statement as to whether such opinions are subject to review or confirmation by the agency's central or other office. In general, there must be a statement of the information which may

be obtained from, and the applications or requests which may be filed with, the different field offices. In view of the last sentence of section 3(a), it is important that each agency state clearly the types of applications, etc., if any, which it requires to be filed with designated agency offices.

13 Statement of Procedures

Section 3(a)(2) provides that every agency shall separately state and currently publish in the Federal Register "(2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations." This subsection is primarily concerned with the procedures by which an agency discharges its public functions—such as rule making, adjudication, and the administration of loan, grant and benefit programs. No categorical statement can be made as to the manner in which each agency should describe "the general course and method by which its functions are channeled and determined."

The act does not require an agency to "freeze" its procedures, nor does it force the adoption of procedures more formal than those now prevailing. However, the agency must, in accordance with section 3, keep the public currently informed of changes in the actual procedures available. Of course, the published procedures of the agency may provide (subject to applicable law) for emergency or exceptional cases.

Where there is an established procedure for the handling of certain functions, the routing of and responsibility for such functions may be stated with reasonable particularity. Some functions, however, may be exercised so seldom that it will not be practicable to prescribe a definite routine. In such cases, the published information should at least include a statement of the office to which inquiries may be directed.

In brief, section 3(a)(2) requires an agency to disclose in general terms, designed to be realistically informative to the public, the manner in which its functions are channeled and determined. In this connection, it should be remembered that matters of internal management are exempted from the publication requirements of section 3.

Informal conference procedures used by an agency should be publicized with a view to both serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioners. The general public should be informed of their availability and as to how and where to take advantage of them.

Forms for application, registration, etc., and the instructions accompanying such forms need not be published in full; publication of a simple statement of the function and contents of the form, and of where copies of the form, if available, may be obtained, is sufficient. (H. Rept. 1980 on S. 7, p. 22.)

Attention is called to the last sentence of the section, stating "No person shall in any manner be required to resort to organization or procedure not so published." Should an agency fail to publish the material required under section 3(a)(1) and (2), persons who have not received actual notice of such agency organization and procedure may contend that they are not bound by them.

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Substantive Rules

Section 3(a)(3) provides that every agency shall separately state and currently publish in the Federal Register "(3) substantive rules adopted as authorized by law and statements of general policy or interpretations formu-

lated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." This exemption for "rules addressed to and served upon named persons in accordance with law" is designed to avoid filling the Federal Register with a great mass of particularized rule making which has always been satisfactorily handled without general publication in the Federal Register.

The phrase "substantive rules adopted as authorized by law" refers, of course, to rules issued by an agency to implement statutory policy. Examples are the Federal Power Commission's rules prescribing uniform systems of accounts, and proxy rules issued by the Securities and Exchange Commission.

Statements of general policy and interpretations need be published only if they are formulated and adopted by the agency for the guidance of the public. Intra-office manuals and memoranda prepared solely for the guidance of the agency's staff are not subject to section 3.

Section 3(a) does not require publication in the Federal Register of statements of agency policy and interpretations which are developed and enunciated only in the course of adjudicatory orders and opinions; such orders and opinions are treated as a separate and distinct body of administrative materials under section 3(b).

An advisory interpretation relating to a specific set of facts is not subject to section 3. (Cong. Rec., May 24, 1946, p. 5755). For example, a reply from the agency's general counsel to an inquiry from a member of the public as to the applicability of a statute to a specific set of facts need not be published.

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Section 3(b)

Section 3(b) provides that "Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules." Section 3(b) does not require publication of these materials in the Federal Register or in any other prescribed form. Regular publication of decisions in bound volumes or bulletins, as many agencies are now doing, will suffice; in such cases, however, the agency should include in its published rule a statement as to where copies of such orders and opinions may be obtained or inspected during the interval prior to publication. It should be noted that the materials specified by section 3(b) need not be published at all if, in accordance with the agency's rule published in the Federal Register pursuant to section 3(a)(1), they are available to public inspection. It is suggested that to the extent section 3(b) is complied with by making materials available for inspection, such inspection be made possible, where practicable, in regional offices as well as in the agency's central office.

The scope of the phrase "opinions or orders in the adjudication of cases" is governed by section 2(d) and, accordingly, includes orders or opinions issued with respect to licenses. Adjudicatory orders and opinions which are not "final" need not be published or made available for inspection. However, where intermediate orders and opinions would be useful to the public as, say, procedural precedents, agencies may wish to publish them or make them available for inspection in the same manner as final orders and opinions.

An agency may withhold from publication or inspection final orders and opinions "required for good cause to be held confidential and not cited as

precedents." If it is desired, however, to rely upon the citation of confidential materials, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts.

The last three words of section 3(b) "and all rules" include "rules addressed to and served upon named persons in accordance with law" which are excluded from the publication requirement of section 3(a)(3). (See H. Rept. 1980 on S. 7, p. 50, fn. 7). In this connection it should be noted that the term "rule" is defined in section 2(c) to mean "any agency statement of general or particular applicability . . . and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." It is obvious that some agencies will be issuing "rules" within this definition which will be "addressed to and served upon named persons in accordance with law"; such rules need not be published in the Federal Register pursuant to section 3(a), but the provisions of section 3(b) apply.

13 Section 3(c)

Section 3(c) provides that "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." The introductory saving clause is intended to preserve existing statutory requirements for confidential treatment of certain materials, such as income tax returns.

Each agency should publish in the Federal Register, under 3(a)(1), a rule listing the types of official records in its files, classifying them in terms of whether or not they are confidential in character, stating the manner in which information is available (as by inspection or sale of photostatic copies), the method of applying for information, and by what officials the application will be determined.

The term "official record" is difficult of definition. In general, it may be stated that matters of official record will include (a) applications, registrations, petitions, reports and returns filed by members of the public with the agency pursuant to statute or the agency's rules, and (b) all documents embodying agency action, such as orders, rules and licenses. In formal proceedings, the pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record are "matters of official record."

Section 3(c) does not purport to define "official record". Each agency must examine its functions and the substantive statutes under which it operates to determine which of its materials are to be treated as matters of official record for the purposes of the section. Indicative of the types of records which are considered official records by Congress are maps, plats, or diagrams in the custody of the Secretary of the Interior (5 U.S.C. 438), records, books or papers in the General Land Office (28 U.S.C. 672), and registration statements filed with the Securities and Exchange Commission under the Securities Act (15 U.S.C. 77f).

The great mass of material relating to the internal operation of an agency is not a matter of official record. For example, intra-agency memoranda and reports prepared by agency employees for use within the agency are not official records since they merely reflect the research and analysis

preliminary to official agency action. Intra-agency reports of investigations are, in general, not matters of official record; in addition, they usually involve matters of internal management and, in view of their nature, must commonly be kept confidential.

But even matters of official record need be divulged only to "persons properly and directly concerned." It is clear that section 3(c) is not intended to open up Government files for general inspection. The phrase "persons properly and directly concerned" is descriptive of individuals who have a legitimate and valid reason for seeking access to an agency's records. See United States ex rel. Stowell v. Deming, 19 F. (2d) 697 (App. D.C., 1927), certiorari denied, 275 U.S. 531. Each agency is the primary judge of whether the person's interest is such as to require it to make its official records available for his inspection.

An agency may treat matters of official record as "confidential for good cause found" and upon that ground refuse to make them available for inspection. Information held "confidential for good cause found" may be either information held confidential by reason of an agency rule issued in advance (for good cause) making specific classes of material confidential, or such information as is held confidential for good cause found under a particular set of facts. The section does not change existing law as to those materials in Government files which have been heretofore treated as confidential. See Boske v. Comingore, 177 U.S. 459 (1900); Boehm v. United States, 123 F. (2d) 791, 805 (C.C.A. 3, 1941).

Refusals to make information available (when made in the course of any agency proceeding) are subject to the requirements of section 6(d) and, accordingly, prompt notice of any such refusal must be given to the applicant together with a simple statement of the grounds for refusal.

July 15, 1946.